Court File No. CV-18-605366-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

WEICHANG YANG

Applicant

- and -

BESCO INTERNATIONAL INVESTMENT CO., LTD.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, as amended, and section 101 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended

BOOK OF AUTHORITIES OF THE APPLICANT

February 4, 2019

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TAB 1

2013 ONSC 7101
Ontario Superior Court of Justice [Commercial List]

DeGroote v. DC Entertainment Corp.

2013 CarswellOnt 15647, 2013 ONSC 7101, 245 A.C.W.S. (3d) 87, 7 C.B.R. (6th) 232

Michael G. DeGroote Plaintiff and DC Entertainment Corporation, Don Carbone Entertainment Inc. Dream Corporation Inc., King Software Solutions Corp, Dream Casino Corporation S.R.L., Dream Software Solutions Inc., Dream Kiosk Solutions Inc., Antonio Carbone, Francesco Carbone and Andrew Pajak Defendants

Newbould J.

Heard: November 13, 2013
Judgment: November 18, 2013*
Docket: CV-12-9886-00CL

Counsel: W. Niels Ortved, Eric S. Block, Bryan Shaw for Plaintiff
Maurice J. Neirinck for DC Entertainment Corporation, King Software Solutions Corp., Dream Corporation Inc., Dream Casino Corporation, S.R.L., Dream Software Solutions Inc., Antonio Carbone and Francesco Carbone
Ronald Flom, Robert Trifts for Don Carbone Entertainment Inc., Dream Kiosk Solutions Inc., and Andrew Pajak

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

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Conduct of parties
Plaintiff loaned USD $111,924,208 to corporate defendants for casinos and other gambling enterprises in Jamaica and Dominican Republic using electronic equipment manufactured in Ontario — Of that amount, $107,331,167 remained unpaid — Plaintiff had been requesting to review books and records of corporate defendants since May 2012 and each of his many requests had been met with excuses and delay — Between May 2012 and October 18 2012, defendants did not deliver any monthly revenue reports for casinos in Dominican Republic for which reports had previously been delivered and since that time, delivery of monthly revenue reports had been sporadic and incomplete — Plaintiff brought motion for order appointing receiver over all books and records of corporate defendants — Motion granted — Plaintiff was entitled to appointment of receiver — There were no preconditions for exercise of court's discretion to appoint receiver — Plaintiff established strong case of fraud, with reporting of false financial information regarding Jamaican contract but one example — Apparent misuse of some $50 million lent under Dominican Republic contract by lending it to company unknown to plaintiff without his knowledge, contrary to agreement, was another example — It was not reasonable to wait 30 days in this case as there was little faith in defendants doing what needed to be done to have records produced, as history of matter belied any suggestion of good faith on their part.

Debtors and creditors --- Receivers — Order appointing receiver
Plaintiff loaned USD $111,924,208 to corporate defendants for casinos and other gambling enterprises in Jamaica and Dominican Republic using electronic equipment manufactured in Ontario — Of that amount, $107,331,167 remained unpaid — Plaintiff had been requesting to review books and records of corporate defendants since May 2012 and each of his many requests had been met with excuses and delay — Between May 2012 and October 18 2012, defendants did not deliver any monthly revenue reports for casinos in Dominican Republic for which reports had previously been delivered and since that time, delivery of monthly revenue reports had been sporadic and incomplete — Plaintiff brought motion for order appointing receiver over all books and records of corporate defendants — Motion granted — Plaintiff was entitled to appointment of receiver — There were no preconditions for exercise of court's discretion to appoint receiver — Plaintiff established strong

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case of fraud, with reporting of false financial information regarding Jamaican contract, which was but one example — Another example was apparent misuse of some $50 million lent under Dominican Republic contract by lending it to company unknown to plaintiff without his knowledge, contrary to agreement — It was not reasonable to wait 30 days in this case as there was little faith in defendants doing what needed to be done to have records produced, as history of matter belied any suggestion of good faith on their part.

MOTION by plaintiff for order appointing receiver over all books and records of corporate defendants.

Newbould J.:

1 The plaintiff moves for an order appointing a receiver over all of the books and records of the corporate defendants. In their factum, the defendants represented by Mr. Neirinck opposed outright any such order. However in argument their position softened. The defendants represented by Mr. Flom oppose the order sought.

Factual background

2 Mr. DeGroote has loaned USD $111,924,208 to certain of the corporate defendants for casinos and other gambling enterprises in Jamaica and the Dominican Republic using electronic equipment manufactured in Ontario. Of this amount, $107,331,167 (96%) remains unpaid.

3 More particularly, Mr. DeGroote advanced loans for specific purposes to three of the corporate defendants pursuant to three written agreements as follows:

> (a) The "Jamaican Contract" — DC Entertainment is the borrower under a Credit Facility Agreement dated November 29, 2010. DC Entertainment borrowed $5,000,000 from Mr. DeGroote for a casino in Jamaica called the Vegas Flamingo, of which $4,306,573 (86%) remains unpaid.
>
> (b) The "Dominican Republic Contract" — Dream is the borrower under a Credit Facility Agreement dated August 22, 2011, as amended and/or restated by written signed instruments between the parties. Dream has borrowed $91,689,000 from Mr. DeGroote for various casinos, discos, sports betting, and lotto facilities in the Dominican Republic, of which $87,789,386 (96%) remains unpaid.
>
> (c) The "VLMT Contract" — Dream Software is the borrower under a Credit Facility Agreement dated November 18, 2011. Dream Software has borrowed $15,235,208 from Mr. DeGroote for various in-room hotel gaming operations in the Dominican Republic, of which $15,235,208 (100%) remains unpaid.

4 Each Agreement provides that the borrower shall make debt repayments and pay interest on the loans monthly, including interest on overdue interest according to rates specified in the Agreements.

5 Article 7.3 of each Agreement provides, in respect of each casino or gaming facility for which funds have been advanced by Mr. DeGroote, that the borrower shall:

> a. pay to Mr. DeGroote a percentage share of the profits in respect of the Funded Facility 30 days after the end of the month in which the profit was earned;
>
> b. deliver a written report detailing the profit payment each month; and
>
> c. deliver, within 120 days of the end of each fiscal year of the borrower, audited financial statements in respect of the Funded Facilities.

6 Article 7.3 of the Agreements provides:

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> ... The Lender shall at its own expense, on THIRTY (30) DAYS' notice be entitled to review the books and records of the Borrower in respect of the funded Facilities. The Borrower agrees that its books and records shall be maintained in accordance with accounting principles generally accepted in Canada ("GAAP"). [Underlining added.]

7 Article 9.1(f) of the VLMT Contract provides:

> ... the Lender or its agents shall have free and full access at all times during normal business hours upon thirty (30) days notice to examine and copy them. This right of access of inspection shall include the right to examine as provided herein, all agreements, contracts, license agreements, leases and other documents which are the subject matter of this Agreement and the Facilities.

8 Mr. DeGroote claims that the defendants have perpetrated fraud and breached their obligations under the loan agreements.

9 On December 1, 2010, Mr. DeGroote advanced $5,000,000 to DC Entertainment pursuant to the Jamaican Contract in respect of the Vegas Flamingo. In August 2011, Mr. DeGroote stopped receiving monthly profits, monthly profit reports, and debt repayments for the Vegas Flamingo, contrary to art. 7.3 of the Jamaican Contract.

10 Mr. DeGroote's power of attorney and senior advisor, James Watt, made inquiries with the Jamaican Betting, Gaming and Lottery Commission (the "Jamaican Commission"). The Jamaica Commission is a statutory body which regulates and controls the operations of betting gaming and the conduct of lotteries in Jamaica. The Jamaican Commission provided the following information in response:

> (i) the Vegas Flamingo was closed as of December 20, 2011 or earlier;
>
> (ii) the Jamaican Commission was not previously aware of any agreement between the entity that held the gaming licence for the Vegas Flamingo (CTS Associates (Jamaica) Ltd. ("CTS")) and DC Entertainment;
>
> (iii) the Jamaican Commission never had any dealings with DC Entertainment, Antonio or Francesco;
>
> (iv) a website that had been operated by DC Entertainment was shut down and a notice posted that the site was closed by the U.S. Federal Bureau of Investigations and the Department of Homeland Security; and
>
> (v) the Jamaican Commission had no intention of re-licensing the technology for the gaming machines that had been used in the Vegas Flamingo.

11 The Jamaican Commission provided records of the gross sales and profits of the Vegas Flamingo to Mr. DeGroote's Jamaican lawyers. The records show that, between December 2010 and September 2011, the gross profits reported to the Jamaican Commission were 8% of the gross profits reported to Mr. DeGroote by the defendants in their monthly profit reports:

	Gross Sales	*Gross Profit*
Reported to Jamaican Commission	$823,745	$267,117
Reported to Mr. DeGroote	$6,025,286	$3,423,145
Variance	$5,201,541	$3,156,028
Figures Reported to Jamaican Commission as a Percentage of Figures Reported to Mr. DeGroote	14%	8%

12 Mr. DeGroote was never provided with copies of the bank statements for the Vegas Flamingo or any books and records of DC Entertainment.

13 In November 2012, in response to Mr. DeGroote's motion for access to the books and records of the corporate

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defendants, Mr. DeGroote was told, for the first time, that the books and records relating to the Vegas Flamingo had disappeared. Antonio admitted that DC Entertainment was contractually responsible for record-keeping and banking with respect to the revenues and expenses relating to the operation of the 149 gaming machines said to have been installed at the Vegas Flamingo. However, he testified that one Lancelot James ended up doing the recordkeeping, banking and reporting on DC Entertainment's behalf. Antonio testified that every single record relating to the Vegas Flamingo was stolen and destroyed by Mr. James; not a single piece of paper nor a byte of electronic data remain. According to Antonio, all transactions at the Vegas Flamingo were done in cash and all of the money was kept in a safe. The cash (in excess of USD $4,000,000.00) was said to have been stolen by Mr. James under cover of night. Antonio also stated in his cross-examination that the alleged theft of the money was never reported to the Jamaica police.

14 Between April 2011 and May 2012, Mr. DeGroote advanced $91,689,000 to Dream pursuant to the Dominican Republic Contract in specific tranches and for purchases of specific entities pursuant to the terms of that agreement. All funds advanced by Mr. DeGroote were made either to Don Carbone Entertainment or to the trust accounts of Bianchi Presta LLP or Austin Persico, lawyers acting for Dream.

15 From June 2011 to March 2012, Mr. DeGroote received what were purported to be monthly profit payments and revenue reports for certain casinos in the Dominican Republic.

16 In April 2012, Dream provided monthly revenue reports that differed from monthly revenue reports previously delivered. Specifically, Dream reduced Mr. DeGroote's profit by increasing operating costs and deducting Dream's repayment of Dream's shareholder loans by $107,916 for each of the 10 reporting casinos for a total of $1,079,160.

17 Between May 2012 and October 18, 2012, Dream did not deliver any monthly revenue reports for the casinos in the Dominican Republic for which reports had previously been delivered. Since that time, delivery of monthly revenue reports has been sporadic and incomplete.

18 The statement of claim in this matter was served on October 16, 2012. Two days later, Dream's counsel sent revised monthly revenue reports up to and including April 2012 and monthly revenue reports from May through August 2012 for certain casinos. According to Dream's counsel, Mr. DeGroote was "overpaid on account of (i) profit and (ii) repayment of loans" and "operating costs... were inadvertently not included in the previously issued revenue reports for the months up to and including March 2012".

19 From May 2012 onward, Mr. DeGroote was not provided with any monthly profits or debt repayments on the assertion that he had previously been overpaid.

20 While Mr. DeGroote has received some revenue reports for certain Dominican Republic casinos and discos, he has not received any monthly reports for several casinos and sports betting and lotto operations that he has funded. The facilities for which he has received no information at all represent $51,781,000 (56%) of the total funds advanced pursuant to the Dominican Republic Contract. In other words, Mr. DeGroote has received absolutely no records at all for approximately $52,000,000 of his investment.

21 $46,600,000 of the funds for which Mr. DeGroote has received no information are with respect to facilities referred to in Mr. Carbone's affidavits in response to this motion as "Naco," "Merengue," and "Virgilio"/"Vilorio." Mr. DeGroote first learned that his funds had been invested in Virgilio and Vilorio upon reading Mr. Carbone's affidavits delivered in response to this motion. Mr. DeGroote had understood that he was investing in businesses known as "King" and "King Lotto," for which he received executed notes and guarantees. Mr. DeGroote does not know what happened to King or King Lotto, or how the new entities came to be.

22 Mr. DeGroote has been requesting to review the books and records of Dream since May 2012. Each of his many requests has been met with excuses and delay. For example, by letter dated June 5, 2012, the defendants' counsel advised that the Defendants did not agree to a proposed review by PricewaterhouseCoopers, citing concerns about proprietary information and the fact that his clients had an "extreme travel and work schedule." After this action was commenced, scheduled reviews of the books and records of Dream and Dream Software were called off by the defendants on short notice on four successive occasions. It is said by the defendant Antonio Carbone that there was good reason to call these off because of concerns

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regarding Mr. DeGroote and threats made. Virtually all of the evidence of that is hearsay once or twice over. It is all denied by Mr. DeGroote.

23 The VLMT Contract provided that Mr. DeGroote would loan up to $28,138,000 to Dream Software for in-room hotel entertainment and gaming units for use in hotels in the Dominican Republic in return for the repayment of principal, interest and a share of the profits for each Hotel VLMT Operation.

24 In November 2011, Mr. DeGroote loaned $15,235,208 to Dream Software in respect of VLMTs. Mr. DeGroote has received no interest, principal or profit payments on his investment.

25 Mr. DeGroote has not received any profits or monthly reports under the VLMT Contract.

26 Mr. DeGroote's requests to examine the books and records of the corporate Defendants continued throughout 2012. In a with prejudice letter from his lawyers dated August 10, 2012, Mr. DeGroote gave notice to inspect the books and records of DC Entertainment and Dream. In his statement of claim issued on October 19, 2012, Mr. DeGroote sought an interim, interlocutory, and permanent order:

> ... requiring the defendants to forthwith deliver, or cause to be delivered, the books and records of DC Entertainment, Don Carbone Entertainment, King Software, Dream, Dream Casino, Dream Software, Dream Kiosk and any affiliated or associated companies.

27 The defendants continued to refuse to provide access to the books and records after the action was commenced. As a result, Mr. DeGroote brought a motion, which was heard by Wilton-Siegel J. on December 21, 2012.

28 In relation to the Dominican Republic Contract, Wilton-Siegel J. held that section 7.3 provides Mr. DeGroote with a right of access to the books and records at any time. He rejected the defendants' argument that the review should occur only after the audited financial statements had been delivered. In relation to the Dream Software Agreement, Wilton-Siegel J. held that section 9.1(f) provides an independent and general right to review the books and records of Dream Software and its affiliates.

29 The defendants then engaged in what appears to have been an obvious tactical manoeuvre to delay. On January 4, 2013 they appealed the order of Wilton-Siegel J. to the Divisional Court. The motion for leave was scheduled to be heard on January 31, 2013 but on January 23, 2013 they abandoned their motion for leave. On January 28, 2013, the last day of the 30-day appeal period, the defendants delivered a notice of appeal to the Court of Appeal. On February 6, 2013, Mr. DeGroote brought a motion before the Court of Appeal seeking to quash the appeal.

30 The next day, on February 7, 2013, Mr. DeGroote's counsel wrote to the defendants' counsel and advised that Mr. DeGroote's accountants and lawyers would attend at the offices of Dream and Dream Software on February 15, 2013 to review the books and records. Defendants' counsel refused to schedule the review of the books and records "for several reasons including the outstanding Appeal," and directing that "no one should travel to the Dominican Republic" on February 15, 2013.

31 The motion to quash the appeal was scheduled to be heard on March 26, 2013. On March 18, 2013, the defendants wholly abandoned their appeal to the Court of Appeal.

32 After the defendants abandoned their appeal, Mr. DeGroote's counsel once again renewed efforts to review of the books and records in the Dominican Republic. The review was scheduled on four separate occasions, only to be called off at the eleventh hour each time. The Carbone defendants assert that there was good reason to call these off, allegedly because Mr. DeGroote was trying to take over Dream. This is all based on hearsay evidence that cannot be given credit on this motion.

33 There is evidence, which Mr. DeGroote acknowledges, that he spoke to someone about obtaining evidence and paying the deponents for the evidence. He says, and there is no evidence to contradict it, that he asked the person he was dealing with, a disbarred lawyer whom the Carbones had earlier hired, if that would be legal. He was told probably not. He then

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obtained advice from a Bermuda lawyer that it would be illegal and he then said he was not going to follow through with it. He acknowledges that he should not have started down that road. I would not in the circumstances of this case deny any relief because of this. Mr. DeGroote is 80 years of age and a huge amount of money appears to have been misused, and it is understandable that without any reports that he was entitled to, he would try to obtain evidence from someone who would know the situation in the Dominican Republic.

34 This motion was originally returnable on August 2, 2013. Prior to the motion, counsel to the Carbone defendants agreed to make the books and records available for review in the Dominican Republic. On that basis, Mr. DeGroote accepted the offer and agreed to adjourn this motion and the review was scheduled to commence on September 9, 2013.

35 The books and records were not made available for review on September 9, 2013 as promised. On September 4, 2013, counsel to the Carbone defendants advised that the review could not proceed due to "ongoing serious security concerns". Counsel to the Carbone defendants agreed to make the books and records available for review at the offices of Collins Barrow LLP, their corporate auditors, in Vaughan, Ontario instead of the Dominican Republic. Counsel further advised that there would be fifty-five banker's boxes of documentation available for review commencing on September 16, 2013.

36 The documents were not made available for review at Collins Barrow on September 16, 2013 as promised.

37 Mr. DeGroote has not received audited financial statements for DC Entertainment in respect of the $5,000,000 loan advanced pursuant to the Jamaican Contract. According to Antonio, all books and records for the Vegas Flamingo were stolen. According to the incredible explanation given by Antonio, Mr. DeGroote will never receive any audited financial statements for DC Entertainment. I expect a receiver would try to determine whether the books and records exist somewhere.

38 One of the reasons given for delaying and denying access to the books and records was that Dream was busy preparing its audited financial statements. The defendants have repeatedly extended the supposed deadlines for completion of the audit of Dream.

39 Dream purported to change its year-end on multiple occasions in 2012:

(1) on May 9, 2012, Antonio advised that Dream's year-end would be May 31, 2012;

(2) on August 20, 2012, Mr. Persico wrote to Mr. DeGroote's counsel and advised that the "deemed fiscal year-end for [Dream] is set as August 31"; and

(3) on October 12, 2012, Dream's counsel advised that "Dream's first fiscal year end has been selected as December 31, 2012 based on professional advice from its chartered accountants... Baker, Tilley in Santo Domingo".

40 In his affidavit sworn November 26, 2012 in response to the access motion, Antonio swore that they had a firm commitment from Dream's chartered accountants for the completion of the audited financial statements for the funded facilities by March 15, 2013. Dream did not deliver audited financial statements by March 15, 2013. On March 18, 2013, counsel to the Carbone defendants advised that audited financial statements would be delivered later in March. Dream did not deliver audited financial statements by the end of March 2013.

41 On April 11, 2013, the parties attended at a 9:30 a.m. appointment before Wilton-Siegel J. Pursuant to his endorsement of that date, Dream was obligated to deliver its audited financial statements by April 19, 2013. Dream failed to do so. At 4:10 p.m. on April 19, 2013, counsel to the Carbone defendants advised Mr. DeGroote's counsel that Dream's auditors, Collins Barrow, would release its audited financial statements on Monday, April 22, 2013, and that he would forward them upon receipt.

42 The Carbone Defendants provided draft financial statements for Dream on April 22 and May 9, 2013. The draft statements contain significant financial and accounting irregularities.

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43 Mr. DeGroote has not received any financial statements for Dream Software.

44 Antonio admits that audited financial statements for Dream Software have not yet been completed, despite the passage of over two years since Mr. DeGroote advanced approximately $15.2 million under the VLMT Contract. Antonio stated that the audited financial statements for Dream Software are "far less important" than those for Dream. He asserts that the business is not yet operating and that Dream's supposedly extensive and profitable operations have necessitated a complicated, expensive and time-consuming audit. He later stated that the preparation and completion of audited statements for Dream Software was "forgotten about" as a result of the alleged conspiracy and sabotage campaign supposedly carried out by Mr. DeGroote.

45 In his affidavit sworn July 17, 2013, Mr. Carbone testified that since recently being served with the plaintiff's motion record, he had requested that the Dream Software audited financial statements be prepared and completed and said that they would be released as soon as they were in hand. Mr. DeGroote has still not received any audited financial statements for Dream Software.

46 On April 11, 2013, Wilton-Siegel J. ordered that the defendants produce by May 3, 2013 a long list of documents. The defendants failed to provide this documentation by May 3, 2013. Two and a half months later, some of the documents were produced, being the formal licenses for the casinos operated by Dream. However, these were inconsequential and did nothing to indicate where Mr. DeGroote's money ended up.

47 The Carbone defendants agreed to make the books and records available for review at Collins Barrow in Vaughan on September 16, 2013. They indicated that fifty five boxes of records would be sent to Toronto for review. The first tranche of documents, totalling only eight boxes, were available for review at Collins Barrow's offices on October 31, 2013, less than two weeks before the return of this motion. To date, only nine boxes in total have been made available.

48 Mr. DeGroote retained Gary Moulton, a managing director of Duff & Phelps Canada Limited. Mr. Moulton is a chartered accountant with a specialty designation in investigative and forensic accounting from the Canadian Institute of Chartered Accountants. He is a Fellow of the Institute of Chartered Accountants of Ontario and has practised in the area of forensic and investigative accounting for over 30 years.

49 Mr. Moulton has reviewed the draft financial statements for Dream as well as the other information made available to Mr. DeGroote. Mr. Moulton concludes that:

> 1. Mr. DeGroote's loans were not used in a manner consistent with the Dominican Republic Contract and the underlying descriptions in the promissory notes. Mr. Moulton was unable to conclude how the loans were invested on a property-by-property basis or whether the funds were used for the specific properties for which they were intended.
>
> 2. The draft audited financial statements do not enable verification of the specific casino licenses or the valuation of the assets listed on Dream's balance sheet.
>
> 3. Only $41,543,872 of the proceeds from Mr. DeGroote's loans to Dream under the Dominican Republic Contract were invested in casino licenses and property and equipment. There is approximately $50,145,378 from Mr. DeGroote's loans to Dream remaining after taking into account the funding of casino licenses and property and equipment shown on the draft financial statements.
>
> 4. Approximately $48,634,000.00 of the monies advanced by Mr. DeGroote to Dream pursuant to the Dominican Republic Contract was lent by Dream to an entity called Empresas de Negocio BSE, SRL, a related party entity previously unknown to Mr. DeGroote. Mr. Moulton states that he had no "details regarding the nature of business conducted by [Empresas], the quality of the underlying security of the assets, or the purpose or use of the funds invested by Dream with [Empresas]".
>
> 5. Approximately $4,873,333 of Mr. DeGroote's money was used by Dream to repay a related party entity (Dream Kiosk Inc. in St. Lucia) for an equipment loan.

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6. The draft statements contain numerous accounting irregularities, including the failure to disclose contingent liabilities and the failure to disclose sufficient information about large related-party transactions totalling $64,170,930.

50 Mr. Moulton has reviewed the material in the nine boxes provided to date and advises that the contents of the few boxes received contain mostly information related to the day-to-day operational data of various casinos operated by Dream and limited documentation relating to capital expenditures made by the casinos, consisting of receipts signed by the provider of services. The material made available for review falls far below the amount of information requested to date. According to Mr. Moulton the information and material provided is insufficient to enable the determination of the accuracy of the monthly reports provided, or the accuracy of the 2012 Draft Audited Financial Statements.

Analysis

51 Section 101 of the *Courts of Justice Act* provides that a court may appoint a receiver where it appears to a judge of the court to be just or convenient to do so.

52 A court must have regard to the circumstances of the case and the rights of the parties. In this case, equity cries out for the need to have all books and records produced now. The defendants have appeared to have done their best to prevent this from happening. It is Mr. DeGroote who is suffering the prejudice by this. A receiver can be appointed for the purpose of gaining access to the books and records of a company. See *Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc.*, [2002] O.J. No. 3717 (Ont. S.C.J. [Commercial List]) and *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.) at paras. 14-17. See also *Schembri v. Way*, [2010] O.J. No. 4873 (Ont. S.C.J.) at paras. 12 and 18-19

53 There are no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depends on its own facts. While proving a strong case in fraud can obviously be of great significance in establishing the need for a receiver, it is in my view not a *sine qua non*. Having said that, in this case Mr. DeGroote has established a strong case in fraud. The reporting of false financial information regarding the Jamaican contract is but one example. The apparent misuse of some $50 million lent under the Dominican Republic contract by lending it to a company unknown to Mr. DeGroote without his knowledge, contrary to the agreement, is another example. There are very serious breaches of the agreements in the failure to produce financial information that the defendants appear to have countenanced, if not actively sought.

54 Mr. Neirinck in opening his argument on behalf of the Carbone defendants acknowledged that there was no dispute regarding the history of the matter and that Mr. DeGroote had a right to financial information which had not occurred. He said however that the order sought was premature. His position was that his clients are trying to get the balance of the 55 boxes delivered to Toronto and that if this could not happen within 30 days, it would be appropriate to make the order sought by Mr. DeGroote. He said his clients had now been locked out of the premises in the Dominican Republic by Mr. Pajak, with whom they are in litigation regarding the shares of Dream, but they were taking some legal steps in the Dominican Republic, the details of which he could not say, to try to get back in.

55 I do not think it reasonable in this case to wait for 30 days. I have little faith in the Carbones doing what needs to be done to have records produced. The history of the matter belies any suggestion of good faith on their part.

56 Moreover, there are very important documents that are not in the 55 boxes. Dream's Chief Financial Officer, Mr. Ed Kremblewski, advised Mr. Moulton that the corporate documents relating to the purchase agreements for bancas, lottos and casinos are in the possession of Mr. Austin Persico and not available to either Mr. Kremblewski or Collins Barrow. These very basic documents have not been produced. They were the subject of the order of Wilton-Siegel J. which was ignored.

57 As well, Mr. Persico's trust records of the money advanced by Mr. DeGroote for the Dominican Republic and VMLT contracts are of crucial importance to understand what happened to the money. Mr. Persico was the solicitor for Dream and the money advanced by Mr. DeGroote under those contracts went to Mr. Persico. It is quite clear that Mr. Persico has been taking his instructions from the Carbones who have operated the business. In the *Carbone v. Pajak* action, in which competing applications were heard by me last week immediately following the hearing of this motion, documents disclosed

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made clear that Mr. Persico is taking instructions from the Carbones and that he has been evading service of an appointment to be examined.

58 Mr. Neirinck also asserted that some of the companies over which the receiver is sought were not parties to the lending agreements other than being guarantors. I think this not important. It is very clear that all of the companies are associated and the businesses are interwoven, with money flowing to some of them and the officers and directors being common to all of them, either the Carbones or Mr. Pajak.

59 The draft order provides that copies of any records obtained by the receiver are to be provided to any of the defendants as their cost. Mr. Neirinck objected to his clients having to bear the copying costs. In reply, Mr. Ortved said that his client would pay the photocopying costs.

60 Mr. Flom for the Pajak defendants contended that there is no basis for an order regarding the Pajak companies, being Don Carbone Entertainment Inc. and Dream Kiosk Solutions Inc. However, both of those companies were involved in the movement of funds. The $5 million lent by Mr. DeGroote on the Jamaican contract was paid to Don Carbone Entertainment and Dream Kiosk Solutions routed some money to Mr. DeGroote. It is clear that these companies were involved and that their books and records should be produced.

61 Mr. Flom asserted that Mr. Pajak had given what was asked and thus there was no basis for an order over these two corporations. However, he could not say if Mr. Pajak could deliver the documents of those corporations. On his cross-examination, Mr. Pajak said he didn't have the records of those corporations as the offices of Dream had been ransacked. Moreover, the documentation makes clear that there were requests of the Pajak defendants made to their then solicitor Mr. Neirinck that went unanswered.

Conclusion

62 The plaintiff is entitled to the appointment of a receiver in the form included at Tab F of his motion Record, volume IV, with the deletion from paragraph 3 (g) the words ""and subject to payments of the Receiver's associated costs" and the addition in paragraph 11 of the words "subject to any assessment" in the first line after the word "that".

63 If there are any issues raised regarding privileged documents, they may be addressed at a 9:30 am appointment and, if necessary, by way of a motion.

64 The plaintiff is entitled to his costs of this motion. If costs cannot be agreed, brief written submissions along with a proper cost outline can be made within 10 days and brief written reply submissions can be made within a further 10 days.

Motion granted.

Footnotes

* Additional reasons at *Degroote v. DC Entertainment Corp.* (2014), 2014 CarswellOnt 23, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]).

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Tab 2

2010 BCSC 477
British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

2010 CarswellBC 855, 2010 BCSC 477, [2010] B.C.W.L.D. 4567, [2010] B.C.W.L.D. 4568, [2010] B.C.J. No. 635, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171

Textron Financial Canada Limited (Plaintiff) and Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth (Defendants)

Willcock J.

Heard: February 10, 2010
Judgment: April 9, 2010
Docket: Vancouver S100268

Counsel: W.E.J. Skelly, B. La Borie for Plaintiff
A. Brown for Defendants

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

Headnote

Debtors and creditors --- Receivers — Appointment — General principles
Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff demanded payment from C Ltd. and NHLP, issued notice of intention to enforce security under s. 244 of Bankruptcy and Insolvency Act, and made demand upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for, inter alia, order appointing receiver — Application granted in part — Just and convenient to grant receivership order — As parties stipulated in their contracts that plaintiff would be entitled to appoint receiver or apply for court-appointed receiver in event of default, relief sought not extraordinary — Defendants owed plaintiff significant sum, and had not reduced principal debt — No dispute as to amount of debt, nor that defendants were in default — No imminent prospect of repayment of principal from operations — There had not been full disclosure of defendants' refinancing plans — Interim plan to make partial payments would not indemnify plaintiff against interest accumulating in interim — No assurance interim payments could be made — There was risk to plaintiff's equity and doubt regarding prospect of recovery of principal — Defendants' plans did not provide for indemnity to plaintiff for losses incurred on ongoing basis — There was inadequate provision to minimize irreparable losses lender would incur — No persuasive evidence appointment of receiver would cause defendants undue hardship — Plaintiff should not have to leave its interests in hands of defendants.

Debtors and creditors --- Receivers — Order appointing receiver
Defendants C Ltd. and NHLP built, owned, and operated hotel — Plaintiff, commercial lender, lent money to C Ltd. for development and construction of hotel on terms in loan agreement — C Ltd. executed promissory note — Other transactions were executed as additional security — Default occurred — Plaintiff made demand upon C Ltd. and NHLP for payment, and issued notice of intention to enforce security under provisions of s. 244 of Bankruptcy and Insolvency Act — Demand was also made upon defendant guarantors — Plaintiff brought action — Plaintiff brought application for order appointing receiver, and that receiver have conduct of sale of hotel, subject to court approval — Application granted in part — Balancing rights of parties, it was just and convenient to grant receivership order — Order appointing receiver would not authorize receiver to have conduct of sale of hotel — As conduct of sale precluded redemption, order sought was inconsistent

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with affording defendants redemption period — Special circumstances did not exist such that plaintiff should have order for sale before judgment and consideration of appropriate redemption period — It was not clear that value of security was diminishing — To contrary, there was some evidence that profitability and therefore value of hotel was likely to increase in interim — Some net income was being generated from operations — Receiver would be authorized to engage only in such sales as would occur in ordinary course of business of hotel.

APPLICATION by plaintiff for order appointing receiver, and that receiver have conduct of sale of certain property.

Willcock J.:

Introduction

1 Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

Background

2 Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

3 Chetwynd and NHLP built, own and operate the Hotel.

4 Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

(c) in the event of default, Textron would be entitled to a prepayment charge of 3% of the outstanding principal together with costs of collection, including solicitor fees and disbursements.

5 On January 31, 2007 Chetwynd executed a promissory note by which it promised to pay on demand the lesser of the principal sum of $7.5 million plus interest or the unpaid principal balance on all advances. As additional security the following were executed on the same date:

(a) a mortgage from Chetwynd to Textron, registered against the Lands (the "Mortgage");

(b) an assignment of rents from Chetwynd to Textron, also registered against the Lands;

(c) a trust agreement between Chetwynd, NHLP and Textron, whereby NHLP, as beneficial owner of the Lands,

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granted a mortgage and charge to Textron of all of its real or personal property interests in the Land;

(d) a general security agreement from Chetwynd and NHLP granting a security interest in favour of Textron over the undertaking of Chetwynd and NHLP (the "General Security Agreement");

(e) a guarantee and postponement of claims from NHLP to Textron;

(f) a guarantee from Pomeroy and William Robert Pomeroy (the "Pomeroy guarantors") of two thirds of the amount outstanding to Textron under the Loan Agreement, to a maximum of $5,000,000, and a postponement of claims in favour of Textron;

(g) a guarantee from 711970 and Carrie Langstroth (the "Langstroth guarantors") of one third of the amount outstanding to Textron under the Loan Agreement, to a maximum of $2,500,000, and a postponement of claims in favour of Textron; and

(h) a general security agreement from Pomeroy and 711970 in favour of Textron which granted a security interest in favour of Textron over the undertaking and assets of Pomeroy and 711970 (the "Collateral General Security Agreement").

6 By May 1, 2007 Textron had advanced the entirety of the loan to Chetwynd. The Hotel was substantially complete by May 18, 2007.

7 The Loan Agreement required Chetwynd to make monthly payments of interest only for a period of 12 months from substantial completion. Thereafter Chetwynd was to make monthly payments of principal and interest based on a 25-year amortization period. Chetwynd agreed to maintain a debt service coverage ratio of not less than 0.30.

8 For the months from September to December 2009, Chetwynd failed to make required payments of principal and interest. Chetwynd did not maintain the debt service coverage ratio and failed to provide the financial reporting that was called for under the Loan Agreement. By September 30, 2009 Chetwynd's debt service ratio was 0.47.

9 On November 10, 2009, Textron made demand upon Chetwynd and NHLP for payment of $7,509,585.54, the amount then said to be owing, and issued a notice of intention to enforce security pursuant to the provisions of s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. A demand was also made upon the guarantors. On November 24, 2008, Textron notified Chetwynd that it was in default of the Loan Agreement in that it had failed to meet the debt service coverage ratio. Textron then required Chetwynd to remedy its default. Chetwynd failed to do so.

10 The General Security Agreement provides that in the case of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the undertaking and personal property of Chetwynd and NHLP. The Mortgage provides that in the event of default, Textron is entitled to appoint a receiver by court order or otherwise over the Lands. The Collateral General Security Agreement also provides that in the event of default, Textron is entitled to appoint a receiver, by court order or otherwise, over the interests of the guarantors in the Lands or Hotel.

11 On January 13, 2010, this action was commenced by Textron. The relief sought in the writ of summons includes:

(1) declaration that Textron is the holder of a fixed and specific charge against all of the undertaking, property and assets of Chetwynd and NHLP, and the assets of Pomeroy and 711970 in relation to the Lands and the Hotel;

(2) judgment against Chetwynd, NHLP and Northern Hotels in the amount of $7,509,585.54 to November 9, 2009 and interest thereon at the rate set out in the security agreements;

(3) judgment against the Pomeroy guarantors in the amount of $5,000,000 to November 10, 2009 plus costs and interest thereafter;

(4) judgment against the Langstroth guarantors in the amount of $2,500,000 as of November 10, 2009 plus all other

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applicable costs and interests;

(5) appointment of a receiver or receiver/manager over the Lands and over all of the undertaking, property and assets of Chetwynd and NHLP and over the undertaking, property and assets of Pomeroy and 711970 in relation to the Lands and the Hotel; and

(6) an order that the Lands and the assets secured by Textron be sold free and clear of the right, title and interest of the defendants or an order that the receiver appointed shall sell the Lands and assets subject to further court order.

12 William Pomeroy describes himself as the president of a group of companies referred to as the "Pomeroy Group". The group operates and manages hotels and restaurants in British Columbia and Alberta, including the Hotel, the Pomeroy Inn Chetwynd. Mr. Pomeroy has produced financial reports and month-to-month statistics on the operations of the Hotel for the year prior to December 2009, inclusive, as well as the 2010 budget for the Hotel with comparable 2009 results.

13 It is Mr. Pomeroy's evidence that the Hotel is operating at a slightly better than break-even basis, excluding its financing costs. It has been meeting and is expected to meet its ongoing obligations other than financing expenses. The property is fully insured and the owners are prepared to make regular disclosure of financial information to the plaintiff.

14 Mr. Pomeroy deposes that when the Hotel was developed, the local economy was robust as a result of the health of local resource-extraction industries but the market has since been severely impacted by economic factors, including the closure of a sawmill; the closure of a pulp mill; the suspension of operations at a local coal mine; a dramatic decrease in natural gas prices; and the discontinuance of the operations of a local wind farm. According to Mr. Pomeroy, a reduction in occupancy rates and gross revenues has rendered NHLP unable to make monthly payments on its loan. He cannot say when he expects the business to become more profitable, but believes that in the long term the Hotel will be successful.

15 Mr. Pomeroy deposes that the "Pomeroy Group" is currently in negotiations with lenders to refinance and restructure some of its operations, including the Hotel. He says the restructuring "can be well underway toward completion within the next six months". In his opinion the appointment of a receiver "could have a serious negative impact on our ability to carry out the restructuring".

16 The budget and financial statement produced by Mr. Pomeroy indicate that annual revenue to December 2009 amounted to approximately $1.7 million. After deducting non-financial expenses, the Hotel earned net operating income of $202,000. After depreciation and amortization, interest and financial expenses, the Hotel suffered a loss of $1.45 million. The budget for 2010 will see the Hotel generating net operating income of $457,000 before depreciation, amortization, interest and finance expenses. Interest and financing expenses alone are anticipated to be $489,000. If it meets its budget, the Hotel will not be able to pay all interest and financing expenses. After depreciation, amortization and the interest and principal payments on its loan, the Hotel, on its own budget, will show a net loss of $1.12 million. That budget calls for revenue of $1.96 million compared to 2009 revenue of $1.69 million. The significant increase in revenue is based upon significantly higher projected revenue in the summer and fall of 2010.

17 Chetwynd proposes to make an immediate payment to Textron in the amount of $20,000, and to pay all interest accruing to Textron on a monthly basis, approximately $20,000 per month, while the Pomeroy Group is pursuing restructuring.

18 Textron regards the 2010 budget forecast as optimistic. Textron is of the view that based on actual and projected results, it will not be possible for Chetwynd to raise sufficient funds by refinancing or selling the Hotel to satisfy the outstanding debt to Textron. Although Mr. Pomeroy deposes to attempts to refinance or restructure the operation, there is no assurance that Textron will be paid in full in the event refinancing is obtained, and Textron has not received details of the proposed refinancing from Chetwynd.

Issues

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19 The following issues arise on this application:

1. whether a receiver should be appointed; and, if so

2. whether the receiver should have conduct of sale of the undertaking and property of the Hotel prior to judgment and without a redemption period.

20 The first question requires consideration of the test to be applied on an application for the appointment of a receiver. The parties say the law in this regard is unsettled. The plaintiff says that a receiver should be appointed on the application of a creditor as a matter of course in every case where there has clearly been default unless there is a "compelling commercial reason" to delay the appointment. The defendants say that the statutory requirement that it be just and convenient that the order be made requires a balancing of interests in every case and that the significant detriment to a debtor arising from the appointment of a receiver should lead the court to require the applicant to establish that the balance of convenience favours the appointment.

Applicable Law

Court-Appointed Receivers

21 Section 39(1) of *The Law and Equity Act* describes the jurisdiction to appoint receivers, generally, in terms of justice and convenience:

> 39(1) An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

22 Section 66 of *The Personal Property Security Act*, in addition to the court's general jurisdiction, authorizes the appointment of receivers on the application of interested persons in the event of default under security agreements governed by the provisions of that *Act*.

23 The *Rules of Court* provide the appointment may be on terms:

> 47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

24 In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 (B.C. S.C.), D. Smith J. (as she then was) said at para. 47: "It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.* [citation deleted]."

25 The plaintiff says a mortgagee is entitled to the appointment of receiver or a receiver/manager as a matter of course when a mortgage is in default. The plaintiff says it is just and convenient to give effect to the intentions of the parties reflected in the security agreements. This was the approach adopted by McDonald J. in *Citibank Canada v. Calgary Auto Centre* (1989), 58 D.L.R. (4th) 447 (Alta. Q.B.), citing from Price and Trussler, *Mortgage Actions in Alberta* (1985) at 309:

> Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely

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> have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.

26 This judgment was cited with approval by Burnyeat J. in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) (followed in *Ross v. Ross Mining Ltd.*, 2009 YKSC 55 (Y.T. S.C.)). In that case, the Court held that upon default being proven the court should accede to an application for a court-appointed receiver except in rare circumstances where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

27 In *United Saving*, the first mortgagee applied to appoint a receiver of commercial property being operated as a hotel. There was a mortgage on the land only and no security instrument expressly authorizing the appointment of a receiver of the hotel business. The application was opposed by a second mortgagee. The judgment does not expressly describe the equity in the property but the court found it unlikely that the owner had remaining equity to protect. There were significant unpaid taxes and only some rents were being collected by the second mortgagee under an assignment. The balance of the rents were either not being paid or were being paid to the owners. There was no evidence that any rents were being expended for the benefit of the property or for the benefit of anyone with equity in the property. There was evidence of "a very real danger" that the property would be subject to a cease and desist order from the City and there had been a number of judgments registered against the property.

28 The Court was of the view the English line of authorities, of which in *Player v. Crompton & Co.*, [1914] 1 Ch. 954 (Eng. Ch. Div.); *Truman & Co. v. Redgrave* (1881), 18 Ch. 547 (Eng. Ch. Div.); and *Pratchett v. Drew*, [1924] 1 Ch. 280 (Eng. Ch. Div.) were said to be representative, were consistent in stating that a receiver will be appointed as a matter of course or a "mere matter of course" once default under a mortgage is established. Those authorities were said to have been adopted and followed in British Columbia in *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149, 50 C.B.R. (N.S.) 247 (B.C. S.C.); and *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (B.C. S.C. [In Chambers]), where receivers were appointed without proof of jeopardy.

29 Mr. Justice Burnyeat expressed the view that the decision of Huddart J.(as she then was) in *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (B.C. S.C. [In Chambers]), discussed below, to the effect that a receiver should not be appointed as a matter of course, should be limited to its facts. He observed that the long-established English practice did not appear to have been brought to the attention of the Court in *Korion* and there appear to have been very good reasons in the *Korion* case why the appointment of a receiver should not have been made.

30 Mr. Justice Burnyeat held, at paras. 15-17:

> In accordance with the English decisions and the decisions in *Motherlode* and *Exeter*, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.
>
> The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.
>
> A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions

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> where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

31 The British Columbia cases referred to in *United Saving* are not unambiguous in their adoption of the rule that a receiver should be appointed as a matter of course. In *Eaton Bay Trust*, the Court noted, at p. 151:

> In practice the appointment of a receiver in a mortgage proceeding is frequently made without proof of jeopardy (*Kerr on Receivers*, 15th ed. (1978),pp. 6, 30; *Re Crompton & Co., Player v. Crompton & Co.*,[1914] 1 Ch. 954).

32 The Court did, however, express some reservations with respect to the adequacy of the material and the order appears to have been granted principally because it was unopposed, all parties having been served.

33 As Taylor J. noted in *Royal Bank v. Cal Glass Ltd.* (1978), 94 D.L.R. (3d) 84 (B.C. S.C.) at p. 351 [*Cal Glass*]: "While receivers are appointed in some types of action almost as a matter of course, this may largely be due to the fact that other parties do not object." In that case, the order appointing a receiver/manager on a debenture was not granted. There was opposition and the applicant did not discharge the onus of establishing the justice and convenience of a court appointment, having already instrument-appointed a receiver.

34 The defendants say that the decision in the *United Saving* should not be followed, or should be closely restricted to its facts. They say the requirement in the *Law and Equity Act* that appointment be just and convenient is inconsistent with any presumption and no order should be made "as a matter of course". The defendants say that other remedies short of receivership should first be considered: [*Cal Glass*; *Eaton Bay Trust*; *Royal Trust Corp.*; *Korion*; *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]); *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 C.B.R. (4th) 95 (Alta. Q.B.); and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 53 C.B.R. (5th) 161 (Alta. C.A.).

35 As noted above, *Eaton Bay Trust* dismisses the requirement that there be jeopardy before the appointment but does place significant weight upon the exercise of the court's discretion in granting the order. [*Cal Glass* is of little assistance to the defendants as the principal issue in that case was whether the court should come to the assistance of a bank with an instrument-appointed receiver where the respondent did not seek the discharge of the receiver, but simply sought to have the receiver continue to act at his peril. The issue before me is more clearly and explicitly addressed in *Korion* and *Maple Trade Finance*.

36 In *Korion*, the application for a court-appointed receiver was brought by a second mortgagee after judgment. The circumstances of the case were somewhat unusual in that there was apparently sufficient equity in the property to protect the applicant's interests. The mortgagor's property had an assessed market value of $13,600,000. The first mortgage securing a debt of $3,000,000 was in good standing. Korion's judgment was for $908,053.53. It had the right to appoint a receiver by instrument but, as in the case at bar, sought a court-appointed receiver-manager to avoid conflict. On its application, Korion did not adduce evidence to support its submission that the appointment of a receiver-manager was necessary or desirable. Rather, it simply asserted its right to enjoy the profits from its property. The Court held at paras. 7-8:

> ... In *AcmeTrack Ltd. v. Nor East Industries Ltd.*, (1983), 62 N.S.R. (2d) 358, Nathanson J. held that an affidavit supporting an application to appoint a receiver must state facts from which the court may draw a conclusion as to the necessity or advisability of appointing a receiver. I agree.
>
> Courts have appointed post-judgment receivers for two main purposes: (i) to enable persons who possess rights over property to obtain the benefit of those rights where ordinary legal remedies are defective: *Sign-O-Lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 24 B.C.L.R. 172 at 174 (S.C.) and *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. 256 at 258 (S.C.); and (ii) to preserve property from some danger which threatens it: *Kerr on Receivers*, 17th ed. 1989, at 5-6 and 116; *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191 at 194-195; *HMW-Bennett & Wright Contractors Ltd. v. BMV Investments Ltd.* (1991), 7 C.B.R. (3d) 216 at 224 (Sask. Q.B.); *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 at 14 (Ont. S.C.) and *First Investors Corp Ltd. v. 237208 Alta. Ltd.* (1982), 20 Sask. R. 335 at 341 (Q.B.).

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37 The Court held there was no evidence that "ordinary legal remedies" were insufficient to preserve the property pending realization and there was no threat or danger to the property.

38 The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:

> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

39 The Court accepted the respondent's submission that the appointment of a receiver would jeopardize its operations and attempts to obtain refinancing. Significantly, the respondent was paying the applicant the full amount of monthly interest accruing on its loan and proposed to continue doing so. On weighing the evidence, the Court exercised its discretion against granting the order sought.

40 In *Maple Trade Finance*, the plaintiff sought an order for the appointment of a receiver and manager following default by the defendant on a loan upon which the outstanding balance was $5.7 million. The defendant did not dispute the default. It was prepared to make payments of $4 million in instalments and to have the dispute with respect to the interest payable on the loan dealt with as a discreet issue.

41 The defendant had executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The general security agreement provided for the appointment of a receiver or application for court-appointed receiver in the event of default. Although the authorities cited to the Court are not referred to in the oral reasons for judgment of Masuhara J. (therefore there is no explicit consideration of *United Saving*), the Court does note that the applicant relied upon authorities to the effect that it ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default. Further, the applicant submitted:

42 The parties had agreed the plaintiff may seek the appointment of a receiver in the event of a default;

43 The defendant owed a significant sum of money;

44 There appeared not to be a dispute with the fact of the size of the indebtedness;

45 The defendant was in default;

46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

47 There were concerns with respect to the financial statements of the defendant; and

48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

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> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

51 Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

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> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088(Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> .....
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

53 The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International*, at para. 17, the Court held:

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
>> ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

54 In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in [*Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

56 Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
>> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or

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(b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,

on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

57 A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (B.C. C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (B.C. S.C. [In Chambers]) and *Canlan Investment Corp. v. Gibbons* (1983), 42 B.C.L.R. 199 (B.C. S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

58 In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

60 The court could only contemplate departure from the normal requirements to account for the amount which must be paid and establish an appropriate redemption period - where the applicant could establish a "very special reason" for doing so.

61 The right to redeem is inconsistent with the granting of an order for sale to the mortgagee: *Canlan*, citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (B.C. C.A.) and *First Western Capital Ltd. v. Wardle*, [1982] B.C.J. No. 770 (B.C. S.C.).

62 In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:

In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there

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> was no evidence that the security of the applicant was in jeopardy.

63 That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

64 The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

65 There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.) at para. 21; *Royal Bank v. Astor Hotel Ltd.* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 (B.C. C.A.) [*Astor Hotel*], at para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (B.C. C.A.).

66 There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

67 At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

68 Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

69 In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes Ltd. v. Taplow Financial Ltd.* (1985), 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225 (B.C. S.C.); and *Astor Hotel*.

70 In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject

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to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

72 In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union*
>
> [citation omitted].

73 In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific*, *Vista Homes*, *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (B.C. S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

74 In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

Discussion

Appointment of a Receiver

75 The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

76 The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

77 There is no imminent prospect of repayment of principal from operations. There is some evidence of refinancing efforts but there is no suggestion that those efforts will lead to repayment of even the principal loan in its entirety.

78 There has not been full disclosure of the defendants' refinancing plans. The plaintiff has not been involved in refinancing efforts and has not received particulars of the proposed plan.

79 The interim plan to make partial payments to the plaintiff will not indemnify the plaintiff against interest accumulating on the principal and arrears in the interim.

80 If payments are to come from operating revenues, the defendants estimates of those revenues are optimistic and there is no assurance that those interim payments can be made.

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81 In the case at bar, unlike *Korion* and *Maple Trade Finance*, there is a real risk to the plaintiff's equity and real doubt with respect to the prospect of recovery of principal. The defendants' plans do not provide for indemnity to the plaintiff for the losses incurred on an ongoing basis. There is inadequate provision to minimize the irreparable losses that will be incurred by the lender.

82 The defendants say that it would not be just and equitable to appoint a receiver in the circumstances of this case. The defendants say that the overriding consideration for the court is the protection and preservation of the property pending judgment and that operation of the hotel by experienced managers will minimize interim losses and maximize the potential sale value. They say they can most effectively market the property while operating it without any risk or further jeopardy to the plaintiff. The defendants say the appointment of a receiver will be detrimental to all parties.

83 The defendants further say appointment of a receiver will so damage the hotel's reputation that its value will be substantially affected. There is, however, no persuasive evidence that the appointment would cause undue hardship to the defendants. I conclude, as did the Court in *Royal Trust Corp.*, that it would be naive to think that those with whom the defendants do business would be unaware of the foreclosure proceedings presently underway.

84 The defendants seek to have the reins of the debtor company while the risk of profit and loss in the interim remains almost entirely in the hands of the plaintiff. The liability of the guarantors is limited. While there does not appear to be any basis to conclude that the asset will be wasted, the budget does call for management fees to be paid by the defendant to related companies owned by the Pomeroy Group. The Pomeroy Group operates other hotels and businesses. There is some risk to the plaintiff in permitting the defendants to manage the operations of the Hotel when it may be in the defendants' interests to earn their profits elsewhere. The Plaintiff is suffering losses in the interim. I am of the view that it should not be required to leave its interests in the hands of the defendants.

85 Balancing the rights of the parties I find it is just and convenient to grant a receivership order.

Order for Sale

86 The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

87 The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

88 It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

89 I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

90 The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

91 The form of the order appointing the receiver, subject to the limitation set out in these reasons, will be in the form provided to the Court by the plaintiff on the application.

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92 The parties have leave to apply for further directions if necessary.

Application granted in part.

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Tab 3

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Applicant Australian company lent funds to respondent Ontario company under Facility Agreement (FA) — Parties to FA included mining company in Colombia owned by respondent — All amounts under FA became payable upon default — Applicant and respondent entered into general security agreement under which respondent charged all its assets — Parties and mining company entered into share pledge agreement which provided that, in event of default under FA, applicant had right to appoint receiver — In June 2014, respondent had insufficient funds to make interest payment, triggering default — Applicant demanded payment of outstanding amounts under FA, gave notice of intention to enforce security, began enforcing its pledge of shares in mining company, and replaced mining company's board of directors — Mining company's ousted CEO refused to relinquish control and sought creditor protection in Colombia — Applicant applied to appoint receiver over respondent's assets — Application granted — It was just and convenient to appoint receiver — In accordance with FA, respondent's default granted applicant right to seek appointment of receiver — Appointment of receiver was necessary to stabilize corporate governance of mining company, as respondent's wholly-owned subsidiary and its major asset — Failure to obtain additional financing for respondent and mining company might result in significant deterioration in value — Applicant was prepared to advance funds to receiver to fund receivership and mining company's liability, thereby preserving mining company's enterprise value.

APPLICATION to appoint receiver over respondent company's assets.

Newbould J.:

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing

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properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30,

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2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 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:

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(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.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

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

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually

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resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

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Tab 4

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

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

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

Newbould J.

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

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

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Debtor was in business of leasing motor vehicles — Debtor was indebted to creditor bank; vehicles guaranteed indebtedness to $1.5 million — Creditor held security over assets of debtor including general security agreement under which it had right to appoint receiver of debtor or to apply to court for appointment of receiver — Under terms of wholesale leasing facility, total advances for used vehicle financing were not to exceed 30 percent of approved lease portfolio credit line — Creditor's account manager was informed that used car lease portfolio was 60 percent of leases financed by creditor, well in excess of 30 percent condition of loan — Creditor delivered demands for payment — Creditor applied for appointment of receiver — Application granted — Debtor relied on decision in which judge was critical of actions of bank in overstating its case and making unsupportable allegations of fraud — In case at bar there was no basis to refuse order sought because of alleged misconduct on part of creditor or its counsel — If anything, shoe was on other foot as factum filed on behalf of debtor was replete with allegations of false assertions on behalf of creditor, none of which were established — Cited case was relied upon in which it was held that where security instrument permits appointment of private receiver, extraordinary nature of remedy sought is less essential to inquiry — It was preferable to have court appointed receiver rather than privately appointed one as debtor stated that if private appointment was made it would litigate its right to do so.

APPLICATION by creditor for appointment of private receiver of debtor.

Newbould J.:

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

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president

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and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

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

Events leading to demand for payment

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

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

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

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

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

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

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed

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and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

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

Issues

(a) Right to enforce payment

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

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

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

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

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

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

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

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

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

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

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

(b) Court appointed receiver

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

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

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg*

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(1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

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

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

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

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

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

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to

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establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

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

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

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

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

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

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

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

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

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

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

Application granted.

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Tab 5

2013 ONSC 1911
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. Pine Tree Resorts Inc.

2013 CarswellOnt 12749, 2013 ONSC 1911, 232 A.C.W.S. (3d) 393, 6 C.B.R. (6th) 205

Business Development Bank of Canada Applicant and Pine Tree Resorts Inc. and 1212360 Ontario Limited Respondents

Mesbur J.

Heard: March 27, 2013
Judgment: April 2, 2013
Docket: CV-13-9991-00CL

Proceedings: leave to appeal refused *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 115 O.R. (3d) 617, 100 C.B.R. (5th) 91, 2013 ONCA 282, 2013 CarswellOnt 5026, 307 O.A.C. 1 (Ont. C.A.)

Counsel: George Benchetrit for Applicant
Milton Davis for Respondents
David Preger for Romspen Investment Corporation

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

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Respondents owned and operated inn — Inn experienced financial difficulties over years — Applicant had lent respondent over $3.3 million in two loans secured by first mortgages against bulk of properties that formed inn's premises — Applicant held additional security through general security agreements granted by respondents over all assets — Respondents failed to make scheduled payments that were due and were in default under loan agreements and mortgages — In August 2011, applicant demanded payment of outstanding arrears but respondents failed to pay — In October 2011, applicant demanded payment of outstanding balances of loan — Parties worked toward forbearance agreement — They did not reach agreement, but respondents paid arrears under loans until January 2012 — Respondents were required to make large principal payment in July 2012 but did not — Applicant issued demand for payment of loan arrears — Applicant applied for appointment of receiver over assets of respondents — Application granted — Respondents were in default under mortgages and general security agreements — Parties agreed that inn must be sold, but disagreed on how sale should be accomplished — Where there was disagreement among stakeholders about how property should be marketed, it was appropriate to appoint receiver — Applicant had right to appoint receiver under general security agreements and mortgages — Receivership would benefit second mortgagee, as it would not be put to immediate expense of paying arrears and other costs under mortgages — Receivership was best way to protect interests of all stakeholders with view to maximizing value for all.

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Miscellaneous
Respondents owned and operated inn — Inn experienced financial difficulties over years — Applicant had lent respondent over $3.3 million in two loans secured by first mortgages against bulk of properties that formed inn's premises — Applicant held additional security through general security agreements granted by respondents over all assets — Respondents failed to make scheduled payments that were due and were in default under loan agreements and mortgages — In August 2011, applicant demanded payment of outstanding arrears but respondents failed to pay — In October 2011, applicant demanded payment of outstanding balances of loan — Parties worked toward forbearance agreement — They did not reach agreement, but respondents paid arrears under loans until January 2012 — Respondents were required to make large principal payment in July 2012 but did not — Applicant issued demand for payment of loan arrears — Applicant applied for appointment of

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receiver over assets of respondents — Application granted — Respondents were in default under mortgages and general security agreements — Parties agreed that inn must be sold, but disagreed on how sale should be accomplished — Where there was disagreement among stakeholders about how property should be marketed, it was appropriate to appoint receiver — Applicant had right to appoint receiver under general security agreements and mortgages — Receivership would benefit second mortgagee, as it would not be put to immediate expense of paying arrears and other costs under mortgages — Receivership was best way to protect interests of all stakeholders with view to maximizing value for all.

APPLICATION for appointment of receiver.

Mesbur J.:

The application:

1 Business Development Bank of Canada (BDC) applies for the appointment of a Receiver over the assets of the respondents. The respondents own and operate the Delawana Inn in Honey Harbour Ontario. The Inn has experienced financial difficulties over the years, particularly since the economic downturn of 2008.

2 BDC has lent the respondents just over $3.3 million advanced in two loans, the first for $3 million and the second for $325,000. The two loans are secured by first mortgages against the bulk of the properties forming the Inn's premises. In addition, BDC holds additional security by way of general security agreements granted by each of the respondents over all of their assets. Mr. Fischtein, the principal of the respondents, has also provided his personal guarantee of 15% of the outstanding balance on the larger loan. Both the mortgages and the GSAs give the bank the right to appoint a receiver if the respondents default.

3 The respondents' ongoing financial difficulties resulted in their loans being transferred to the bank's special accounts department in April of 2011. The respondents then failed to make the scheduled principal and interest payments due in July and August, 2011. They also failed to pay realty taxes. They were thus in default under their loan agreements and the mortgages.

4 The bank demanded payment of the outstanding arrears in August 2011. The respondents failed to pay. In October of 2011, the bank demanded payment of the outstanding balances of the loan. The loan agreements and mortgages provide for acceleration of payment in the event of default. At the same time, the bank issued a notice of intention to enforce security (NITES) under s. 244 of the *Bankruptcy and Insolvency Act*.

5 The respondents then asked BDC to postpone principal payments due under the loans, so they could put forward a turnaround proposal. The bank agreed, and the parties worked toward a forbearance agreement. They did not reach an agreement, but the respondents did pay all principal and interest arrears under the loans in January 2012.

6 Under the loans, the respondents were required to make a large principal payment in July 2012. Just before the payment was due, the respondents advised BDC they would not make the payment. BDC then issued a demand for payment of the loan arrears.

7 The respondents asked BDC to restructure the loan, since they were hoping to redevelop the Inn into a condominium/time-share resort.

8 The respondents and BDC then entered into a letter agreement in September of 2012 amending the loan agreement. This amendment stretched principal payments, and the term of the loans, out to October of 2031. Even though the loan was restructured in this way, the respondents still did not pay. They requested further extensions.

9 Finally, BDC reached the end of its patience. It issued a demand letter on November 23, 2012 declaring the balances of the loans were immediately due and payable. BDC also sent a NITES pursuant to the *BIA*.

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10 A few days later, BDC wrote the respondents advising that if and only if they paid all loan principal arrears together with all loan interest arrears and outstanding fees by January 7, 2013, BDC would withdraw the demand for payment and would then confirm that the repayment terms under the amendment letter would continue to apply.

11 The respondents asked for more time, and sought an extension to January 31, 2013. BDC agreed to an extension to January 31 for principal payments, but only if the respondents paid the outstanding interest arrears, fees and legal fees by January 11, 2013.

12 On January 11 the respondents advised BDC the money would not be available until the following week. BDC then requested the payment be received on January 16, 2013.

13 January 16 came and went. The respondents never paid. In sum, they have paid nothing on account of the BDC loans since June of last year, a period of over nine months. As of January 31, 2013 the respondents owed BDC a total of $2,583,257.45 for principal, interest, additional interest, costs, disbursements and expenses, being the total amount of the debt secured under the mortgages and GSAs.

14 There is no question the respondents are in default under the BDC mortgages and GSAs. Both the mortgages and the GSAs give BDC the right to appoint a receiver pursuant to its security. It could appoint a private receiver if it wished. Instead, BDC moves for a court appointed receiver to sell the security. BDC takes the position this is the most transparent, cost effective and sensible way to proceed. While it could have pursued power of sale proceedings under the terms of its mortgages, it views a receivership as a better, more just and convenient way to maximize value for all stakeholders.

15 Both the respondents and second mortgagee, Romspen Investment Corporation oppose the application. Romspen holds the second mortgage on the property secured by BDC's first mortgage. It also holds additional security on some of the respondents' other properties. Romspen is owed about $4.3 million. The respondents are also in default under the Romspen mortgages. Romspen wishes to pay the current arrears under the BDC mortgages, along with arrears of taxes and costs, and then take control of the sale of the Inn under the notices of sale it has already delivered pursuant to its mortgages.

16 Romspen takes the position that under s. 22 of the *Mortgages Act*[1] it is entitled to put the BDC mortgages into good standing, and relieve against acceleration of the full amounts due under the mortgages. This is what it proposes to do, while pursuing its rights to sell the properties under the power of sale provisions of its own mortgages.

17 Romspen says that under these circumstances it would not be just or convenient to appoint a receiver. It suggests that a receivership will be a more expensive and time consuming process than simply letting it put BDC's mortgages into good standing and maintain them in good standing while it sells the properties.

18 The respondents support Romspen's position. They agree the Inn should be sold to satisfy the outstanding debts. Mr. Fischtein, the principal of the respondents, and guarantor, says he is at the greatest risk of loss, and has a particular interest in obtaining the highest and best price for all the properties as a whole. He says the entire property should be sold, not just the portion over which BDC holds security. He says with his many years of operating the Inn, he can assist in ensuring the sales process is operated effectively and efficiently. He goes even further and says that if Romspen sells the property (with his cooperation, presumably) he would have no objection to a Monitor, acceptable to both mortgagees, reporting to BDC on the progress of a sales process.

The law:

19 BDC asks the court to appoint a receiver under both s. 101 of the *Courts of Justice Act* and s. 243(1) of the *Bankruptcy and Insolvency Act.* Both statutes provide the court may do so if it is "just or convenient".

20 In general the parties do not disagree on the appropriate legal principles to apply here. All agree that the overarching criterion in considering whether to appoint a receiver is whether it is "just and convenient" to do so.[2]

21 While appointing a receiver is generally viewed as an "extraordinary remedy", it is less so when, as is the case here, a

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debtor has expressly agreed to the appointment of a receiver in the event of default.[3]

22 In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.[4] In order to answer the question the court must consider all the circumstances of the case, particularly:

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

c) The nature of the property and the rights and interests of all parties in relation to it.[5]

23 The *Mortgages Act* also has an impact on this case. Romspen wishes to avail itself of the provisions of section 22(1) of the *Mortgages Act* which says: Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

a) At any time before sale under the mortgage; or

b) Before the commencement of an action for the enforcement of the rights of

the mortgagee or of any person claiming through or under the mortgagee, the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

24 Section 1 of the *Mortgages Act* defines "mortgagor" as including "any person deriving title under the original mortgagor or entitled to redeem a mortgage." Thus Romspen, as second mortgagee is, by definition, a "mortgagor" entitled to the benefits of section 22(1).

25 Simply put, Romspen says that since BDC has not brought an action to enforce its mortgage within the meaning of the *Mortgages Act* it has an unequivocal right to put the BDC mortgage into good standing under s. 22.

26 It is against this legal framework I turn to the facts of the case to decide whether in these circumstances it would be just and equitable to appoint a receiver, or whether, if Romspen exercises its rights under s. 22 of the *Mortgages Act*, it would not be just and equitable to do so.

Discussion:

27 What is unusual about this application is that all the interested parties before the court support an immediate sale of the property. Each, particularly Mr. Fischtein, has an interest in obtaining the highest and best price for the property. They disagree, however, on who should manage the process, and what the process should be.

28 With that in mind, I will consider each party's plan, and determine what would be most just and convenient in all the circumstances, having regard to the criteria set out above.

BDC's plan

29 BDC proposes to appoint Ernst & Young (E&Y) as receiver. The rates E&Y quotes for its services range from $200 or $225 per hour for support staff, to $350 per hour for managers, up to $475 per hour for the partner who will manage the file. BDC says E&Y would market the property itself, without using a real estate agent. The receiver does not propose to open and operate the Inn, but rather to attempt to sell it before it would otherwise open in June. Because BDC holds security over the

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real estate and the respondents' personal property, all the Inn's non-real estate assets could also be sold in the receivership.

30 The respondents and Romspen suggest BDC's plan is flawed because BDC does not hold mortgage security over the entire property and could therefore not sell it *en bloc.* BDC's mortgage covers all but Royal Island (which Mr. Fischtein is already marketing separately as a residential family property), and three very small cottages. With the respondents' consent, these properties could be included in a sale. Even without these properties, the receiver would still be able to sell what appears to be more than 90% of the Inn's holdings.

31 BDC also points out that a receivership would provide the added benefits of a stay of proceedings, as well a vesting order in favour of any purchaser. It also suggests this is a case where the court's overall supervision of the process, coupled with the receiver's obligations as the court's officer, would be in the best interests of all stakeholders.

Romspen's plan

32 Romspen tells me that pursuant to s. 22 of the *Mortgages Act*, it will pay the principal arrears under the BDC mortgage forthwith, (i.e., within a day), and will bring all interest payments up to date, including interest on interest, together with BDC's costs and expenses, and outstanding realty taxes. It undertakes to continue to make all payments of principal and interest due under the mortgage as amended by the September 2012 agreement between the respondents and BDC. It does not, however, propose to pay outstanding HST.

33 Romspen says it will market the whole of the property quickly with a view to selling all of it, within a reasonable period of time. It is prepared to keep BDC apprised of its efforts on an ongoing basis. It also agrees that if I dismiss the receivership application, it could be without prejudice to BDC's renewing the application at a later date.

34 Romspen is quite candid that by using s. 22 of the *Mortgages Act* it can reap the benefit of the very favourable terms of the respondents' mortgages with BDC, and particularly the terms of the September 2012 amending agreement. It says BDC will not be prejudiced, because it will have received exactly what it bargained for in its agreements with the respondents, particularly the letter agreement amending the mortgage terms in September of 2012.

35 Romspen argues that under its plan, BDC will be in the same position it would have been had the respondents' not defaulted. Under those circumstances, it argues it would not be just and convenient to appoint a receiver.

The respondents' plan

36 The respondents prefer the Romspen plan. That said, they acknowledge the Inn must be sold, and Mr. Fischtein says he is "prepared to cooperate with the secured lenders in having the Delawana marketed and sold in an orderly fashion, through the appointment of an agreed upon agent, and, if necessary, with the supervision of a monitor who is acceptable to both lenders."[6] He says he can assist in ensuring that the sale process is operated effectively and efficiently.

37 From these statements I infer that Mr. Fischtein, and thus the respondents, would cooperate with either mortgagee on a sale, and would do his utmost to see that value is maximized.

The risks and benefits of the proposed plans.

38 Everyone agrees the Inn must be sold. They simply disagree on how the sale should be accomplished.

39 The respondents suggest that this is a case like *Chung v. MTCC 1067*[7] where I denied a mortgagee's application for the appointment of a receiver. In my view, this is not a case like *Chung*. There, the real estate was a simple parking garage, without cross collateralized debt from different creditors. There, unlike here, there was no specific provision for a receiver in any security document.

40 The respondents argue that appointing a receiver now will affect the 165 reservations that have been made for the Inn

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this summer. They say this represents 830 room nights. Fifteen family reunions have been booked. The Inn provides 110 summer jobs, which the respondents say will be imperilled if a receiver is appointed.

41 The respondents want the Inn to open in June, and be listed for sale without the "stigma" of a receivership. It seems to me that selling the property under power of sale is just as much of a stigma as having a receivership sale. If Romspen is candid in its stated intention to sell the property immediately, I fail to see how opening in June bears on the issue one way or the other. BDC suggests that since the Inn does not operate in the winter months, a receiver would be in a good position to conduct a quick sales process now that could result in a going concern sale. That outcome would provide the respondents' existing employees with employment with the Inn's purchaser in time for the 2013 season.[8]

42 If the property can be sold quickly, new owners may honour the reservations and take on the employees. If the property is put on the market now, but not sold quickly, those who have reservations can be advised so they can make other arrangements, since the receiver has no plans to open and operate the Inn this season.

43 With a power of sale (Romspen's plan), the properties will be sold. I am told there is sufficient equity to pay out BDC regardless of who sells it. The difficulty with Romspen's plan, however, is that its interests may run contrary to those of BDC and other creditors and stakeholders. For example, a sale that other stakeholders might support could be unacceptable to Romspen for any number of reasons. The advantage of a receivership is that the process will be subject to the court's supervision, coupled with the receiver's obligations to act in the interests of all creditors and stakeholders.

44 I must consider the interests of all stakeholders. Although Romspen's plan could put the BDC mortgage into good standing, it does not remedy the default under the GSAs. For example, Romspen has no intention of paying the HST arrears. These alone come to about $250,000 for 2011 and 2012. The existence of those arrears constitutes a default under the GSA. The respondents are in default under the Romspen mortgages. That, too, constitutes default under the BDC GSAs.

45 BDC points out that since Romspen holds security over more of the properties than does BDC, it is not unlikely that if Romspen sold the properties, there could be conflicts over allocation of the purchase price among the properties. BDC is not the only other creditor. There are third party equipment lessors, arrears of realty taxes, outstanding HST obligations, and the usual unsecured creditors. Mr. Fischtein himself, through companies he controls, also holds mortgages over all the properties. All have an interest in maximizing value, and having some input in the allocation of any global purchase price.

46 I recognize that as a mortgagee, Romspen has an obligation in power of sale proceedings to sell at market value. I am not satisfied that that obligation alone is sufficient to protect the interests of all stakeholders.

47 What about cost? Romspen and the respondents suggest that a receivership will be much more costly and cumbersome than a simple sale with an agent. They also say that only Romspen is in a position to sell all the land *en bloc*. I am not persuaded these considerations are sufficient to carry the day.

48 I do not know how or when Romspen actually intends to market the Inn. I do not know how it will arrive at a listing price, nor do I know what rate of commission it will incur, or what the listing terms might be. I also have no idea of the likely time frame for soliciting offers. All I know is that Romspen intends to sell the property using a commercial agent, with whom I assume there would be the usual commission arrangement.

49 Mr. Fischtein already has the island portion of the property, Royal Island, up for sale, along with a couple of the cottage properties. Royal Island is being marketed as a "family property", rather than as part of the Inn. It is listed on MLS as a residential property with commission payable at 5%. Although I have no real indicator of value for the property covered by the BDC mortgage, its MPAC value is stated to be more than $4 million. If it sold at this price, a commission of $200,000 or more would likely be payable.

50 When I look at Romspen's plan as a whole, they would propose to incur immediate costs to put the BDC mortgage into good standing,[9] and then spend another $200,000 on commission and other expenses. Their plan is hardly inexpensive.

51 I am told the receiver would market the property itself, without the interposition of an agent. BDC's counsel suggests that any marketing process would be court approved prior to the receiver embarking on it. In this way, the court could

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monitor the cost issue. The court would also have to approve any proposed sale, thus providing an open and transparent forum to protect the interests of all stakeholders.

52 I find it interesting that Mr. Fischtein suggests the supervision of a monitor as an alternative to appointing a receiver. I do not see that as providing any cost savings. The advantage of a receiver, of course, is that the receiver is the court's officer, with duties and obligations to both the court and to all the stakeholders. If stakeholders disagree about the appropriate marketing process, the court can determine what is in the interests of all of them. Similarly, if allocation issues arise concerning how sales proceeds should be allocated among assets, each with different security against them, this is something a receiver can explore, and on which it can make recommendations to the court. Ultimately, the court can decide the issue if necessary.

53 Other advantages of a receiver's sale include both a stay of proceedings, and the fact that any purchaser will obtain a vesting order, thus protecting it against any potential claims from other creditors. In a receivership, the receiver can also sell the other assets over which BDC holds security. This includes all the contents and equipment in the Inn.

54 Courts have held that in circumstances where there was disagreement among stakeholders about how the property should be marketed, it was appropriate to appoint a receiver.[10] The same concern arises here.

55 BDC has the right under both its GSAs and mortgages to appoint a receiver. Even if Romspen were to invoke the provisions of s. 22 of the *Mortgages Act* the respondents would still be in default under the BDC GSAs. They are in arrears of HST, which Romspen does not propose to pay. They are also in default under the Romspen mortgage and Romspen is pursuing a power of sale. All of these constitute default under the BDC security. Under those circumstances, BDC is still contractually entitled to the appointment of a receiver.

56 If I appoint a receiver, Romspen will not be put to the immediate expense of paying the arrears of principal, interest and other costs (as well as the ongoing obligations) under the BDC mortgages. As I see it, a receivership will benefit Romspen overall.

57 A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all. I therefore exercise my discretion and grant the application to appoint a receiver.

58 I note that the proposed receivership order has a borrowing power for the receiver of up to $250,000. First, I am not obliged to approve borrowings at that level, and second, I do not know what the receiver will really need in order to conduct its duties. I am not prepared to approve the borrowing provisions in the draft order BDC has provided. This receivership should be conducted efficiently and quickly. For that reason, I will reduce the receiver's borrowing powers to $175,000 without further order. Given the receiver's hourly rates for the partner, managers and support staff it would assign (none of which exceed $475 per hour), this amount should be ample. If it is not, the receiver can return to court to seek an increase. If it does, it will have to justify an increase to the court's satisfaction.

59 In that regard, if the receiver moves to increase the receiver's borrowings, the court hearing the motion should be made aware that one of the reasons I have made the receivership order is because of the submissions BDC has made that the receiver can accomplish the sale quickly, efficiently, and without the need to incur the cost of commission that would be attendant to a listing arrangement for the properties.

Conclusion:

60 The application is therefore granted, and a receivership order will issue in terms of the draft order submitted, with the exception of the amount of $250,000 referred to in paragraph 20 of the draft order. The figure of $250,000 will be replaced with the figure of $175,000.

61 Given my disposition of the application, I assume there is no necessity to deal with any issue of costs, other than as set out in the draft receivership order. If I am incorrect, I invite counsel to provide me with brief written costs submissions (no more than 2 pages long), within two weeks of the release of these reasons, failing which there will be no further order as to costs.

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Application granted.

Footnotes

1 R.S.O.1990, c. M.40, as amended

2 S. 101, *Courts of Justice Act*

3 See, for example, *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]); *Chung v. MTCC 1067*, 2011 ONSCC 3187 (S.C.J.)

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

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

6 Debtors' factum at paragraph 32

7 2011 ONSC 3187 (S.C.J.)

8 See paragraph 46 of the affidavit of Ruth Thomson, Senior Account Manager, Special Accounts, with BDC, sworn February 4, 2013, filed in support of the application

9 Romspen has offered to pay $164,634.94 to BDC to put the mortgage into good standing. BDC takes the position that payment would not represent all the money BDC is owed.

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

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Tab 6

2011 SCC 18
Supreme Court of Canada

British Columbia (Attorney General) v. Malik

2011 CarswellBC 923, 2011 CarswellBC 924, 2011 SCC 18, [2011] 1 S.C.R. 657, [2011] 6 W.W.R. 383, [2011] B.C.W.L.D. 3169, [2011] A.C.S. No. 18, [2011] S.C.J. No. 18, 17 B.C.L.R. (5th) 1, 199 A.C.W.S. (3d) 1284, 1 C.P.C. (7th) 374, 303 B.C.A.C. 1, 330 D.L.R. (4th) 577, 414 N.R. 332, 512 W.A.C. 1, 76 C.B.R. (5th) 56, J.E. 2011-714

Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia (Appellant) and Ripudaman Singh Malik, Raminder Malik and Jaspreet Singh Malik (Respondents)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: October 15, 2010
Judgment: April 21, 2011
Docket: 33266

Proceedings: reversing *British Columbia (Attorney General) v. Malik* (2009), 2009 CarswellBC 1193, 53 C.B.R. (5th) 1, 69 C.P.C. (6th) 205, 92 B.C.L.R. (4th) 78, [2009] 7 W.W.R. 61, 2009 BCCA 201, 454 W.A.C. 178, 270 B.C.A.C. 178 (B.C. C.A.); reversed in part *British Columbia (Attorney General) v. Malik* (2008), 2008 CarswellBC 1621, 2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.)

Counsel: Jonathan Noel Eades, Matthew S. Taylor, Robert N. Hamilton, for Appellant
Bruce E. McLeod, for Respondents, Ripudaman Singh Malik and Raminder Malik
Jaspreet Singh Malik, for himself

Subject: Civil Practice and Procedure; Insolvency

Headnote

Civil practice and procedure --- Judgments and orders — Ex parte orders — Setting aside — General principles
Crown brought action against three defendants, and three other members of their family and four corporations owned by them to recover monies it advanced to fund defence costs known as Air India trial — Crown obtained two ex parte orders for Mareva injunction and Anton Piller orders — Mareva injunction restrained each of defendants from selling, mortgaging or otherwise disposing of any of their respective assets — It also restrained defendants from causing any of corporate defendants to sell, mortgage or otherwise dispose of any of their assets — Anton Piller order authorized independent lawyers to enter three premises to search for and take away any documents or computers relating to assets and liability of defendants, including numerous specified documents — Defendants' application to have Mareva injunction and Anton Piller order set aside or varied was dismissed with exception of variation of Mareva injunction increasing amount of funds available to defendants for purpose of paying legal fees — Defendants appealed and appeal was allowed in part — Mareva injunction against defendants other than accused was set aside — Anton Piller order was set aside in its entirety — Mareva injunction was found to be supportable against accused — Injunction was found to be reasonably necessary to preserve accused's assets pending determination of Crown's claims — Court found that there was not strong prima facie case of fraud or real risk of dissipation of assets by defendants — Court also found that refusing to restrain accused from transferring or encumbering his assets could cause irreparable harm to Crown, while there was little or no potential harm to accused — Court concluded that Anton Piller order should not have been granted on basis of admissible evidence before court — Court found that evidence before chambers judge established strong prima facie case for claim against accused for reimbursement of advances made by Crown under agreement, but evidence did not establish strong prima facie case of fraud or show real possibility defendants would destroy incriminating documents that may be in their possession — Crown appealed — Appeal allowed — Anton

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Piller order was properly granted as it was open to chambers judge on whole of interlocutory record to issue order — Chambers judge was entitled to take into account lack of any contest in affirming his ex parte orders and dismissing defendants' review application — Objection to Anton Piller order based on solicitor-client confidences also rejected.

Procédure civile --- Jugements et ordonnances — Ordonnances ex parte — Annulation — Principes généraux
Province a déposé une action à l'encontre des trois défendeurs, trois membres de leur famille et quatre de leurs sociétés afin de récupérer la somme d'argent qu'elle avait avancée afin de couvrir les frais de défense encourus dans le cadre du procès relatif à l'affaire Air India — Province a obtenu des ordonnances ex parte accordant une injonction de type Mareva ainsi que des ordonnances Anton Piller — Injonction de type Mareva enjoignait chacun des défendeurs à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs respectifs — Elle enjoignait également les défendeurs à ne pas faire en sorte que les sociétés défenderesses vendent, hypothèquent ou disposent d'aucune autre manière une partie ou l'ensemble de leurs actifs — Ordonnance Anton Piller autorisait des avocats indépendants à pénétrer dans trois locaux pour y chercher et y saisir tous documents ou ordinateurs liés aux actifs et aux dettes des défendeurs, y compris de nombreux documents désignés — Sauf en ce qui concernait une modification à l'injonction de type Mareva permettant une hausse des montants disponibles aux défendeurs pour payer les frais légaux, la requête des défendeurs visant à faire annuler ou modifier l'injonction de type Mareva et l'ordonnance Anton Piller a été rejetée — Défendeurs ont interjeté appel et l'appel a été accueilli en partie — Injonction de type Mareva a été annulée à l'encontre de tous les défendeurs sauf l'accusé — Ordonnance Anton Piller a été annulée dans son intégralité — On a jugé que l'injonction de type Mareva était justifiée en ce qui concernait l'accusé — On a jugé que l'injonction était nécessaire, d'un point de vue rationnel, afin de préserver les actifs de l'accusé en attendant qu'une décision soit rendue à l'égard des prétentions de la province — Cour a conclu qu'il n'y avait pas, à première vue, de preuve solide de fraude ou de risque réel de dilapidation des actifs par les défendeurs — Cour a également conclu que de refuser d'enjoindre l'accusé à ne pas transférer ou grever ses actifs risquait de causer un tort irréparable à la province, alors que l'accusé ne souffrait que peu ou pas d'inconvénients potentiels — Cour a conclu que l'ordonnance Anton Piller n'aurait pas dû être accordée au vu des éléments de preuve admissibles devant elle — Cour a conclu que la preuve déposée devant le juge siégeant en cabinet faisait ressortir clairement le bien fondé de la réclamation déposée à l'encontre de l'accusé visant à obtenir le remboursement des montants avancés par la province en vertu de l'entente, mais ne démontrait pas clairement qu'il y avait eu fraude ou que les défendeurs risquaient vraisemblablement de détruire des documents incriminants pouvant se trouver en leur possession — Province a formé un pourvoi — Pourvoi accueilli — Ordonnance Anton Piller a été accordée légitimement puisqu'il était loisible au juge siégeant en cabinet, en se fondant sur l'ensemble du dossier interlocutoire, de rendre l'ordonnance — Juge siégeant en cabinet était en droit de tenir compte de la totale absence de contestation pour confirmer ses ordonnances ex parte et rejeter la demande de réexamen présentée par les défendeurs — Il y avait également lieu de rejeter l'objection fondée sur le secret professionnel de l'avocat qui a été soulevée à l'égard de l'ordonnance Anton Piller.

The Crown brought an action against three defendants, and three other members of their family and four corporations owned by them to recover monies advanced to fund defence costs for a case known as the Air India trial. The Crown obtained two ex parte orders for a Mareva injunction and Anton Piller orders. The Mareva injunction restrained each of the defendants from selling, mortgaging or otherwise disposing of any of their respective assets. It also restrained the defendants from causing any of the corporate defendants to sell, mortgage or otherwise dispose of any of their assets. The Anton Piller order authorized independent lawyers to enter three premises to search for and take away any documents or computers relating to the assets and liability of the defendants, including numerous specified documents. The defendants' application to have the Mareva injunction and the Anton Piller order set aside or varied was dismissed with the exception of a variation of the Mareva injunction increasing the amount of funds available to the defendants for the purpose of paying legal fees. The defendants appealed and the appeal was allowed in part. The Mareva injunction against the defendants other than the accused was set aside. The Anton Piller order was set aside in its entirety. The Mareva injunction was found to be supportable against the accused. The injunction was found to be reasonably necessary to preserve the accused's assets pending the determination of the Crown's claims. The court found that there was not a strong prima facie case of fraud or a real risk of dissipation of assets by the defendants. The court also found that refusing to restrain the accused from transferring or encumbering his assets could cause irreparable harm to the Crown, while there was little or no potential harm to the accused. The court concluded that the Anton Piller order should not have been granted on the basis of the admissible evidence before the court. The court found that the evidence before the chambers judge established a strong prima facie case for a claim against the accused for reimbursement of advances made by the Crown under the agreement, but the evidence did not establish a strong prima facie case of fraud or show a real possibility that the defendants would destroy incriminating documents that may be in their possession. The Crown appealed.

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Held: The appeal was allowed.

Per Binnie J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): The Anton Piller order was properly granted as it was open to the chambers judge on the whole of the interlocutory record to issue the order. The chambers judge was entitled to take into account the lack of any contest in affirming his ex parte orders and in dismissing the defendants' review application. The objection to the Anton Piller order based on solicitor-client confidences was also rejected.

La province a déposé une action à l'encontre des trois défendeurs, trois membres de leur famille et quatre de leurs sociétés afin de récupérer la somme d'argent qu'elle avait avancée afin de couvrir les frais de défense encourus dans le cadre du procès relatif à l'affaire Air India. La province a obtenu des ordonnances ex parte accordant une injonction de type Mareva ainsi que des ordonnances Anton Piller. L'injonction de type Mareva enjoignait chacun des défendeurs à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs respectifs. Elle enjoignait également les sociétés défenderesses à ne pas vendre, hypothéquer ou disposer d'aucune autre manière une partie ou l'ensemble de leurs actifs. L'ordonnance Anton Piller autorisait des avocats indépendants à pénétrer dans trois locaux pour y chercher et y saisir tous documents ou ordinateurs liés aux actifs et aux dettes des défendeurs, y compris de nombreux documents désignés. Sauf en ce qui concernait une modification à l'injonction de type Mareva permettant une hausse des montants disponibles aux défendeurs pour payer les frais légaux, la requête des défendeurs visant à faire annuler ou modifier l'injonction de type Mareva et l'ordonnance Anton Piller a été rejetée. Les défendeurs ont interjeté appel et l'appel a été accueilli en partie. L'injonction de type Mareva a été annulée à l'encontre de tous les défendeurs sauf l'accusé. L'ordonnance Anton Piller a été annulée dans son intégralité. On a jugé que l'injonction de type Mareva était justifiée en ce qui concernait l'accusé. On a jugé que l'injonction était nécessaire, d'un point de vue rationnel, afin de préserver les actifs de l'accusé en attendant qu'une décision soit rendue à l'égard des prétentions de la province. La cour a conclu qu'il n'y avait pas, à première vue, de preuve solide de fraude ou de risque réel de dilapidation des actifs par les défendeurs. La cour a également conclu que de refuser d'enjoindre l'accusé à ne pas transférer ou grever ses actifs risquait de causer un tort irréparable à la province, alors que l'accusé ne souffrait que peu ou pas d'inconvénients potentiels. La cour a conclu que l'ordonnance Anton Piller n'aurait pas dû être accordée au vu des éléments de preuve admissibles devant elle. La cour a conclu que la preuve déposée devant le juge siégeant en cabinet faisait ressortir clairement le bien fondé de la réclamation déposée à l'encontre de l'accusé visant à obtenir le remboursement des montants avancés par la province en vertu de l'entente, mais ne démontrait pas clairement qu'il y avait eu fraude ou que les défendeurs risquaient vraisemblablement de détruire des documents incriminants pouvant se trouver en leur possession. La province a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Binnie, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : L'ordonnance Anton Piller a été accordée légitimement puisqu'il était loisible au juge siégeant en cabinet, en se fondant sur l'ensemble du dossier interlocutoire, de rendre l'ordonnance. Le juge siégeant en cabinet était en droit de tenir compte de la totale absence de contestation pour confirmer ses ordonnances ex parte et rejeter la demande de réexamen présentée par les défendeurs. Il y avait également lieu de rejeter l'objection fondée sur le secret professionnel de l'avocat qui a été soulevée à l'égard de l'ordonnance Anton Piller.

APPEAL by Crown from judgment reported at *British Columbia (Attorney General) v. Malik* (2009), 2009 CarswellBC 1193, 53 C.B.R. (5th) 1, 69 C.P.C. (6th) 205, 92 B.C.L.R. (4th) 78, [2009] 7 W.W.R. 61, 2009 BCCA 201, 454 W.A.C. 178, 270 B.C.A.C. 178 (B.C. C.A.).

POURVOI de la province à l'encontre d'un jugement publié à *British Columbia (Attorney General) v. Malik* (2009), 2009 CarswellBC 1193, 53 C.B.R. (5th) 1, 69 C.P.C. (6th) 205, 92 B.C.L.R. (4th) 78, [2009] 7 W.W.R. 61, 2009 BCCA 201, 454 W.A.C. 178, 270 B.C.A.C. 178 (B.C. C.A.).

Binnie J.:

I. Introduction

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1 The issue on this appeal is whether the Supreme Court of British Columbia erred in issuing an *Anton Piller* order to permit the Province to conduct a "private search" of the respondents' premises on the basis of an "information and belief" affidavit. The Province sought this interlocutory order in connection with its action against the respondents alleging debt, breach of contract, conspiracy, and fraud. It is seeking reimbursement of more than $5.2 million it paid to fund the respondent Ripudaman Singh Malik's defence in the Air India bombing trial, in which Mr. Malik and a co-accused were acquitted. The other respondents are Mr. Malik's wife Raminder, and their son Jaspreet, a Vancouver lawyer.

2 In granting the *Anton Piller* order to search the business and residential properties of the respondents for evidence that they helped conceal Mr. Malik's assets, and a *Mareva* injunction to freeze their existing assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence. Mr. Malik's *Rowbotham* application had been rejected on the basis that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (2003 BCSC 1439, 111 C.R.R. (2d) 40 (B.C. S.C. [In Chambers]), at para. 71).

3 The current proceedings are still at the interlocutory stage. The seizure of documents has occurred but the documents are in the control of the independent solicitor and have not been seen by the Province. The British Columbia Court of Appeal set aside the *Anton Piller* order and limited the *Mareva* injunction to Mr. Malik himself (2009 BCCA 201, 92 B.C.L.R. (4th) 78 (B.C. C.A.)). The Province appeals only the refusal of the *Anton Piller* order to this Court.

4 The procedural question that divided the courts below is whether a Superior Court judge hearing an *ex parte* application for an interlocutory order may admit into evidence the findings and conclusions of a prior judicial decision (here the *Rowbotham* proceeding between Mr. Malik and the Province) or whether, as the Court of Appeal held, the prior decision was *not* admissible to prove the truth of its contents *unless* the Province could establish that the respondents were precluded by issue estoppel or abuse of process from relitigating the facts thus adduced. On that basis the Court of Appeal permitted only three "facts" to be extracted from the *Rowbotham* judgment, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs" (para. 63). On the record thus truncated the Court of Appeal held that there was insufficient admissible evidence to justify the *Anton Piller* order.

5 An *Anton Piller* order is an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss. The fact the Province was the applicant here conferred no special Crown privilege or priority. The Province comes before the Court as an ordinary civil litigant and its application should be judged by the same rules as any other litigant, as should be the merits of the position taken by the Malik family respondents.

6 Nevertheless, I believe that the Court of Appeal was wrong to insist that the same series of financial transactions as had been exhaustively reviewed on the *Rowbotham* application had to be, in effect, tried *de novo* and *ex parte* by the chambers judge as if the *Rowbotham* proceedings had never taken place, apart from the three "facts". These facts, as the Court of Appeal held, shed little light on what the chambers judge had to decide here.

7 In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

8 On the interlocutory record thus considered admissible, the *Anton Piller* order was properly granted, in my view. The chambers judge was entitled to evaluate, as with any affidavit based on information and belief, the reliability and probative value of the sources relied on by the affiant. The chambers judge was entitled to have regard to the judgment of Stromberg-Stein J. in the *Rowbotham* proceedings brought by Mr. Malik himself — a contested hearing in which he and members of his family gave evidence and examined witnesses. This was permissible provided of course that the chambers judge himself, taking into account the whole of the interlocutory record, made the factual and legal determinations necessary to issue or to decline to issue the order. It is evident in this case from his reasons that the chambers judge made up his own

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mind and, in my view, it was open to him on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*.

9 It was also of course open to Mr. Malik or his wife and Jaspreet to challenge any of the "*Rowbotham* facts" when they brought before the chambers judge their application to set aside the *Mareva* injunction and the *Anton Piller* orders. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* orders. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the respondents' review application. I would therefore allow the appeal.

II. Facts

10 On October 27, 2000, Mr. Malik and a co-accused were charged with multiple counts of murder arising out of bomb explosions on Air India flight 182, which was blown out of the air off the coast of Ireland on June 23, 1985, and a second bomb that exploded on the same date at Narita Airport, Japan, which killed two baggage handlers. Mr. Malik's criminal trial commenced April 28, 2003 and continued for almost two years. In December 2000, Mr. Malik applied for bail. At the time it was in his interest to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources to pay for his own defence, Mr. Malik sought government funding.

A. The Provincial Funding Agreements

11 Public money was made available to Mr. Malik under a series of funding agreements with the Province. The "Indemnity Agreement", dated March 21, 2002, contained an acknowledgment that Mr. Malik was not entitled to funding unless he committed all of his resources to his defence, and covenanted not to encumber his assets. The Indemnity Agreement was replaced a few months later by the "Defence Counsel Agreement", dated August 6, 2002, which contained similar provisions but provided as well that Mr. Malik would transfer all his assets to the Province and for that purpose would assist in the identification of those assets. The Province's claim for approximately $5.2 million relates to funds paid out under the August 6, 2002 agreement.

12 In January 2003, being of the view that Mr. Malik was not living up to his undertakings, the Province notified him that it would terminate his defence funding unless he executed an indemnity. Mr. Malik refused to do so unless he could obtain a *Rowbotham* funding order under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

13 On May 14-15, 2003, Tysoe J., then of the Supreme Court of British Columbia, ordered Mr. Malik to provide financial disclosure. Some disclosure was made, but not to the Province's satisfaction.

B. The Rowbotham Application

14 In August 2003, Mr. Malik brought an application seeking relief pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), seeking to compel the Province to provide funding or to stay the criminal proceedings. The other respondents provided supportive testimony.

15 On September 19, 2003, the applications judge, Stromberg-Stein J., held that Mr. Malik had not demonstrated that he was financially eligible for funding and dismissed his application. As stated, she found that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (para. 71). In particular, she held:

> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless. [para. 25]
>
> [Further], Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year. He and his wife jointly own millions

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> in real estate, although there is little equity because it is heavily mortgaged. [para. 31]
>
> The legitimacy of Mr. Malik's claims that he owes more than $1 million to family members is questionable. The claims are imprecise, none were documented until after Mr. Malik's arrest, and there is no proper proof of legitimacy. [para. 72]

16 In summary, Stromberg-Stein J. concluded, "[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely" (para. 82).

17 In support of these conclusions Stromberg-Stein J. made a number of findings of fact regarding the Malik family finances (the "*Rowbotham* facts"). It is the attempted use in the *Anton Piller* proceedings of the *Rowbotham* findings and conclusions that lies at the heart of this appeal.

C. The "Rowbotham facts"

18 The findings of Stromberg-Stein J. that informed the belief of Mr. Gordon Houston, who filed the Province's principal affidavit on the interlocutory motions, were summarized by the chambers judge as follows:

> At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para. 5];
>
> In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4, para. 6];
>
> In February, 2002, negotiations between Mr. Malik's counsel and the AG led to an interim funding agreement [p. 4, para. 6];
>
> The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik's representations [p. 4, para. 7];
>
> Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member [p. 5, para. 10];
>
> The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p. 10, para. 21];
>
> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise [p. 16, para. 25];
>
> Title to the Marguerite Street home is in Mrs. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses [p. 19, para. 35];
>
> It appears that since Mr. Malik's arrest, Papillon's annual earnings dropped from $4 million to $2.5 million per year [p. 22, para. 42];
>
> Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];
>
> Regarding the allegation that Gurdip Malik loaned Mr. Malik $330,000 US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Importes Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para. 48];

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Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel [p. 25, para. 49];

There is evidence of collusion to secure Gurdip Malik's loan before [the *Rowbotham*] hearing and to reduce Mr. Malik's equity in the hotel [p. 25, para. 50];

There is no record of outstanding wages now claimed [by the Malik children] dating as far back as 1994 up to 1997. No formal records were kept regarding the hours worked by the children [p. 25, para. 51];

Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];

Following Mr. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated. Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];

Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];

Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

Darsham purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];

The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satman Education Society or Satnam Trust, which were headed by Mr. Malik ... [p. 28, para. 60];

In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the Province during this application [p. 29, para. 63];

About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];

Mr. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration. Malik failed to liquidate his assets [p. 30, paras. 69-70];

Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Malik's assets [p. 31, para. 75];

The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];

Any perceived cash shortage is artificial and contrived [p. 34, para. 83].

(2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.), at para. 43)

19 In respect of the value and ownership of certain properties in India Stromberg-Stein J. noted that

[a]t the bail hearing Mr. and Mrs. Malik provided affidavits claiming to own property in India valued at $200,000. Two years later their in-house accountant, Mr. Singh, provided a letter indicating the property was burdened with a tenant who had failed to pay rent. Mr. Malik maintains he does not know whether he owned it, whether he made lease payments, or whether it earned rental income. This is inconsistent, and unlikely behaviour for an astute business person, particularly one looking for a potential source of income. [para. 45]

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D. The Payment Agreement

20 Following the dismissal of the *R. v. Rowbotham* application, the Province and Mr. Malik entered into the "Payment Agreement", dated October 17, 2003, which set out terms for the provision of future fees and required Mr. Malik to provide security for these fees and to acknowledge his indebtedness to the Province for the sums advanced under the previous agreements.

21 The Province paid Mr. Malik a total of $5,200,131 under the Defence Counsel Agreement and $1,681,526 under the Payment Agreement. The latter has been repaid. However the Province claims that Mr. Malik has not transferred the assets (alleged to be his at least beneficially) to the Province. The debt of $5,200,131 under the Defence Counsel Agreement is still outstanding. The Province demanded repayment on December 13, 2005.

22 In March 2007, Mr. Malik issued a writ against the Province for malicious prosecution. At the time of the Province's application for the *Mareva* injunction and *Anton Piller* order that writ had not been served.

23 On October 23, 2007, the Province commenced the present action in debt, breach of contract, conspiracy, and fraud against six members of the Malik family and four corporations owned by them. It claims that all these individuals made false statements (mainly concerning debts said to be owed by Mr. Malik to other members of the family) and conspired to conceal Mr. Malik's assets. On the same day the Province applied *ex parte* to obtain an *Anton Piller* order authorizing independent lawyers to enter three business and residential premises to search for and take away any documents or computer files relating to the assets and liabilities of the respondents, including numerous specified documents. The three premises were the home of Mr. Malik and his wife; the law office at which their son Jaspreet Singh Malik ("Jaspreet") practices law; and the office of Papillon Eastern Imports Ltd. (where Jaspreet also previously carried on the practice of law).

III. Relevant Enactments

24 *Supreme Court Rules*, B.C. Reg. 221/90, r. 51

Rule 51 — Affidavits

(10) **Contents of affidavit** An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made

(a) in respect of an application for an interlocutory order, or

(b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

IV. Judicial History

A. Supreme Court of British Columbia (McEwan J.), 2008 BCSC 1027, 46 C.B.R. (5th) 41 (B.C. S.C.)

25 On the respondents' motion to set aside the *Anton Piller* order and *Mareva* injunction, the Maliks claimed "witness immunity" in respect of their earlier testimony in the *Rowbotham* proceedings. The chambers judge distinguished between the factual findings in the *Rowbotham* proceedings, which he held were admissible to establish a *prima facie* case, and the legal arguments that the Province sought to base on these facts, including issue estoppel and abuse of process. In his view, the latter issues did not need to be decided on the interlocutory application in light of the respondents' decision not to lead evidence to contradict the *R. v. Rowbotham* findings:

The facts which the Province outlined in its original [*ex parte*] submissions have not been shown to be materially

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misleading.

From the perspective of a court assessing the evidence with a view to ensuring that the positions of the parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegations that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. [paras. 60-61]

26 Accordingly, the chambers judge affirmed the *Anton Piller* order and the *Mareva* injunction.

B. Court of Appeal (Finch C.J.B.C. and Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78 (B.C. C.A.)

27 Tysoe J.A., writing for a unanimous court, set aside the *Anton Piller* order in its entirety and the *Mareva* injunction against all respondents but Mr. Malik. In that court's view, the chambers judge should not have relied on the *Rowbotham* proceedings apart from the three findings already mentioned, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs" (para. 63). However, Tysoe J.A. held

The remaining *Rowbotham* findings were <u>not admissible</u> because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. [Emphasis added; para. 38.]

28 In the court's view, the limited admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the Province, did not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the Malik family. The appeals were therefore allowed. As stated, only the *Anton Piller* order is in issue before this Court.

V. Analysis

29 An *Anton Piller* order is, as our Court emphasized in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 (S.C.C.), a thoroughly "draconian" measure equivalent to a private search warrant reserved for "exceptional circumstances" (para. 30) where "unscrupulous defendants" may if forewarned make "relevant evidence disappear" (para. 32). Accordingly:

There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work. ... [para. 35]

It bears repeating that the Province enjoys no special status in this application. It appears as a civil litigant and is to be treated no differently than any other applicant for an *Anton Piller* order.

30 The Province's argument is that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. It alleges that Mr. Malik breached his undertakings in the Indemnity Agreement of March 21, 2002 not to encumber his assets. Nor, according to the Province, did Mr. Malik respect the undertaking in the Defence Counsel Agreement of August 6, 2002 to identify and transfer assets to the Province. Although at his bail hearing in December 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85, Mr. Malik took the position at his *Rowbotham* application in August 2003 that he was unable to contribute anything to his own defence. Stromberg-Stein J. rejected this claim on the basis of detailed factual

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findings in respect of intra-family transactions. The Province alleges that the *Rowbotham* application itself was an act in furtherance of the family conspiracy. The Province claims the Malik respondents, given their track record, cannot be trusted to produce relevant documents in the ordinary way. In the absence of an *Anton Piller* order "there is a real possibility that the defendant[s] may destroy such material before the discovery process can do its work" (*Celanese Canada*, at para. 35).

31 An issue was raised in the court below whether *Anton Piller* orders were available in British Columbia to preserve evidence relevant to a dispute as opposed to preserving property that is the subject matter of the dispute. *Celanese Canada* was an appeal from Ontario, and a difference was noted in wording between r. 46(1) of the British Columbia *Supreme Court Rules*, which deals with preservation of "property that is the subject matter of a proceeding or as to which a question may arise", and r. 45.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which deals somewhat more broadly with the preservation of "property in question in a proceeding or relevant to an issue in a proceeding". I agree with Tysoe J.A. that *Anton Piller* orders for the preservation of evidence are available in British Columbia under the inherent jurisdiction of the Superior Court, which indeed is the source identified by Lord Denning in the eponymous case of *Anton Piller KG v. Manufacturing Process Ltd.* (1975), [1976] 1 Ch. 55 (Eng. C.A.), and endorsed in *Yousif v. Salama*, [1980] 3 All E.R. 405 (Eng. C.A.). Accordingly, the particular wording of British Columbia's r. 46(1) does not assist the respondents.

A. The Evidentiary Record

32 The issue on this appeal is whether the plaintiff (the Province) adduced sufficient admissible evidence on which the chambers judge could make the necessary findings on a balance of probabilities. The Province was required to show that it had a strong *prima facie* case and that absent such an order, there was a real possibility that relevant evidence would be destroyed or made to disappear: *Celanese Canada*, at para. 1. I agree with the respondents that if the Province failed to adduce sufficient admissible evidence at the *ex parte* hearing to justify the orders there was no obligation on them to adduce any evidence at all at the hearing before the chambers judge to set aside the *ex parte* orders.

33 The Province's principal affiant in the *Anton Piller* application, Mr. Gordon Houston, based his information and belief respecting the material facts largely (though not entirely) on the findings of Stromberg-Stein J. in the *Rowbotham* proceedings. However, Mr. Houston also included additional evidence concerning property dealings subsequent to the *Rowbotham* application with the Malik family home (6475 Marguerite Street), commercial properties in Vancouver belonging to the Maliks, and further details of a summary judgment motion for $330,000 allegedly orchestrated by Jaspreet against his father at the suit of Mr. Malik's brother, Gurdip Malik intended (the Province alleges) to reduce artificially Mr. Malik's net worth just prior to the *Rowbotham* application. In the result, based on Mr. Houston's "review of the file, the Malik family's actions leading up to the Rowbotham hearing, the Reasons for Judgment of Stromberg-Stein J., and the Malik family's property dealings subsequent to the execution of the Payment Agreement", he testified as to his belief that "the financial disclosure made by Mr. Malik was neither complete nor accurate" and that "there is a significant risk that evidence relevant to the Province's claims in this action may disappear if an Anton Piller Order is not obtained".

34 I agree with Tysoe J.A. that if the *Rowbotham* judgment is admissible only in respect of the three "facts" previously noted, the *Anton Piller* order cannot stand.

35 One of the problems that confronted the courts below was that the Province initially put forward the extravagant position that the "*Rowbotham* facts" not only constituted *prima facie* evidence that informed its deponents' information and belief, but were conclusive and binding, not only on Mr. Malik — the applicant in the *Rowbotham* application — but on all the other members of the Malik family and their related corporations named as defendants in the present action — by reason of the doctrines of issue estoppel and abuse of process. In my view, the issue of admissibility is separate and distinct from whether, once admitted, the *Rowbotham* findings were conclusive and binding.

36 The chambers judge accepted the *Rowbotham* findings as *prima facie* proof of their content, and noted that while Mr. and Mrs. Malik and Jaspreet led evidence at the hearing to set aside the *ex parte* orders, none of this evidence disputed the transactions relied on by the Province to make the factual case against them. The question of whether the *Rowbotham* findings were conclusive and binding on the Maliks in this case (which would only have arisen had they made the attempt to adduce evidence to contradict those findings), was not something the chambers judge believed he was required to decide. I agree with the chambers judge that the admissibility of the *Rowbotham* facts was not dependent on the respondents being foreclosed from challenging them because of issue estoppel or abuse of process.

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B. The Concern about a Multiplicity of Proceedings

37 The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.

38 It seems clear the *Rowbotham* judgment was properly put before the chambers judge. He was entitled to take judicial notice of prior decisions of the court. Then there is the public documents (or official written statement) exception to the hearsay rule: *McCormick on Evidence* (5th ed. 1999), vol. 2, at § 295. Moreover, it was incumbent on the Province to make "full and frank disclosure of all material facts" to the chambers judge (*Celanese Canada*, at para. 37). This requirement included drawing the court's attention to the *Rowbotham* decision. Further, as the Province points out, the *Rowbotham* proceeding was itself pleaded as a step in the alleged Malik family conspiracy to defraud the Province. In this aspect, the judgment was tendered for the purpose of proving the *fact* that the proceedings were taken by Mr. Malik, and supported by testimony from his family. In this latter respect, the fact the proceeding itself was taken is *not* hearsay: *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.), at pp. 924-25.

39 All of this, of course, does not carry the Province very far. The mere fact the *Rowbotham* decision was properly before the chambers judge does not determine what use may properly be made of it. In my view the chambers judge was *not* required to proceed as if the *Rowbotham* judgment was of merely historical interest and of no probative value to the *Anton Piller* application (apart from the Court of Appeal's "three facts").

40 In a number of decisions our Court had emphasized a public interest in the avoidance of "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 18). Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice:

> Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue.
>
> (*Toronto (City) v. C.U.P.E., Local 79* (2001), 55 O.R. (3d) 541 (Ont. C.A.), *per* Doherty J.A., at para. 74, aff'd, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) (*sub num. Toronto (City) v. C.U.P.E., Local 79*), at para. 44)

When *Toronto (City) v. C.U.P.E., Local 79* reached this Court, Arbour J. pointed out that the judicial concern about duplicative litigation operates equally against a plaintiff or a defendant: "I cannot see what difference it makes" (para. 47). At issue in those cases were the doctrines of *res judicata*, issue estoppel and abuse of process.

41 *Danyluk* concerned a civil action by a disgruntled employee whose claim under the *Employment Standards Act*, R.S.O. 1990, c. E-14, had already been dismissed by a government adjudicator. The employer asked for dismissal on the basis of issue estoppel. The Court held that the doctrine of issue estoppel must be applied flexibly, and that from a fairness perspective the employee should be permitted to relitigate the claims arising out of her employment because "[i]t is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims" (para. 78). On the other hand, *Toronto (City) v. C.U.P.E., Local 79*, applied the doctrine of abuse of process, notwithstanding different parties, to prevent the relitigation of a criminal conviction of a municipal employee for sexual abuse of a child in his care. The issue resurfaced in a subsequent grievance arbitration by the employee, who had been fired following his conviction. The respondent City filed before the arbitrator not only a certificate of conviction but a transcript of the boy's evidence at the criminal trial. (The child did not testify at the arbitration.) In holding the arbitrator bound by the earlier criminal proceedings, Arbour J. offered three observations on why relitigation is generally undesirable:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceedings. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly and additional hardship for some witnesses.

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> Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

42 Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at § 19.177).

43 Here it is objected that the *Rowbotham* issues are different from the fraud and conspiracy case, but Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, cited the decision of the Ontario Court of Appeal in *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), where Houlden J.A. (dissenting on a different point) observed in the context of an appeal from a decision of a professional disciplinary body, that "lack of identity of issue goes to weight, not to admissibility" (p. 17). Arbour J. also referred to *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.). In that case, it was held that it was an abuse of process for the defendants to deny that a certain transfer was fraudulent where that issue had been determined against them after a full and fair trial in a previous proceeding between different parties.

44 The Province suggests that the Court of Appeal was influenced — although not expressly referring to it — by the so-called rule in *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (Eng. C.A.). In that case, in which damages were claimed arising out of a motor vehicle accident, the English Court of Appeal ruled inadmissible in the subsequent civil action a certificate of conviction of the defendant driver for careless driving because "on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant" (p. 595). In its country of origin this rule is "generally thought to have taken the technicalities of the matter much too far" (*Arthur J.S. Hall & Co. v. Simons*, [2000] UKHL 38, [2002] 1 A.C. 615 (Eng. H.L.), at p. 702, *per* Lord Hoffman). The editor of *Cross and Tapper on Evidence* (12th ed. 2010), agrees. After dismissing *Hollington v. F. Hewthorn & Co.* as a bundle of "indefensible technicalities" (p. 109), he comments that the "House of Lords might at some stage reconsider the matter in the light of the modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings" (p. 110). The editors of the Sopinka text appear to share the same view (§ 19.158). To similar effect, see *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961 (New Zealand C.A.), at p. 980, citing at p. 971 *Harvey v. King*, [1901] A.C. 601 (England P.C.), and at p. 974 *McCormick on Evidence*:

> Probably the trend of evolution will be toward the admission generally against a present party of any judgment or finding in a former civil or criminal case if the party had an opportunity to defend. The principles on which is founded the hearsay exception for official written statements would justify this extension.

In this appeal we are concerned only with the effect, if any, to be given to *Hollington v. F. Hewthorn & Co.* in *interlocutory* proceedings. In my view the "rule" simply has no application at this stage of proceedings in British Columbia. In addition to the general considerations already referred to, r. 51(10)(a) of the British Columbia *Supreme Court Rules* expressly permits the admission of hearsay on an interlocutory application (as does replacement r. 22-2(13), which came into force on July 1, 2010 (*Supreme Court Civil Rules*, B.C. Reg. 168/2009)).

45 I do not see how the "indefensible technicalities" of *Hollington v. F. Hewthorn & Co.*, or their extension to interlocutory proceedings in a civil case are consistent with the concerns expressed by this Court in *Toronto (City) v. C.U.P.E., Local 79*, about the need to avoid an unnecessary multiplicity of proceedings.

46 Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. On this point I agree with *Del Core* (which was *not* an interlocutory proceeding) that it "would be highly undesirable to replace this arbitrary rule (in *Hollington v. F. Hewthorn & Co.*) by prescribing equally rigid rules to replace it" (p. 22).

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47 I agree, as well, with the Ontario Court of Appeal in *Del Core* that the prior proceedings may be admissible but the "weight and significance" to be given to them "will depend on the circumstances of each case" (p. 21).

> The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn, supra.* It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases. [p. 22]

48 Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (*Del Core*, at p. 22).

C. The Rowbotham Decision Was Admissible in This Case

49 In my view the chambers judge did not err in treating as admissible the *Rowbotham* decision on the interlocutory applications. The earlier proceeding had been initiated by Mr. Malik and involved the other respondents. The same series of family transactions, and allegations of asset manipulation, had earlier been examined by a judge of the Supreme Court of British Columbia. The underlying issue in the *Rowbotham* case, as it is here, is whether the Malik family was playing games with the Province (and the B.C. courts) with respect to their financial affairs. The question in that case was whether Mr. Malik was without financial resources to fund his defence. The issue in this case is whether Mr. Malik is without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application, and according to the Houston affidavit, has continued ever since. These issues cannot be answered at an eventual trial without access to the underlying documents. The history of dealings between the Province and the Malik family justifies serious concern whether such evidence would be made available by the Malik family in the ordinary course of discovery.

50 On the other hand, the chambers judge (quite properly in my view) did *not* foreclose the Malik family from leading evidence on the return of the motion to explain away or put a different light on their financial transactions.

51 Undoubtedly, a chambers judge should proceed cautiously with hearsay evidence, particularly where the *ex parte* remedies sought are as prejudicial to the absent defendants as in the case of an *Anton Piller* order or a summary judgment (*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 (B.C. C.A.), at pp. 194-95), or an injunction (*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (B.C. S.C.), at para. 5). However, the need to proceed with caution does not render hearsay as such inadmissible under r. 51(10)(a) on an interlocutory motion.

52 More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court's earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*), to have required the chambers judge to put aside Stromberg-Stein J.'s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. Of course the *Hollington v. F. Hewthorn & Co.* doctrine and its civil offshoots are not just about hearsay. They are also about inadmissible opinion evidence — opinion piled on hearsay. But for the reasons already discussed I would decline to give effect to the arguments made in *Hollington v. F. Hewthorn & Co.* They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances.

D. Did the Chambers judge Defer Improperly to the Decision of the Rowbotham Judge, Delivered Five Years Earlier?

53 The reasons of the chambers judge for granting the *Anton Piller* order and *Mareva* injunction are quite brief. He stated that the Province had a "strong *prima facie* case that goes back to the reasons for judgment in 2003 of Madam Justice Stromberg-Stein in this matter" (para. 2), and then didn't refer to the *Rowbotham* case again. He said that his decision to grant the *Mareva* injunction was based on the material and written arguments before him. With respect to the *Anton Piller*

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order, he stated:

> Similarly, with respect to the Anton Piller order, I am satisfied on the basis of the material placed before me and the written argument that the order as sought ... is appropriate. ... [T]he material placed before me suggests, again on a strong *prima facie* basis, that that person may be involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff. That is all I will say, inasmuch as I do not think on an *ex parte* motion of this kind the court should discuss or suggest that it's made any finding on the merits except to say that what is before it suggests a very strong case.
>
> (*British Columbia (Attorney General) v. R.S.M.*, B.C.S.C. (in chambers), No. S077088, October 23, 2007, at para. 5.)

I therefore turn to the four "essential conditions" set out in *Celanese Canada* that must be met to justify an *Anton Piller* order.

(1) The Plaintiff Must Demonstrate a Strong Prima Facie Case

54 What the chambers judge termed a very strong "case" included evidence that (1) Mr. Malik owed the Province over $5.2 million; (2) Mr. Malik's net worth had gone from a joint interest (with his wife) in $11,648,439.85 in December 2000 to alleged insolvency in August 2003 with no explanation other than intra-family transfers of assets; (3) Mr. Malik had neither identified nor transferred assets to the Province as he had undertaken to do; (4) the Malik family has made numerous transfers of assets including luxury vehicles and Mr. Malik's $72,000 income tax refund, in violation of a court order not to dispose of any assets (this amount was belatedly repaid to the Province); (5) the particular transfers of property within the family up to the time of the *Rowbotham* hearing had been examined judicially in the course of that proceeding; (6) the pattern of shuffling assets within the family and loading the remaining assets with debt continued after the *Rowbotham* application in respect of Mr. Malik's home at 6475 Marguerite Street and the commercial property on Hamilton Street, where some of the mortgages ranking in priority to the Province's claim had been shuffled back to a Malik family company, 0772735 B.C. Ltd., in an effort to obtain priority over the Province's claim. These mortgages had a combined value of about $1.9 million; (7) the circumstances of the transfers raised a legitimate concern that their purpose was to facilitate Mr. Malik escaping his financial obligations under the agreements for defence funding that he had entered into with the Province; (8) Jaspreet played an active role in attempting to obtain a default judgment against his father at the suit of his uncle Gurdip Malik on a $330,000 loan that was not due for another year; (9) the intra-family transactions included a security interest registered by Jaspreet in favour of Gurdip Malik against Mr. Malik's shares in Khalsa, a company that owned a $3 million hotel, one year before the $330,000 loan was due and one month after Tysoe J. ordered Mr. Malik not to dispose of or encumber any of his assets; and (10) the Malik children claimed unpaid wages in the amount of $260,000 that had never been recorded or claimed before Mr. Malik's legal troubles.

55 In my view it was open to the chambers judge on the basis of the whole of the interlocutory record to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the respondents' conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement.

(2) The Damage to the Plaintiff of the Defendant's Alleged Misconduct, Potential or Actual, Must Be Very Serious

56 A claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is, in my view, very serious.

(3) There Must Be Convincing Evidence That the Defendant Has in Its Possession Incriminating Documents or Things

57 In my opinion it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation behind the registered and unregistered property transfers was in the possession of the respondents, especially Jaspreet who held himself out as his father's "legal counsel in relation to financial affairs" (chambers judgment, at para. 11). Jaspreet acted for his parents, either personally or in connection with other members of his firm, in at least 18 mortgage transactions since 1996, the majority of which post-date the court order against Mr. Malik not to dispose of his assets. It is

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alleged, based on the evidence, that Jaspreet is functioning not as an independent lawyer, but as a co-conspirator. I think it was reasonable for the chambers judge to conclude that Jaspreet was "involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff" and that, in the circumstances, a good deal of relevant and incriminating evidence would likely be found at the places sought to be searched, namely the Malik family home and Jaspreet's various places of work.

(4) It Must Be Shown That There Is a Real Possibility That the Defendant May Destroy Such Material Before the Discovery Process Can Do Its Work

58 The Province argued that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. The evidence suggests, again on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there is a "real possibility" that he and members of his family will do so again if they think it is to their financial advantage.

59 It will often be difficult or perhaps impossible for a plaintiff to show that a defendant *will* actually destroy evidence, but it is always open to the court to draw inferences reasonably compelled by the surrounding circumstances. As Paperny J. (as she then was) observed in *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 (Alta. Q.B.):

> Generally, courts have inferred a risk of destruction when it is shown that the defendant has been acting dishonestly, for example where matter has been acquired in suspicious circumstances, or where the defendant has knowingly violated the applicant's rights. [para. 22]

This passage was cited with approval by the Alberta Court of Appeal in *Catalyst Partners Inc. v. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264 (Alta. C.A.), at para. 13.

60 Given a history of refusal to provide proper disclosure of financial information despite Mr. Malik's agreement (and a court order) to do so, in my opinion it was open to the chambers judge to conclude that the respondents might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material "before the discovery process can do its work" (*Celanese Canada*, at para. 35).

61 It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. On the respondents' application to set aside the *ex parte* orders Mr. and Mrs. Malik filed evidence (Jaspreet did not) but their evidence did not seek to contradict the facts relating to their financial affairs on which the *ex parte* orders were based. In these circumstances, it was open to the chambers judge, in my opinion, to affirm his previous orders.

62 Whether and to what extent the *Rowbotham* issues can properly be relitigated at the eventual trial of this action is a decision for the trial judge to make.

E. The Solicitor-Client Issue

63 Jaspreet Malik appeared in person before this Court to object to the seizure at his law offices on the grounds of solicitor-client privilege. This is an important issue in *Anton Piller* cases, as the judgment in *Celanese Canada* made clear. However, in this case, unlike *Celanese Canada*, the allegation is that Jaspreet is a party to the alleged fraud and conspiracy, and therefore that no privilege attached to the relevant documents.

64 Moreover, unlike the situation in *Celanese Canada*, the independent solicitors have not made any of the seized documents available to the plaintiff Province. The parties appeared before the chambers judge on October 25th, 2007, two days after the *Anton Piller* order was granted. Counsel raised the issue of solicitor-client privilege, and the parties reached what McEwan J. described as "operating understandings" as to the safeguards that would govern the files seized from the law offices until such time as the Maliks' substantive challenge to the orders was resolved.

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65 In the end Jaspreet was only able to identify three files captured by the search that were subject to proper objections on the ground of solicitor-client privilege. One of those was a file that did in fact belong to one of the Malik family members who was subject to the search but the file was unrelated to the case. The other two files belonged to clients who had the same names as targets of the search. In all three cases the documents were not taken from the premises, and (as stated) none of the documents have been viewed by the Province. In the circumstances, the objection to the *Anton Piller* order based on solicitor-client confidences should also be rejected.

VI. Disposition

66 I would therefore allow the appeal with costs.

Appeal allowed.
Pourvoi accueilli.

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Tab 7

1985 CarswellOnt 900
Ontario Supreme Court, Court of Appeal

Del Core v. College of Pharmacists (Ontario)

1985 CarswellOnt 900, 10 O.A.C. 57, 15 Admin. L.R. 227, 19 D.L.R. (4th) 68, 31 A.C.W.S. (2d) 411, 51 O.R. (2d) 1

DEL CORE v. ONTARIO COLLEGE OF PHARMACISTS

Houlden, Blair and Finlayson JJ.A.

Heard: April 11, 1985
Judgment: June 19, 1985

Counsel: *P.D. Isbister, Q.C.*, for appellant.
Brian P. Bellmore, for respondent.

Subject: Public; Evidence

Headnote

Evidence --- Exclusionary rules — Admissibility of character evidence — In civil matters — Prior criminal convictions

Health Law --- Health care professionals — Pharmacists — Discipline by profession — Practice and procedure

Jurisdictional error — Sufficiency of evidence — Professional Discipline — Fact that finding of committee unsupported by evidence not fatal to validity of decision given other evidence supporting both decision and penalty.

Evidence — Judicial notice — Prior conviction on criminal charges — Conviction admissible in later related professional disciplinary proceedings — Since conviction not challenged, no need to reprove criminal charges.

Following his conviction under the Criminal Code (Canada) for defrauding his supplying pharmaceutical company, DC, a pharmacist, was proceeded against for professional misconduct under the Health Disciplines Act (Ontario), s. 130(3)(b). At the hearing before the Discipline Committee of the college, the only witness against DC was a police officer who, over the objections of DC's counsel, tendered a certificate of DC's conviction on the criminal charges. DC's counsel then did not call any evidence submitting that no legal acceptable evidence had been tendered to the committee.

The committee nevertheless found DC guilty of professional misconduct and ordered his licence to practise suspended for 30 days. In the course of its reasons, the committee noted that DC might never have committed the offences in question had he not been a pharmacist with knowledge of the operations and procedures of the defrauded company. DC appealed from the decision of the Committee to the Ontario Divisional Court and his appeal was allowed. It held that there was no evidence before the committee from which it could have inferred that DC had taken professional advantage of his inside knowledge of the workings of the defrauded company. The decision was therefore quashed to the Ontario Court of Appeal.

Held:

Appeal allowed; committee's decision restored (Houlden J.A. dissenting).

1. (Per Finlayson and Blair JJ.A.)

Whether the conviction on the criminal charges in question was disgraceful or infamous conduct such as to amount to professional misconduct by the standards of the profession was essentially a matter for the members of the committee. Nevertheless, even without the finding that DC had abused his inside knowledge of the defrauded company, for which there

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was no evidence, the conviction of DC for defrauding that company was sufficient in itself to enable a finding of disgraceful or infamous conduct amounting to professional misconduct. In the circumstances particularly given the lightness of the penalty, the reference to use of inside knowledge could be treated as trivial speculation. Moreover, given that the committee consisted of lay persons who are expected to formulate their own reasons and not rely upon counsel or professional staff, it was not appropriate to subject their reasons to painstaking scrutiny.

2. (Per Finlayson J.A.)

Given the nature of the criminal offence as revealed in the certificate of conviction, it was appropriate to rely upon it as proof of professional misconduct. Albeit that s. 130(3)(a) made an offence relevant to the practice of a profession grounds for discipline simply upon proof of conviction, this did not mean that, for the purposes of charges under s. 130(3)(b), there was no right simply to rely upon proof of a criminal conviction. While DC could have introduced mitigating or excusing evidence, he was not entitled to launch a collateral attack on the final decision of a Court of competent jurisdiction. He could not therefore have insisted upon having the substance of his criminal charges retried.

3. (Per Blair and Houlden J.A.)

The evidence of prior convictions for fraud was admissible. The use of such evidence was not restricted to defendants and, where unchallenged, had conclusive effect as to guilt of the offences in question. As DC had not attempted to challenge those convictions or to introduce mitigating evidence, there was no real need to deal with whether he had a right to do so. However, it was open to DC to have challenged the conviction (provided such a challenge was not an abuse of process) or to have mitigated its impact by an explanation of the circumstances.

4. (Per Houlden J.A.)

It would not have been an abuse of process here for DC to have attempted to reopen his conviction since it would not have been primarily for the purpose of retrying the criminal charges against him but for the purpose of resisting the charge of professional misconduct.

5. (Per Houlden J.A. dissenting)

Given that s. 12(6) of the Health Disciplines Act (Ontario) was expressed to apply notwithstanding the Statutory Powers Procedure Act (Ontario) and given that it provided that the committee could only admit evidence admissible in a Court of law and was restricted to the use of such legally admissible evidence, the committee's reliance on the unsupported findings that DC had used his inside knowledge of the workings of the defrauded company tainted the committee's decision. Such evidence, if true, would have been readily available and, by not calling it, the Committee had denied DC the opportunity of countering it.

APPEAL from judgment of Ontario Divisional Court allowing an appeal from a finding of unprofessional conduct by the Discipline Committee of the Ontario College of Pharmacists.

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

1 This is an appeal by the Ontario College of Pharmacists ("the College") from an order of the Divisional Court allowing the appeal of John Anthony Del Core ("the pharmacist") and setting aside a finding of the Discipline Committee of the College ("the Committee") that he was guilty of professional misconduct and ordering that his licence be suspended for 30 days.

2 The proceedings were held under the Health Disciplines Act, R.S.O. 1980, c. 196, and the following sections are relevant to the hearing of this appeal: Health Disciplines Act, R.S.O. 1980, c. 196:

> 12-(6) Notwithstanding the Statutory Powers Procedure Act, nothing is admissible in evidence before a discipline committee that would be inadmissible in a court in a civil case and the findings of a discipline committee shall be based

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exclusively on evidence admitted before it.

. . . . .

130(3) A member may be found guilty of professional misconduct by the Committee if,

(a) he has been found guilty of an offence relevant to his suitability to practise, upon proof of such conviction;

(b) he has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations.

Regulation 47(1)(x):

47. For the purposes of Part VI of the Act, 'professional misconduct' means

. . . . .

(x) Conduct or an act relevant to the practice of a pharmacist that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

3 The pharmacist was charged with being guilty of professional misconduct in that being manager of a pharmacy at 26 Vaughan Road, Toronto, Ontario operated by 338590 Ontario Ltd., and being a director of the said corporation did on or about three stated dates in September and October 1978 by deceit, falsehood or other fraudulent means defraud Drug Trading Company of a quantity of pharmaceuticals of a specified value in moneys, more or less, contrary to the Criminal Code, R.S.C. 1970, c. C-34.

4 In its reasons the Committee referred to the charges, the fact that the pharmacist graduated from the Faculty of Pharmacy of the University of Toronto with a degree of Bachelor of Science in Pharmacy in May 1966, that he became a registered pharmaceutical chemist in May 1967, that he was manager of Cosmopolitan Pharmacy in the Vaughan Medical Centre and was a director of the corporation which operated it.

5 The Committee found that it was satisfied that the pharmacist did defraud Drug Trading Company on the three occasions of quantities of pharmaceuticals with a total value of $8,762.07, that he was charged in the County Court Judges' Criminal Court of the Judicial District of York of indictable offences under s. 338(1)(a) of the Criminal Code to which he pleaded not guilty, that he was found guilty with respect to the charges and was sentenced to a period of one day in jail plus one year's probation including restitution of the amounts taken. The Committee noted that counts 1, 2 and 3 of the notice to the pharmacist from the College followed the wording of counts 1, 2 and 4 respectively of the indictment of the pharmacist for which he was found guilty and sentenced by the Court.

6 The Committee concluded that:

Having so found, the Committee then considered whether or not Mr. Del Core was guilty of professional misconduct. While the Committee is mindful that not every breach of a statute constitutes professional misconduct, it must consider the protection of the public as its paramount interest.

The Committee believes it has an obligation to the public, and, in this case, to Drug Trading Company, a wholesaling group operated by and for the benefit of the majority of pharmacies in Ontario, by ensuring that a pharmacist not disregard his professional responsibility. In this case, Mr. Del Core demonstrated a breach of trust towards his fellow pharmacists by defrauding Drug Trading Company of quantities of pharmaceuticals which he might not have done if not licensed as a pharmacist and possessing knowledge of the operations and procedures of the Company.

The Committee is convinced that Mr. Del Core did contravene a federal law, namely, the Criminal Code of Canada, with respect to the distribution of drugs. Further, his action represented conduct or an act relevant to the practice of a pharmacist that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

7 The Committee then found that the pharmacist was guilty of professional misconduct. Exception was taken only with part of one line of the entire reasons which take up the best part of three pages of single space typing and they are the words

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"and possessing knowledge of the operations and procedures of the company". It is conceded by counsel for the College that there was no evidence from which the Committee could infer this special knowledge on the part of the pharmacist.

8 The Divisional Court regarded this as fatal and stated that the Committee took into account matters on which there was no evidence:

> It is implicit in the reasons that the Committee considered that it was reprehensible of the appellant to take advantage of Drug Trading Company by using the knowledge presumably derived from his professional status. it is not possible to say how much this factor on which there was no evidence influenced the decision of the Committee in finding professional misconduct. In view of the provisions of s. 12(6) of the Act that findings must be based exclusively on admitted evidence, it is our opinion that the decision cannot be sustained and must be quashed.

9 It is to be noted that under the Health Disciplines Act the power of the Divisional Court on an appeal is very broad and it can substitute its opinion for that of the Committee from which the appeal is taken (see s. 13(2)). In this case, however, the Divisional Court did not do that and simply quashed the decision of the Committee on the basis that the Committee relied on inadmissible evidence. In my view, this was an error in law on the part of the Divisional Court.

10 What amounts to professional misconduct under Reg. 47(1)(x) is conduct or an act relevant to the practice of a pharmacist that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. It has been held by Rowell C.J.O. in Re Hett and College of Physicians & Surgeons of Ont., [1937] O.R. 582, 69 C.C.C. 71, [1937] 3 D.L.R. 687 (Ont.C.A.), in reference to similar language (infamous or disgraceful conduct in a professional respect) that (p. 587):

> It appears to me that the natural construction of the language used is that the standard by which the accused is to be judged is not what is infamous or disgraceful conduct in the common judgment of men but that which is infamous or disgraceful conduct in the judgment of his professional brethern of good repute and competency.

11 Additionally, it has been held that members of each profession are, by reason of their special knowledge, training and skill, in the best position to judge the conduct of their peers. See Re Milstein and Ont. College of Pharmacy (No. 2) (1977), 13 O.R. (2d) 700 at 707, 72 D.L.R. (3d) 302 (Ont. H.C.) [varied (Re Milstein and Ont. College of Pharmacy) 20 O.R. (2d) 283, 87 D.L.R. (3d) 392, 2 L. Med. Q. 297 (Ont. C.A.)] where Cory J., as he then was, stated:

> One of the essential indicia of a self-governing profession is the power of self-discipline. That authority is embodied in the legislation pertaining to the profession. The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely and best qualified to establish the standards of professional conduct. Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skill that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession. No other body could appreciate as well as the problems and frustrations that beset a fellow member.
>
> Given such unique qualifications for judgment and discipline of fellow members, the decisions and penalties of professional discipline committees ought not to be lightly interfered with.

12 An important caveat to this is found in Re Reddall and College of Nurses of Ont. (1983), 42 O.R. (2d) 412, 1 Admin. L.R. 278, 149 D.L.R. (3d) 60 (Ont. C.A.), where MacKinnon A.C.J.O. considered a decision of the discipline committee of the College of Nurses which had revoked the certificate of a registered nurse on a finding of incompetence. The Associate Chief Justice pointed out at p. 414 that the most serious finding against the appellant which appeared to be the nub of the decision and the basis of revocation was contained in the sentence in the Discipline Committee's reasons:

> Miss Reddall committed serious errors which endangered the lives of the patients assigned to her care.

He went on to say at p. 416:

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> There was clearly evidence to support a finding of incompetence against the appellant but the seriousness of the errors and omissions leading to that finding has not been established on the record. It is obvious, we think, that the finding that she is unfit to continue in practice and the revocation of her certificate was based on the finding that her errors had endangered the lives of patients assigned to her care. The necessary evidence to support this conclusion is missing and the penalty cannot stand. This view of the record does not mean that the members of the committee cannot use their expertise in assessing all the evidence which is before them. But the evidence has to be before them before they can assess it.

13 The situation in that case should be contrasted with the one at Bar where the impugned language assumed that the pharmacist possessed knowledge of the operations and procedures of Drug Trading. In view of the fact that there was clear evidence of three convictions of fraud on a company which, to the knowledge of the Committee, operated by and for the benefit of the majority of the pharmacies in Ontario, this is fairly harmless speculation. The penalty of 30 days suspension was stated by counsel for the pharmacist to be light and he submitted only that the Court could never know the extent that the College relied on this finding in its determination that the breaches of the Criminal Code constituted professional misconduct.

14 In my view, it was clearly open to the Committee to find that a pharmacist who defrauded his supplier with respect to a quantity of pharmaceuticals by deceit, falsehood or other fraudulent means, is guilty of professional misconduct. Indeed, it was conceded that if counsel for the College had proceeded under s. 130(3)(a) of the Health Disciplines Act, the mere proof of conviction, coupled with a finding that it was for an offence relevant to his suitability to practice, would amount to professional misconduct. The error on the part of the Committee appears to me to go, if anything, to sanction and not to the initial finding of professional misconduct. Certainly, whatever knowledge the pharmacist possessed, or did not possess, as to the operations and procedures of the victim would not affect the fact of the perpetration of the fraud. This being so, at most, the Divisional Court should have referred back the matter of penalty to the Committee as was done in Re Reddall, supra. Instead of that it "rescinded" the suspension because of the time that had elapsed and the fact that substantial restitution had been made. The restitution was made as part of the penalty for conviction under the Code and in the result the pharmacist has suffered no penalty at all at the hands of his governing body.

15 This result is wrong because the reasoning is wrong. It was never intended that the decisions of bodies such as this should be subject to such painstaking scrutiny as the Divisional Court has recorded here. The Court must be cognizant of the fact that not only are the members of disciplinary bodies such as the College of Pharmacists experts in the field of their profession and thus knowledgeable of the problems of the profession, they are lay persons so far as the law is concerned. The Courts have consistently held that the reasons given by discipline committees of self-governing bodies must be the reasons of the committees and cannot be written by counsel or professional staff. See Sawyer and Ont. Racing Comm. (1979), 24 O.R. (2d) 673, 99 D.L.R. (3d) 561 (Ont. C.A.); Re Bernstein and College of Physicians and Surgeons of Ont. (1977), 15 O.R. (2d) 447, 76 D.L.R. (3d) 38, 1 L. Med. Q. 56 (Ont. Div. Ct.); Re Emerson and L.S.U.C. (1983), 44 O.R. (2d) 729, 41 C.P.C. 7, 5 D.L.R. (4th) 294 (Ont. H.C.); Re Stoangi and L.S.U.C. (1978), 22 O.R. (2d) 274, 93 D.L.R. (3d) 204 (Ont. H.C.); Re Stoangi and L.S.U.C. (No. 2) (1979), 25 O.R. (2d) 257, 100 D.L.R. 639 (Ont. Div. Ct.). This being the case, it follows that Courts should not be overly critical of the language employed by such bodies and seize on a few words as being destructive of the entire disciplinary process.

16 In addition to submitting that the decision of the Divisional Court should be sustained for the reasons given, counsel for the pharmacist also advanced the argument in this Court that the finding of professional misconduct could not be sustained because counsel for the College relied exclusively on proof of the conviction of the pharmacist for the named offences as evidence of professional misconduct under s. 130(3)(b) of the Health Disciplines Act. He relies particularly on Hollington v. F. Hewthorn & Co., [1943] 1 K.B. 587, [1943] 2 All E.R. 35 (C.A.), and Royal Bank v. McArthur (1984), 46 O.R. (2d) 73, 8 D.L.R. (4th) 411 (Ont. H.C.) [reversed (1985), 51 O.R. (2d) 86, 10 O.A.C. 394 (Ont. Div. Ct.)].

17 In my view, this objection can no longer stand by virtue of Demeter v. British Pacific Life Ins. Co. (1983), 43 O.R. (2d) 33, 2 C.C.L.I. 26, 37 C.P.C. 277, 150 D.L.R. (3d) 249, [1983] I.L.R. 1-1689 (Ont. H.C.), affirmed on appeal (1984), 48 O.R. (2d) 266, 8 C.C.L.I. 286 (sub nom. Demeter v. British Pacific Life Ins. Co.; Demeter v. Occidental Life Ins. Co. of California; Demeter v. Dom. Life Assur. Co.), 13 D.L.R. (4th) 318, [1983] I.L.R. 1-1862, 7 O.A.C. 143.

18 Counsel for the pharmacist argued that the Demeter case was restricted to the situation where it could be shown on the record that the express purpose of the proceeding was to reopen criminal proceedings in a subsequent civil action in order to

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re-litigate issues that had arisen in the criminal proceedings. He submits that it has no application to a situation where the instigator of the proceedings, whether as plaintiff in a civil action or as complainant in this discipline hearing, seeks to rely upon a criminal conviction as proof of the facts which support the conviction. He relies particularly on the language of Anderson J. in Royal Bank v. McArthur, supra, at p. 80:

> It is to be observed that in each of the cases which I have considered, the introduction of the criminal conviction was raised as a matter of defence in the civil action, the defendant contending that an issue raised by the plaintiff had been previously litigated. I have not found it necessary to consider whether it is pure coincidence that no case has been cited where use of the criminal conviction was raised by a plaintiff in proof of the claim.

19 Counsel makes the further point that, if anything, a certificate of conviction would be admissible under the first part of s. 130(3)(a) to show that the pharmacist had been "guilty of an offence". This would be a situation in which the finding of guilt by another tribunal in itself constitutes professional misconduct. But, he says, in the case at Bar, the College is proceeding under s. 130(3)(b) and the Committee must make its own determination as to whether or not the pharmacist has been guilty of defrauding Drug Trading and cannot accept the certificate of conviction as being proof of that fact in substitution for the formulation of its own opinion.

20 In my opinion, counsel is being excessively technical, and the law as now defined by Demeter, supra, is not as restrictive as he has stated. It must be kept in mind that the certificate of conviction states that the pharmacist defrauded a named victim of a specified amount of money with respect to pharmaceutical products and that is all that is sought to be proved by the certificate of conviction. The moral turpitude involved in the commission of the criminal offence is the gravamen of the professional misconduct alleged.

21 This is not to say that the pharmacist was not at liberty to call evidence in mitigation or by way of excuse for the offence. In this case, for example. evidence was lead as to the good character of the pharmacist. In an appropriate case, evidence could be lead to show that the criminal acts complained of were not relevant to the practice of his profession. The problem of using certificates of criminal conviction in civil actions, is that the criminal offence does not always translate freely into a civil cause of action. In cases where it does not, the proof of conviction may be of limited help but in either case, to insist that the civil Court or other tribunal is required to have proven to its satisfaction by independent evidence that the offence did in fact take place, is to re-litigate the issue in a collateral proceeding. This is so even where, as here, the pharmacist is not initiating the proceeding. By insisting, in his defence, on having the substance of this criminal misconduct re-tried, he is initiating a collateral attack on a final decision of a criminal Court of competent jurisdiction. In my opinion, certainly for the limited use sought to be made of the conviction in the case at Bar, the method of proceeding adopted by counsel for the College is permissible by virtue of Demeter.

22 Accordingly, I would allow the appeal and set aside the order of the Divisional Court. Since there appears to be no complaint about the severity of the penalty, and even if there was, in my view, it should not prevail, I would dismiss the appeal from the finding of the Discipline Committee of the College holding the respondent guilty of professional misconduct and imposing a penalty of 30 days suspension. This College should have it costs here and before the Divisional Court, including the costs of the application for leave to appeal.

***Houlden J.A.* (Dissenting):**

23 I agree with the Divisional Court that the decision of the Discipline Committee cannot stand. I would therefore dismiss the appeal. However, as the case raises difficult and important issues, I propose to state my own reasons for arriving at this conclusion.

24 The only evidence presented to the Committee was a certified copy of the indictment and the endorsements on it. This material showed the three counts on which the respondent had been convicted, and the sentence imposed on each count.

25 The Committee commenced its reasons by stating that it was "mindful that not every breach of a statute constitutes professional misconduct." I agree with this statement: there are many criminal offences that a pharmacist could commit which would in no way relate to his ability to perform his professional duties.

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26 The Committee then turned its attention to the offences committed by the respondent. Relying, presumably, on the knowledge of the pharmaceutical industry of its pharmacist members, the Committee noted that Drug Trading Company was "a wholesaling group operated by and for the benefit of the majority of pharmacies in Ontario". Although there was no evidence before the Committee of the nature of the operations carried on by Drug Trading Company, I think that it was proper for the Committee to draw on the knowledge of its pharmacist members to arrive at this finding; and Mr. Bellmore, counsel for the respondent, raised no objection to it.

27 The Committee could, also, in my opinion, have relied on its own knowledge and expertise to find that the three convictions were sufficient in themselves to constitute professional misconduct; but it did not do so. Instead, it made this statement:

> In this case, Mr. Del Core demonstrated a breach of trust towards his fellow pharmacists by defrauding Drug Trading Company of quantities of pharmaceuticals which he might not have done if not licensed as a pharmacist and possessing knowledge of the operations and procedures of the Company.

As Saunders J. pointed out, there was no evidence before the Committee that the appellant possessed knowledge of the operations and procedures of Drug Trading Company. Fraud covers a wide spectrum of activities. The fraudulent acts of the respondent may have been related to the respondent's knowledge of the operations and procedures of Drug Trading Company, or they may not. As Saunders J. said:

> It is implicit in the reasons that the committee considered that it was reprehensible of the appellant to take advantage of Drug Trading Company by using the knowledge presumably derived from his professional status. It is not possible to say how much this factor on which there was no evidence influenced the decision of the committee in finding professional misconduct.

28 Since the hearing before the Committee had such potentially serious consequences for the respondent, a high standard of Justice was required. As Dickson J. pointed out in Kane v. Bd. of Govs. of Univ. of B.C. [1980] 1 S.C.R. 1105 at 1113, [1980] 3 W.W.R. 125, 18 B.C.L.R. 124, 110 D.L.R. (3d) 311, "[a] disciplinary suspension can have grave and permanent consequences upon a professional career".

29 The serious consequences that may result from a hearing by a Discipline Committee has been recognized by the Legislature. Section 15 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, which gives a broad discretion to a tribunal to admit evidence, including hearsay, has no application to a hearing by a Discipline Committee. Section 12(6) of the Health Disciplines Act, R.S.O. 1980, c. 196, provides:

> (6) Notwithstanding the Statutory Powers Procedure Act, nothing is admissible in evidence before a discipline committee that would be inadmissible in a court in a civil case and the findings of a discipline committee shall be based exclusively on evidence admitted before it.

Thus, to be admissible, evidence must meet the test of admissibility in civil proceedings, and the findings of the Discipline Committee must be based "*exclusively* [my emphasis] on evidence admitted before it."

30 A somewhat similar problem to the one that arises in this case was dealt with in Re Reddall and College of Nurses of Ont. (1983), 42 O.R. 412, 1 Admin. L.R. 278, 149 D.L.R. (3d) 60 (Ont. C.A.), reversing in part (1981), 33 O.R. (2d) 129, 123 D.L.R. (3d) 568 (Ont. Div. Ct.). That case involved a decision of the Discipline Committee of the College of Nurses. Some 21 errors or omissions were alleged against a nurse. On the hearing before the Discipline Committee, the nurse admitted 19 of those errors. The most serious finding against her and the basis for the revocation of her licence by the Committee was that she "committed errors which endangered the lives of the patients assigned to her care". There was no evidence in the record to support this finding. The Divisional Court refused to interfere with the finding of the Committee that the nurse was guilty of incompetence. In allowing the appeal in part, MacKinnon A.C.J.O. said at pp. 416-17:

> We do not think that the Divisional Court was being asked to 'to review the unreviewable'. It is only so if the mere ipse dixit of the discipline committee, without more, is enough in all cases to establish the seriousness of the incompetence. Such an approach, with deference, emasculates the broad right of appeal given by s. 13(2) quoted above. There were two

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> laymen on the committee and it cannot be that they are to act outside the evidence given at the hearing. Indeed they are directed, as are all members of the committee, to base their finding on the evidence before them (s. 12(6) and s. 83(2)(b) — this is sharp contrast to ss. 15 and 16 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484). Are the laymen on the committee to take evidence and expert opinion from their professional colleagues on the committee in executive session without the person charged having an opportunity to challenge the evidence or opinion by cross-examination and rebuttal? it would appear to be a denial of the right to a fair hearing and of natural justice as well as a breach of the sections referred to, to allow this to be so. Further, the members of the Divisional Court are in the same position as the lay members of the discipline committee. Yet they are given the same powers as that committee to weigh and assess the evidence and indeed to exercise all of its powers. They, like the committee, can only act on the evidence which is in the record.
>
> There was clearly evidence to support a finding of incompetence against the appellant but the seriousness of the errors and omissions leading to that finding has not been established on the record. It is obvious, we think, that the finding that she is unfit to continue in practice and the revocation of her certificate was based on the finding that her errors had endangered the lives of patients assigned to her care. The necessary evidence to support this conclusion is missing and the penalty cannot stand. This view of the record does not mean that the members of the committee cannot use their expertise in assessing all the evidence which is before them. But *the evidence has to be before them before they can assess it.* On any appeal one would expect the Divisional Court to give considerable weight to the decisions of the tribunal which has weighed the admissible evidence in light of its expertise and we do not deny the value of that expertise.

[my emphasis]

31 Mr. Isbister strenuously argued that we should find that the Committee relied on its own expertise in concluding that the respondent's defrauding of Drug Trading Company was related to the respondent's "knowledge of the operations and procedures of the Company". With respect, I cannot see how we can make that finding, since, in my opinion, the necessary evidentiary basis from which the Committee could derive that conclusion is missing.

32 Counsel for the Ontario College of Pharmacists could, without difficulty, have called some person from Drug Trading Company to describe the nature of the fraud, but that was not done, and in the absence of such evidence, there was no evidence on which the Committee could base its findings. Furthermore, since the respondent's knowledge of the operations and procedures of Drug Trading Company was not an issue before the Committee, the respondent was given no opportunity to call evidence to rebut it. In my judgement, the Divisional Court was right, therefore, in holding that the decision of the Discipline Committee cannot be sustained and must be quashed.

33 Since I would dismiss the appeal, it is unnecessary for me to say anything bout the admissibility of the certificate proving the convictions and the effect of the convictions. However, as Finlayson J.A. has dealt with his issue I will express my own view, for what it is worth, on this vexing question.

34 If s. 15 of the Statutory Powers Procedure Act applied to the hearing by the Discipline Committee, the Committee would clearly have the right to admit the certificate of conviction as evidence. However, as has been pointed out, s. 15 does not apply to a hearing by the Discipline Committee and, to be admissible, evidence must meet the standard of admissibility for civil proceedings. The issue therefore is: Is proof of conviction of the respondent in a competent criminal Court admissible in civil proceedings?

35 In England, this question was answered in the negative by the Court of Appeal in Hollington v. F. Hewthorn & Co., [1943] 1 K.B. 587, [1943] 2 All E.R. 35 (the law in England has been changed by Civil Evidence Act, 1968 (U.K.), c. 64). In the recent case of Demeter v. British Pacific Life Ins. Co., 48 O.R. (2d) 266, 8 C.C.L.I. 286 (sub nom. Demeter v. British Pacific Life Ins. Co.; Demeter v. Occidental Life Ins. Co. of California; Demeter v. Dom. Life Assur. Co.), 13 D.L.R. (4th) 318, [1985] I.L.R. 1-1862, 7 O.A.C. 143, affirming the judgment of Osler J. reported, 43 O.R. (2d) 33, 2 C.C.L.I. 246, 37 C.P.C. 277, 150 D.L.R. (3d) 249, [1983] I.L.R. 1-1689, this Court held that Hollington v. Hewthorn is not the law of Ontario. In the lower Court decision in the Demeter case, Osler J., after a careful review of the authorities, concluded that proof of the plaintiff's conviction for murder could be adduced in evidence, and if this was done, it would be prima facie proof of that issue subject to rebuttal by the plaintiff on the merits. However, he went on to hold that to allow the actions to go forward would, in the circumstances, result in a travesty of justice and would bring the administration of justice into disrepute. On

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appeal, MacKinnon A.C.J.O. greed with Osler J. that the actions should not be allowed to proceed. After referring with approval to Osler J.'s conclusion that Hollington v. Hewthorn did not represent the law of Ontario, he said at p. 268:

> We are equally of the view that the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to relitigate an issue already tried, is an abuse of the process of the court.

MacKinnon A.C.J.O. made no reference to Osler J.'s views on the right to adduce the certificate of conviction as evidence and the effect of the certificate.

36 In the present case, counsel for the Ontario College of Pharmacists tendered the certificate of conviction to prove that the respondent committed the fraudulent acts. If Osler J. is right in the Demeter case, the evidence was admissible, but the respondent had the right to call evidence in rebuttal.

37 There have been two recent High Court decisions dealing with this issue. The first is Royal Bank v. McArthur (1984), 46 O.R. (2d) 73, 8 D.L.R. (4th) 411 (Ont. H.C.) [reversed (1985), 51 O.R. (2d) 86, 10 O.A.C. 394 (Ont. Div. Ct.)]. In that case, the defendants had been tried and convicted in a competent criminal Court of robbery and conspiracy to commit robbery of the plaintiff bank. The bank then issued a writ against the defendants for the amount of its loss and in its statement of claim pleaded that the defendants had been found guilty of the offences by a County Court Judge and jury and that an appeal from the convictions had been dismissed. A motion for determination of a point of law was heard by Anderson J. One of the questions submitted to the learned Judge was whether certificates of the defendants convictions were admissible as evidence at the trial. Anderson J. held that they were not on the ground that there was no "clear and undeniable identity" between the issues in the criminal proceeding and the issues in the civil action.

38 The second case is Q. v. Minto Mgmt. Ltd. (1984), 46 O.R. (2d) 756, 44 C.P.C. 6 [leave to appeal refused 44 C.P.C. 6 at 13 (Ont. H.C.)]. In that case, the female plaintiff was sexually assaulted and raped in premises rented from the defendant Minto and owned by the other defendants except the defendant Halliday. The defendant Halliday was employed by Minto as a maintenance man. He gained access to the plaintiff's apartment by use of a master key. After trial before a Supreme Court Judge and jury, Halliday was convicted of rape; he did not appeal. The plaintiff then commenced an action against all defendants for damages for assault. An application was brought before Steele J. under R. 124 in which seven questions were posed for the Court concerning proof of the conviction of Halliday for rape. Steel J., after reviewing the relevant law (he did not refer to Royal Bank v. McArthur presumably because it had just been released) held that the proof of the conviction was admissible not only against Halliday, but also against the other defendants, but that it was only prima facie evidence which the defendants could rebut. Although Steele J. only mentions the point incidentally when referring to the decision of the Supreme Court of Canada in La Foncière Cie D'Assurance de France v. Perras, [1943] S.C.R. 165, [1943] 2 D.L.R. 129, 10 I.L.R. 45, I believe it is clear that the issue in both the criminal and civil proceedings were identical in the Q. case, since if Halliday raped the plaintiff, he had assaulted her.

39 Steele J.'s decision that the conviction is not conclusive proof but only some evidence that the accused committed the crime is in accordance with decisions of Courts in other jurisdictions dealing with the effect of a conviction, or a prior finding of another Court, in subsequent disciplinary or civil proceedings. One such decision is Gen. Med. Council v. Spackman, [1943] A.C. 627, [1943] 2 All E.R. 337 (H.L.), a case which concerned a medical practitioner who had been found by a divorce Court to have committed adultery with a woman who had been one of his patients. A decree nisi was pronounced and was thereafter made absolute. Because the doctor had been found guilty of committing adultery with a woman with whom he stood in a professional relationship, the General Medical Council charged him with infamous conduct in a professional respect. The Council held a hearing to consider the charge and to decide whether they should remove his name from the medical register pursuant to s. 29 of the Medical Act 1858 (U.K., 21 & 22 Vic.), c. 90. Section 29 provided:

> 29. If any registered medical practitioner ... shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may ... direct the registrar to erase the name of such medical practitioner from the register.

40 The issue before the House of Lords was whether the Council, in the hearing to decide whether to strike the doctor from the medical register, should have permitted the doctor's solicitor to call evidence with a view to challenging the correctness of the Judge's conclusion on the adultery issue. The House of Lords held that the decree was prima facie evidence

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of adultery and that, in order to comply with the requirement for "due inquiry" under s. 29 of the Medical Act, the Council was bound to hear any evidence tendered by the practitioner to show that he was not guilty of adultery. Viscount Simon said at p. 635:

> A jury's verdict of justification in proceedings for slander, judgment for the plaintiff in an action for seduction, a bastardy order made by a bench of magistrates — all these, and many other, instances of adverse conclusions reached in a court of law might conceivably in certain circumstances lead to a charge against a medical man of infamous conduct in a professional respect. It seems obvious, in these other instances, that, while the council might well treat the conclusion reached in the courts as prima facie proof of the matter alleged, it must, when making 'due inquiry' permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention. The previous decision is not between the same parties. There is no question of estoppel or of res judicata. In such cases the decision of the courts may provide the council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the council should hear the challenge and give such weight to it as the council thinks fit. The same view must, I think, be taken if the practitioner challenges the correctness of a finding of adultery by the Divorce Court. The decree provides a strong prima facie case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. So much follows from the structure of s. 29 and from the necessity, if there is to be 'due inquiry," of giving the accused party a fair opportunity of meeting the accusation.

41 A similar result was reached by Scollin J. in Rosenbaum v. Law Soc. of Man., [1983] 5 W.W.R. 752, 22 Man. R. (2d) 260, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352 (Man. Q.B.) , affirmed [1984] 4 W.W.R. 95, 25 Man. R. (2d) 154, 7 Admin. L.R. 77, 8 C.C.C. (3d) 256, 3 D.L.R. (4th) 478 (Man. Q.B.), leave to appeal to Supreme Court of Canada refused 27 Man. R. (2d) 159n, 7 Admin. L.R. xlvi, 55 N.R. 400 (S.C.C.). In Rosenbaum, the applicant lawyer had testified in a civil action where the critical question was whether or not the applicant had falsified corporate records to alter a company's share structure. The trial judge found that the lawyer falsely denied making various changes. This finding led to the citation of the lawyer before the judicial committee of the law society. The applicant sought an order preventing the law society from accepting the trial Judge's finding as conclusive proof of the charge of giving false testimony. Scollin J. held at p. 758 that the finding was not conclusive proof:

> The availability to the committee of the previous proceedings does not mean that the judgment of this court, any more than the judgment of any other tribunal, merits treatment as conclusive evidence. In this case some guidance is afforded by the fact that s. 42(9) of the Law Society Act provides that for the purposes of the inquiry a certified copy of conviction of crime is conclusive evidence that person charged committed the crime. Significantly the statute does not deal with the effect of a finding or judgment by any tribunal other than a criminal court. In England, prior to the making of a statutory provision as to the conclusiveness of a finding in a matrimonial cause, the House of Lords held that the General Medical Council erred in refusing to hear fresh evidence offered by a doctor to dispute a finding of adultery by a divorce court: Gen. Medical Council v. Spackman.

His Lordship decided at p. 759 that the committee "is entitled to exercise its discretion to rely upon the civil proceedings as evidence in support of the charge" provided the lawyer is given fair opportunity to adduce further evidence and to submit argument to dispute the accuracy of the findings.

42 The effect of a conviction in an ordinary civil proceeding was fully canvassed in the case of Jorgensen v. News Media (Auckland) Ltd., [1969] N.Z.L.R. 961, a case referred to by Osler J. in Demeter. This case concerned a claim by the plaintiff for damages for the defendant newspaper's allegedly libellous statement that the plaintiff had murdered two men. The defendant wished to enter the plaintiff's conviction for the murder to establish its plea of justification. A ruling was sought from the Court of Appeal on the question of whether the conviction was admissible and what effect it should have. It was held in Jorgensen that Hollington v. Hewthorn should not be followed. Further, the Court held that the conviction should be conclusive proof only of the fact of conviction. The conviction was not conclusive of guilt, but was "evidence admissible in proof of the fact of guilt" (p. 980).

43 In reaching this conclusion, the Court of Appeal relied on a Privy Council decision Harvey v. R., [1901] A.C. 601, which held that orders in lunacy were "admissible as prima facie evidence" that the party was a lunatic and that "if uncontradicted they ought to be regarded as sufficient evidence" of that fact (p. 611). The Court also referred to in Re Crippen, [1911] P. 108 in which Evans P. held at p. 115 that a conviction for murder was admissible as "presumptive proof of

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the commission of the crime".

44 As the certificate of conviction is only admitted as prima facie proof, I see no reason why there has to be a "clear and undeniable identity" between the issues in the two proceedings as was held by Anderson J. in royal Bank v. McArthur. The certificate of conviction must be relevant to the issues in the civil proceedings, but lack of identity of issue goes to weight, not to admissibility. In the present case, the wording of the three complaints follows, almost word for word, the wording of the three counts in the indictment. Prima facie the certificate proved that the respondent committed the three offences. The effect of that evidence is, of course, different in the criminal proceedings and in the proceedings before the Discipline Committee, but I see no reason why this lack of identity in the issues should make the certificate inadmissible.

45 The Discipline Committee was right, therefore, in admitting the certificate of conviction as evidence. The certificate was only prima facie evidence, no conclusive evidence, that the respondent had committed the three acts of fraud; but since the respondent adduced no evidence in rebuttal, the Committee was entitled to act on it and to find that the respondent had committed the fraudulent acts.

46 The remaining issue is whether the defendant should have been prohibited from insisting in his defence on having the substance of his conduct retried because this would be an abuse of process as defined in the Demeter case. As it was in this case the defendant who was seeking to contest a effect, the plaintiff in the proceedings, the doctrine of abuse of process in the Demeter case has no application.

47 The doctrine of abuse of process enunciated in Demeter was formulated by the House of Lords in Hunter v. Chief All E.R. 727 (H.L.). The doctrine applies, according to Lord Diplock, where a plaintiff initiates civil proceedings, without any real interest in the outcome, in an attempt to challenger a prior conviction. That the rule applies only where the *plaintiff* has been convicted and is initiating the civil proceedings is made clear by Lord Diplock at p. 541;

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the *intending plaintiff* which has been made by another court of competent jurisdiction in previous proceedings in which the *intending plaintiff* had a full opportunity of contesting the decision in the court by which it was made.

[Emphasis added]

48 The existence of an ulterior motive for bringing the proceedings is important in the abuse of process cases. As Lord Diplock stated in Hunter at p. 541:

> ... the dominant purpose of this action...has not been to recover damages but is brought in an endeavour to establish that the confessions on the evidence on which they were convicted were induced by police violence with a view to putting pressure on the Home Secretary to release them from the life sentences.

The motives of Mr. Demeter were apparently important to the Court of Appeal in Demeter because MacKinnon A.C.J.O. quoted, in an otherwise very short judgment, an excerpt from a de bene esse examination in which the appellant said:

> I am not here for the money, I am here to reopen my case.

49 The abuse of process doctrine does not apply in this case because Mr. Del Core is not the notional plaintiff who initiated the proceeding, he is the defendant. Further, he is very interested in the decision that the civil Court comes to, potentially a disciplinary suspension, which as the supreme Court of Canada has noted, can have grave and permanent consequences upon a professional career.

50 With respect, I cannot agree with Finlayson J.A. that by insisting in his defence on having the substance of his misconduct re-tried, the respondent is initiating a collateral attack on a final decision of a criminal Court of competent jurisdiction. If that proposition is correct, the Demeter case has brought about an astounding amalgamation of criminal and civil law which has heretofore been unknown in Canadian law. Before leaving this point, I should say that I appreciate that my view of the admissibility of the certificate of conviction is contrary to the recommendation of the Ontario Law Reform

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Commission in its Report on the Law of Evidence, 1876, at pp. 95-103 (but see the discussion in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence at pp. 247.257).

51 The problem concerning the evidentiary effect of the three convictions could have been avoided if the respondent had been charged with professional misconduct under s. 130(3)(a) as well as under s. 130(3)(b) of the Health Disciplines Act. Finlayson J.A. has quoted those portions of the Act in his reasons and it is unnecessary to repeat them. As can be seen, s. 130(3)(a) contemplates proof of guilt by proving the convictions. The only qualification is that the offence must be relevant to the pharmacist's suitability to practice. Providing the wording of the indictment was sufficiently explicit, I see no reason why the Committee could not draw on its expertise in deciding whether the offences were so relevant.

52 For these reasons I would dismiss the appeal with costs to include the cost of the application for leave to appeal.

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

53 I have had the advantage of reading the judgments of my brothers Houlden and Finlayson and I agree with them that there are two issues in this case. The first is whether the Disciplinary Committee ("the Committee") of the Ontario College of Pharmacists ("the College") erred in admitting evidence of the prior conviction of the respondent on three counts of fraud. The second is whether the Committee erred in finding the respondent guilty of professional misconduct on the evidence before it. Since both the issues and the relevant authorities have been carefully reviewed by my brothers I propose to refer to them only to the extent necessary to explain my conclusions.

I. Admission of Evidence of Prior Criminal Conviction

54 The only witness called by the college was a police officer who had been involved with the prosecution of the fraud charges against the respondent. A certificate of conviction was tendered through this witness. The respondent's counsel objected to its admissibility but, after hearing submissions, the Committee admitted it. Counsel for the College then sought to have the police officer give evidence about the circumstances surrounding the convictions for fraud. The Committee refused to admit this evidence upholding the respondent's objection that it was hearsay. Counsel for the College thereupon closed his case. Counsel for the respondent stated that he would call no evidence because, in his submission, no legally acceptable evidence had been presented to the Committee to support the charge of professional misconduct.

55 Thus, the question on the first issue is clear and uncomplicated. It is simply whether evidence of the prior convictions for fraud was admissible. There is no need to consider what might have happened if the respondent had attempted to challenge the conviction or to mitigate its effect by explaining the circumstances surrounding it.

56 I agree with my brothers that the evidence of the convictions for fraud was admissible. It must now be taken as the settled law of this province that the evidence of a prior criminal conviction is admissible in subsequent civil proceedings: Demeter v. British Pacific Life Ins. Co., 48 O.R. (2d) 266, 8 C.C.L.I. 286 (sub nom. Demeter v. British Pacific Life Ins. Co.; Demeter v. Occidental Life Ins. Co. of California; Demeter v. Dom. Life Assur. Co.), 13 D.L.R. (4th) 318, [1985] I.L.R. 1-1862, 7 O.A.C. 143 (Ont. C.A.), affirming the decision and adopting the reasons of Osler J. reported at 43 O.R. (2d) 33, 2 C.C.L.I. 246, 37 C.P.C. 277, 150 D.L.R. (3d) 249, [1983] I.L.R. 1-1689 (Ont. H.C.).

57 Counsel for the respondent submitted that evidence of a prior criminal conviction was admissible only where it was submitted as a defence in subsequent civil proceedings. He contended that a plaintiff in a civil case or a complainant in disciplinary proceedings like the present could not adduce evidence of a prior criminal conviction as proof of the fact of guilt but had to prove it again by other evidence submitted to the Court or tribunal. He relied on a passage from the judgment of Anderson J. in Royal Bank v. McArthur (1984), 46 O.R. (2d) 73 at 80, 8 D.L.R. (4th) 411 (Ont. H.C.) [reversed (1985), 51 O.R. (2d) 86, 10 O.A.C. 394 (Ont. Div. Ct.)], which reads as follows:

> It is to be observed that in each of the cases which I have considered, the introduction of the criminal conviction was raised as a matter of defence in the civil action, the defendant contending that an issue raised by the plaintiff had been previously litigated. I have not found it necessary to consider whether it is pure coincidence that no case had been cited where use of the criminal conviction was raised by a plaintiff in proof of the claim.

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58 This comment merely raises the question whether only defendants can tender evidence of prior convictions.

59 In my opinion, the respondent's contention is not supported by the authorities. It must be remembered that that so-called ruled in Hollington v. F. Hewthorn & Co., [1943] K.B. 587, [1943] 2 All E.R. 35, arose from a decision based on a plaintiff's claim. The English Court of Appeal held that a plaintiff in an action for automobile negligence could not tender evidence of conviction of a defendant arising from the same occurrence. The declaration of this Court in Demeter, supra, that this rule is not part of the law of Ontario can only mean that it does not apply in any circumstances and that persons whether in the position of plaintiffs, as in Hollington v. Hewthorn, or defendants may adduce evidence of prior convictions of other parties where it is relevant.

60 In this case it is not necessary to consider the effect of the admission of evidence of a prior conviction and to decide whether it constitutes mere prima facie evidence of guilt or has a more conclusive effect. Here, such evidence was conclusive because it was unchallenged by the respondent. Nevertheless, I propose to comment on the effect of proof of criminal conviction in order to place my conclusions in their proper perspective.

61 I agree with my brother Houlden that such evidence constitutes prima facie and not conclusive proof of the fact of guilt in civil proceedings. The prior conviction must of course be relevant to the subsequent proceedings. Its weight and significance will depend on the circumstances of each case. The rationale for this rule of evidence is expounded by the Court of Appeal of New Zealand in Jorgensen v. News Media (Auckland) Ltd., [1969] N.Z.L.R. 961, where, after a careful review of the authorities, it concluded that the rule in Hollington v. Hewthorn did not extend to New Zealand. After holding that a certificate of conviction was conclusive evidence of that conviction, North P. stated at p. 980:

> [P]roof of ... conviction ..., while not conclusive of ... guilt, is evidence admissible in proof of the fact of guilt. Whether such evidence discharges the the evidentiary burden of proof at any stage of the trial will be for the Court to decide on the evidence tendered.

I also agree with his comment at p. 580 on the weighing of such evidence.

> ... I do not overlook the practical difficulties which in some cases may arise in determining what weight should be given to proof of a conviction of a crime which is again in issue in the civil proceedings but I think these difficulties are more apparent than real for the weight to be given to the conviction will vary very considerably according to the nature of the civil action with which the Court is concerned and the circumstances surrounding he conviction. If it is a Judge alone case he should have little difficulty in determining what weight should be given to the conviction. If it is a jury case no doubt it will require a careful direction by the Judge.

62 Since evidence of prior convictions affords only prima facie proof of guilt it follows that its effect may be countered in a variety of ways. For example, the conviction may be challenged or its effect mitigated by explanation of the circumstances surrounding the conviction. It is both unnecessary and imprudent to attempt any exhaustive enumeration. The law of Ontario is only now emerging from the long shadow cast over it by the decision in Hollington v. Hewthorn, supra. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases.

63 The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that he conviction was wrong in circumstances where it would constitute an abuse of process to do so: Demeter, supra, and Hunter v. Chief Constable of West Midlands Police, [1982] A.C. 529, [1981] 3 All E.R. 727 (H.L.). Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined in future cases.

64 Some confusion appears to have arisen between the rule that evidence of prior convictions is admissible and the doctrine of abuse of process. This appears from the passage quoted above from the McArthur case and in other dicta. It was argued that such evidence could only be admitted where it would be an abuse of process to challenge the conviction. This is not so. The admissibility of such evidence is not dependent on a determination that it would be an abuse of process to attack the conviction. As I have explained above, evidence of prior convictions is admissible in all cases, where it is relevant. The

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abuse of process doctrine can only be invoked, in particular cases, to prohibit rebuttal of such evidence.

II. Proof of Professional Misconduct.

65 On the second issue, I adopt the conclusion and the reasons of my brother Finlayson. The respondent had practiced as a pharmacist for approximately ten years prior to the commission of the offences. The Drug Trading Company was acknowledged during the hearing of the appeal to be a company organized by and for the the benefit of Ontario pharmacists. In view of this, I consider that the Committee's reference to the respondent's knowledge of the company's operation and procedures was merely a rhetorical comment which did not detract from the integrity of its decision that he was guilty of professional misconduct. This case is similar to Re Reddall and College of Nurses of Ont. (1983), 42 O.R. (2d) 412, 1 Admin. L.R. 278, 149 D.L.R. (3d) 60 (Ont. C.A.), where a nurse had admitted to the discipline committee the commission of numerous errors in treatment of patients. The committee found her guilty of incompetence and revoked her licence to practice.

66 The committee's decision stated that she had "committed serious errors which endangered the lives of the patients assigned to her care". This Court found that no evidence had been placed before the committee that her errors had endangered patients' lives, but, nevertheless, upheld the finding of incompetence because it was supported by the evidence. The Court considered that the committee's unsubstantiated comment merely affected the severe penalty of revocation which it had imposed and this was remitted to the committee for reconsideration. In my opinion, the statement objected to in the Reddall case was more grave and condemnatory than the one objected to in this case. Here there can be no argument that the penalty might be reconsidered because, as my brother Finlayson has observed, it is minimal by any standard.

67 I would therefore allow the appeal and set aside the order of the Divisional Court with costs to the appellant in this Court and the Divisional Court.

Appeal allowed. Order of Discipline Committee reinstated.

Footnotes

1 (1985), 51 O.R. (2d) 1, 19 D.L.R. (4th) 68, 10 O.A.C. 57.

2 R.S.O. 1980, c. 196.

3 R.S.O. 1980, c. 484.

4 S.O. 1974, c. 47. Two provisions with some similarities and of older origin are found at s. 33(9) of the Law Surveyors Act, R.S.O. 1980, c. 492.

5 See, for example:
Architects Act, S.O. 1984, c. 12, s. 35(6);
Denture Therapists Act, R.S.O. 1980, c. 115, s. 19(6);
Funeral Services Act, R.S.O. 1980, c. 180, s. 21(6);
Professional Engineers Act, S.O. 1984, c. 13, s. 31(6).

6 See, for example:
Chiropody Act, R.S.O. 1980, c. 72;
Dental Technicians Act, R.S.O. 1980, c. 114;
Drugless Practitioners Act, R.S.O. 1980, c. 127;
Notaries Act, R.S.O. 1980, c. 319;
Ophthalmic Dispensers Act, R.S.O. 1980, c. 364;
Psychologists Registration Act, R.S.O. 1980, c. 404;
Public Accountancy Act, R.S.O. 1980, c. 405;

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Radiological Technicians Act, R.S.O. 1980, c. 430;
Veterinarians Act, R.S.O. 1980, c. 522.
Two exceptions are s. 22(9) of the Law Society Act, R.S.O. 1980, c. 233, and s. 27(9) of the Surveyors Act, R.S.O. 1980, c. 492.

7 The paper was sent to affected health professions and other interested groups and individuals on August 12, 1985. The Review solicited comments and responses to the issues raised.

8 [1943] K.B. 587, [1943] 2 All E.R. 35 (C.A.).

9 [1984] 5 W.W.R. 752, 22 Man. R. (2d) 260, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352 (Man. Q.B.), affirmed [1984] 4 W.W.R. 95, 25 Man. R. (2d) 154, 7 Admin. L.R. 77, 8 C.C.C. (3d) 256, 3 D.L.R. (4th) 768 (Man. C.A.). Leave to appeal to Supreme Court of Canada refused 27 Man. R. (2d) 159n, 7 Admin. L.R. xlvi, 55 N.R. 400 (S.C.C.).

10 Ibid., 22 Man. R. (2d) 260 at 263.

11 See, for example, Re Cathcart and Pub. Service Comm. [1975] F.C. 406 (T.D.).

12 (1983), 42 O.R. (2d) 412, 1 Admin. L.R. 278, 149 D.L.R. (3d) 60 (C.A.), reversing in part (1981), 33 O.R. 129, 123 D.L.R. (3d) 568 (Ont. Div. Ct.).

13 R. v. Potts (1982), 36 O.R. (2d) 195 at 204 (C.A.).

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1983 CarswellOnt 3747
Ontario Superior Court of Justice (Divisional Court)

Del Core and Ontario College of Pharmacists, Re

1983 CarswellOnt 3747, 21 A.C.W.S. (2d) 389

IN THE MATTER OF THE HEALTH DISCIPLINES ACT, R.S.O. 1980, c. 196 AND IN THE MATTER OF THE DECISION OF THE DISCIPLINE COMMITTEE OF THE ONTARIO COLLEGE OF PHARMACISTS MADE DECEMBER 9, 1981 BETWEEN: JOHN ANTHONY DEL CORE Applicant and THE ONTARIO COLLEGE OF PHARMACISTS Respondent)

Osler, Saunders and Trainor JJ

Judgment: August 25, 1983
Docket: None given.

Counsel: B.P. Bellmore for the appellant
P.D. Isbister, Q.C. for the respondent

Subject: Public

SAUNDERS J.:

1 This is an appeal to the Divisional Court front the decision and order of the Discipline Committee of the Ontario College of Pharmacists finding the appellant guilty of professional misconduct and ordering the suspension of his licence for 30 days.

2 The appellant had been indicted on three counts of defrauding Drug Trading Company of a quantity of pharmaceuticals contrary to the *Criminal Code* of Canada. The appellant pleaded not guilty to the charges and after a trial was convicted and sentenced on each count. There was a fourth count in the indictment for a different offence for which he was found not guilty.

3 A hearing was held by the Discipline Committee of the respondent College on a charge that the appellant had been guilty of professional misconduct in that he had done the acts on the basis of which he had been found guilty. At the hearing, counsel for the College called a police officer who testified as to the indictment, the plea of not guilty and the outcome of the criminal trial. There was admitted through the police officer and over the objection of counsel for the appellant a certified copy of the indictment and a document setting out the sentence imposed. No other evidence with respect to the charge was introduced by either party prior to the decision of the Committee finding the appellant guilty of professional misconduct as charged.

4 Section 130(3) of the *Health Disciplines Act*, R.S.O. 1980. c.196 (the "Act") provides as follows:

(3) A member may be found guilty of professional misconduct by the Committee if,

(a) he has been found guilty of an offence relevant to his suitability to practise, upon proof of such conviction;

(b) he has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations.

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5 It is common ground that the finding of the Committee was under Clause (b) of s. 130(3). It is also agreed that to reach its conclusion the Committee had to first find that there was professional misconduct as defined in the regulations and then find professional misconduct under s. 130(3). Counsel for the College conceded that the only applicable regulation was Regulation 47(1)(x) under the Act which provides as follows:

> 47. For the purposes of Part VI [s. 130 is in Part VI] of the Act, "professional misconduct" means
>
> ....
>
> (x) conduct or an act relevant to the practice of a pharmacist that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

6 Section 12(6) of the Act was applicable to the hearing. It says:

> Notwithstanding the *Statutory Powers Procedure Act*, nothing is admissible in evidence before a discipline committee that would be inadmissible in a court in a civil case and the findings of a discipline committee shall be based exclusively on evidence admitted before it.

7 The Committee announced its decision on December 9, 1981 in the course of the hearing. It subsequently issued reasons dated December 14, 1981. After setting out the charges of professional misconduct and briefly describing the professional and personal history of the appellant, the Committee went on to say:-

> In dealing with the facts, the Committee is satisfied from the evidence presented that:
>
> 1. Mr. Del Core did defraud Drug Trading Company on three occasions of quantities of pharmaceuticals with a total value of $80762.07.
>
> 2. Mr. Del Core was charged in County Court Judges' Criminal Court of the Judicial District of York of indictable offences under Section 338(1)(a) of the *Criminal Code of Canada*, to which he pleaded not guilty on September 14, 1979 to Judge A.C. Whealy.
>
> 3. Mr. Del Core was found guilty by Judge A.C. Whealy and on October 22, 1979 sentence was imposed consisting of:
>
> > (i) one day in jail, plus one year probation with usual terms, plus restitution in the amount of $8.762.07 on the first count
> >
> > (ii) one day in jail concurrent and in addition, a fine of $5,000 or 45 days in jail; time to pay - 1 year. on the second count
> >
> > (iii) one day in jail concurrent and, in addition, a fine or [tic] $5,000 or 45 days - one year to pay, of the fourth count of the indictment.
>
> It was noted that counts 1, 2 and 3 of the notice to Mr. Del Core from the College. dated June 16, 1981, followed the wording of counts 1, 2 and 4 respectively of the Indictment of Mr. Del Core for which he was found guilty and sentenced by the Courts.
>
> 4. An appeal of the conviction and penalty of the County Court Judges' Criminal Court was dismissed.
>
> Having so found, the Committee then considered whether or not Mr. Del Core was guilty of professional misconduct. While the Committee is mindful that not every breach of a statute constitutes professional misconduct, it must consider the protection of the public as its paramount interest.
>
> The Committee believes it has an obligation to the public, and, in this case, to Drug Trading Company, a wholesale

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group operated by and for the benefit of the majority of pharmacies in Ontario, by ensuring that a pharmacist not disregard his professional responsibility. In this case, Mr. Del Core demonstrated a breach of trust towards his fellow pharmacists by defrauding Drug Trading Company of quantities of pharmaceuticals which he might not have done if not licensed as a pharmacist and possessing knowledge of the operations and procedures of the Company.

The Committee is convinced that Mr. Del Core did contravene a federal law, namely the *Criminal Code of Canada*, with respect to the distribution of drugs. Further, his action represents conduct or an act relevant to the practice of a pharmacist that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Committee concludes that Mr. Del Core is guilty of professional misconduct.

8 The principal argument on the appeal was the admissibility of the testimony of the police officer and the documents previously referred to as evidence of the facts on which the conviction was based. it was argued on behalf of the appellant that the decision in *Hollington v. F. Hewthorn & Company, Limited*, [1943] 2 All E.R. 35 was binding on this court and that the testimony and documents were, accordingly, inadmissible. What has been called the rule in *Hollington v. Hewthorn* has been subject to much discussion and some controversy. It has been discussed in a recent decision of the House of Lords (*Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529). However, in the view that we take of the matter, it is not necessary to decide whether the evidence was admissible in this case.

9 The Committee found that the appellant had demonstrated a breach of trust towards his fellow pharmacists which he might not have done if not licensed as a pharmacist and possessing knowledge of the operations and procedures of Drug Trading Company. There was no evidence before the Committee that the appellant possessed knowledge of such operations and procedures. There was also no evidence that the appeal from his conviction had been dismissed, but that, in our view, is not material.

10 While, if admissible, the evidence of the police officer might have been sufficient to base a finding of professional misconduct, the Committee, in considering the knowledge of the appellant of the operations and procedures of Drug Trading Company, took into account matters on which there was no evidence. It is implicit in the reasons that the Committee considered that it was reprehensible of the appellant to take advantage of Drug Trading Company by using the knowledge presumably derived from his professional status. It is not possible to say how much this factor on which there was no evidence influenced the decision of the Committee in finding professional misconduct. In view of the provisions of s. 12(6) of the Act that findings must be based exclusively on admitted evidence, it is our opinion that the decision cannot be sustained and must be quashed.

11 In view of the time that has elapsed and the fact that, as we are advised, substantial restitution has been made, we feel that no good purpose would be served by ordering a new hearing and, accordingly, the suspension will simply be rescinded. The appellant will have his costs.

***OSLER*:**
"I agree"

***TRAINER*:**
TRAINER: — "I agree"

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Tab 8

2018 ONSC 4978
Ontario Superior Court of Justice

Trez Capital Limited Partnership v. Ontario International College Inc.

2018 CarswellOnt 13967, 2018 ONSC 4978, 296 A.C.W.S. (3d) 292

Trez Capital Limited Partnership, Trez Capital (2011) Corporation, and Computershare Trust Company of Canada (Plaintiffs) and Ontario International College Inc./ College International de l'Ontario Inc. (Defendant)

Perell J.

Heard: August 17, 2018
Judgment: August 23, 2018
Docket: CV-18-590053

Counsel: Dominique Michaud, for Plaintiffs
Jennifer Tam, for Defendant

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

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
Plaintiffs, commercial mortgage lender, provided mortgage financing to numbered company to purchase commercial property — N Inc. entered into share purchase agreement for sale of all issued and outstanding shares of numbered company — J was owner of N Inc. and was director and officer of N Inc., numbered company and defendant — It was term of share purchase agreement that defendant would execute guarantee — Numbered company defaulted on mortgage, plaintiffs commenced receivership proceedings, receiver was appointed and property was sold — Plaintiffs brought action seeking to enforce guarantee and recover balance of indebtedness — Plaintiffs brought motion for summary judgment to enforce guarantee — Motion granted — There were no genuine issues requiring trial and case was appropriate case for summary judgment — If there were genuine issues requiring trial, then there was more than adequate evidentiary record to decide genuine issues, and it would be in interests of justice to do so.

Guarantee and indemnity --- Guarantee — Contract of guarantee — Validity and enforceability
Plaintiffs, commercial mortgage lender, provided mortgage financing to numbered company to purchase commercial property — N Inc. entered into share purchase agreement for sale of all issued and outstanding shares of numbered company — J was owner of N Inc. and was director and officer of N Inc., numbered company and defendant — It was term of share purchase agreement that defendant would execute guarantee — Numbered company defaulted on mortgage, plaintiffs commenced receivership proceedings, receiver was appointed and property was sold — Plaintiffs brought action seeking to enforce guarantee and recover balance of indebtedness — Plaintiffs brought motion for summary judgment to enforce guarantee — Motion granted — There was no evidentiary basis for defendant's allegations of undue influence or unconscionability — Legal advice that was provided was adequate to rebut any argument that defendant had non est factum, misrepresentation, mistake, duress, undue influence, or unconscionability defence to plaintiffs' claim to enforce guarantee — Defendant knew it was signing guarantee and it knew possible legal consequences of doing so — There was no misrepresentation and no non est factum — Defendant was not mere accommodation party to transaction, and independent legal advice was not required for guarantor who was direct beneficiary from loan transaction — Interests of J and his corporations were complimentary and unconflicted — Defendant was intended beneficiary of purchase of property, it was adequately and properly advised, and it had no defence to plaintiffs' claim to enforce guarantee — Plaintiffs were granted summary judgment for $2,794,929.55 plus $438.36 per day.

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MOTION by plaintiffs for summary judgment to enforce guarantee.

Perell J.:

A. Introduction

1 The Plaintiffs, Trez Capital Limited Partnership and Trez Capital (2011) Corporation and Computer Trust Company of Canada (collectively "Trez Capital") bring a summary judgment motion to enforce a Guarantee and Postponement of Claim signed by Ontario International College Inc./College International de l'Ontario Inc. ("OIC").

2 OIC resists the summary judgment motion, and in its factum, it requests leave to amend its Statement of Defence to assert a crossclaim against Evan Shapiro, its lawyer who acted when OIC signed the Guarantee. At the hearing of the motion, I advised OIC that since Mr. Shapiro was not a defendant, if a claim was to be brought against him, it would have to brought by a Third Party Claim or by a new proceeding. In other words, I advised OIC that I could not and would not deal with its request for leave to assert a crossclaim and would address only Trez Capital's summary judgment motion.

B. Facts

3 Trez Capital carries on business as a commercial mortgage lender.

4 In April, 2015, 2481043 Ontario Inc., which at the time was owned by Trez Real Estate Operating Partnership, purchased a commercial property, municipally known as 1450 Don Mills Road, Toronto. 2481043 Ontario financed the purchase by placing a $30 million mortgage on the property.

5 In January, 2016, Trez Real Estate Operating Partnership entered into a Share Purchase Agreement with Norstar Investment Consortium Inc. for the sale of all issued and outstanding shares of 2481043 Ontario. It was a term of the Share Purchase Agreement that the mortgage encumbering the 1450 Don Mills Road property would have a principal sum of $23.4 million with a variable interest rate of 4.5% per annum to 7.00% per annum. (The Mortgage currently accrues interest at 6.0% per annum from January 1, 2018 to December 31, 2018 and at 7.00% per annum from January 1, 2019 onwards.) The purchase price for the shares was $1.0 million in cash and the assumption of liability for the $23.4 million mortgage.

6 Norstar Investment is owned by Anchuan Jiang. Mr. Jiang is an officer and director of Norstar Investment, and he is also an officer and director of 2481043 Ontario and of OIC. Mr. Jiang's plan was to use 2481043 Ontario's property at 1450 Don Mills Road as a campus for OIC's private school.

7 It was a term of the Share Purchase Agreement that OIC would execute a guarantee.

8 On the share purchase transaction, Mr. Jiang, Norstar Investment, and OIC were represented by Evan Shapiro, a lawyer practicing in Toronto. Mr. Shapiro spoke to Mr. Jiang in English, which is not Mr. Jiang's first language.

9 Mr. Jiang's first language is Mandarin, and Mr. Jiang deposed that although he had taken classes at the University of Toronto in English, spoke English in managing OIC, spoke English in dealing with school regulators, spoke English to the lawyers acting for 2481043 Ontario in the receivership proceedings, described below, and although he was comfortable in communicating with his companies' lawyers in English, nevertheless, he did not understand the nature of the Guarantee document that he signed for OIC.

10 Mr. Jiang deposed that he has no experience with respect to legal matters and no knowledge of legal jargon and terminology. Mr. Jiang says that he did not understand that OIC was exposed to a liability beyond the $1.0 million portion of the purchase price for the 1450 Don Mills Road property.

11 Mr. Jiang blames Mr. Shapiro for not explaining the documents that were being signed to acquire 2481043 Ontario and

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its principal asset the property at 1450 Don Mills Road.

12 Here, it may be noted that Mr. Jiang swore his affidavit for the summary judgment motion in English and he was cross-examined without the assistance of a translator.

13 Mr. Shapiro, who was served with a subpoena to give evidence in aid of the summary judgment motion, deposed that he met with Mr. Jiang before the Share Purchase Agreement was executed. He says that they discussed which of Mr. Jiang's companies would provide the Guarantee for the transaction.

14 Mr. Shapiro testified that he explained what it meant to be a guarantor and that he explained the possible consequences of providing a guarantee. Mr. Shapiro said that Mr. Jiang gave him instructions to make OIC the guarantor. Mr. Shapiro said that he was confident that Mr. Jiang understood the share purchase transaction and the related agreements, including the Guarantee.

15 Mr. Shapiro was not cross-examined by OIC, which did not attend at the cross-examination.

16 In paragraph 12 of the Guarantee, the guarantor acknowledges that there was no coercion in signing the Guarantee. Paragraph 12 states:

> The Covenantor further confirms that the Covenantor [...] [has] entered into this Guarantee and Postponement of Claim on its own volition and without fear, threats, compulsion, influence or pressure from the Borrower or any other covenantor in respect of the Loan.

17 Mr. Jiang deposed and argued that OIC was not provided with true (i.e., genuine) independent legal advice and that OIC did not understand the nature of the Guarantee document it was signing. As already noted above, Mr. Jiang deposed that when he signed the documents on behalf of OIC, he thought the limit of OIC's liability was the $1 million portion of the purchase price for 2481043 Ontario's shares.

18 Mr. Jiang acknowledges signing the Guarantee for OIC, and Mr. Jiang testified that he read it before he signed it. Section 12 of the Guarantee provides that by signing the Guarantee, the Guarantor confirms that it is fully aware of the nature and effect of the Guarantee and of its the obligations.

19 In the spring of 2016, 2481043 Ontario defaulted on the mortgage, and the parties discussed whether Trez Capital would forbear in enforcing its security. At that time, a draft Forbearance Agreement was prepared by Trez Capital and reviewed by Mr. Shapiro. However, the Forbearance Agreement became unnecessary when 2481043 Ontario brought the mortgage into good standing.

20 In the fall of 2016, 2481043 Ontario defaulted again in making its payments under the mortgage and negotiations for a Forbearance Agreement resumed. On October 5, 2016, OIC executed a Forbearance Agreement. Once again, before OIC signed the Forbearance Agreement, it was reviewed by Mr. Shapiro.

21 Under the Forbearance Agreement, the terms of the mortgage were amended and 2481043 Ontario and Norstar Investment agreed to provide additional security for the mortgage loan.

22 2481043 Ontario, Norstar Investment, and OIC signed a certificate that they respectively had received independent legal advice with respect to the Forbearance Agreement.

23 The recitals to the Forbearance Agreement confirms, among other things, that the Guarantee was provided to Trez Capital as a condition of Norstar Investment entering into the Share Purchase Agreement.

24 Pursuant to Articles 1.2 and 1.3 of the Forbearance Agreement, Norstar Investment, 2481043 Ontario, and OIC acknowledged that 2481043 Ontario was in default of the mortgage loan and indebted in the amount of $22,499,334.04 as of August 31, 2016.

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25 Article 1.6 of the Forbearance Agreement provided:

> The Borrower, the Guarantor and the Beneficial Owner hereby consent to the terms of the Lender's forbearance and other accommodations as set out herein. The Borrower, the Guarantor and the Beneficial Owner specifically acknowledge that they have, as of the date hereof, no defences, counterclaims or rights of set-off or reduction to any claims which might be brought by the Lender under the security granted by the Borrower or the Guarantor to the Lender or in respect of the Loan, notwithstanding the provisions of the *Limitations Act, 2002*.

26 Mr. Shapiro testified that he had several discussions with Mr. Jiang about the draft and final versions of the Forbearance Agreement and about its operation and meaning. Mr. Shapiro testified that OIC was in no way coerced or forced to sign the Forbearance Agreement and that Mr. Jiang knew the purpose and effect of that agreement.

27 Mr. Jiang, however, deposed that when OIC signed the Forbearance Agreement, it did not receive true independent legal advice, it was unduly influenced, and the Forbearance Agreement was unconscionable.

28 In the summer of 2017, the mortgage went into default yet again, and Trez Capital commenced receivership proceedings in Commercial Court.

29 Eventually, after several adjournments, by Order of Justice Conway dated December 15, 2017, MNP Ltd. was appointed receiver over 2481043 Ontario's assets.

30 In the receivership proceedings, MNP Ltd. sold the 1450 Don Mills Road's property and Trez Capital received a distribution of $20 million.

31 On January 15, 2018, Trez Capital commenced an action against OIC to enforce the Guarantee and to recover the balance of the indebtedness.

32 By Statement of Defence and Counterclaim dated March 7, 2018, OIC alleged that: (a) it did not enter into the Guarantee; (b) the actual guarantor was Trez Capital Group Limited Partnership; (c) Trez Capital is precluded from enforcing its Guarantee until it has moved against Trez Capital Group Limited Partnership; (d) the amount owing on the loan is overstated; (e) Trez Capital breached duties owed to the Guarantor, including the duty to advise the Guarantor to obtain independent legal advice; and (f) Trez Capital is the author of its own misfortune, which in turn, releases the Guarantor of its obligations under the Guarantee.

33 Trez Capital brings a summary judgment for the balance outstanding on the $23.4 million mortgage. As of August 15, 2018, the outstanding balance on the mortgage loan is $2,794.929.55 million, inclusive of principal, interest, expenses, costs and legal fees. The per diem charge after August 15, 2018 is $438.36.

34 OIC resisted the summary judgment motion, and Mr. Jiang delivered an affidavit upon which he was cross-examined. OIC declined to cross-examine Trez Capital's witnesses for the summary judgment motion.

C. Discussion

1. Is the Case Appropriate for a Summary Judgment?

35 Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

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1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

36 In *Hryniak v. Mauldin*[1] and *Bruno Appliance and Furniture Inc. v. Hryniak*,[2] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

37 If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings and to fairly and justly adjudicate the issues in the case.[3]

38 *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[4] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[5]

39 In my opinion, in the immediate case there are no genuine issues requiring a trial and the case at bar is an appropriate case for a summary judgment. It is further my opinion that if there were genuine issues requiring a trial, then there is a more than adequate evidentiary record to decide the genuine issues and it would be in the interests of justice to do so.

2. Should Trez Capital be Granted a Summary Judgment?

40 There is no evidentiary basis whatsoever for OIC's allegations of undue influence or unconscionability.

41 While there is some evidence in support of OIC's allegation that it did not receive genuine independent legal advice and in support of its plea of *non est factum*, neither the allegation nor the plea provide OIC with a defence. There are no genuine issues requiring a trial.

42 It is not a defence to a claim on a guarantee that the guarantor did not receive independent legal advice.[6] The presence of absence of independent legal advice is relevant to whether the guarantor has a defence based on misrepresentation, fraud, mistake, duress, undue influence, or unconscionability, but apart from its relevance to a plea of those defences, the absence of independent legal advice, standing alone, provides no defence to a claim on a guarantee. In *Bank of Montreal v. Featherstone*,[7] the Court of Appeal stated:

> The failure of a wife to obtain independent legal advice before executing a guarantee will not in every case entitle her to escape liability under the guarantee. The obvious purpose of the bank in requiring a certification of independent advice is avoid, if possible, the spouse's later raising defences such as *non est factum*, unconscionability, fraud, misrepresentation or undue influence. The burden of proving each of these defences rests upon the person seeking to set aside the guarantee.

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43 In the immediate case, strictly speaking, the legal advice that Mr. Shapiro provided OIC was not independent legal advice because Mr. Shapiro was also acting for Mr. Jiang, Norstar Investment, and 2481043 Ontario, which in law are separate entities. However, the legal advice provided by Mr. Shapiro was adequate to rebut any argument that OIC had a *non est factum*, misrepresentation, mistake, duress, undue influence, or unconscionability defence to Trez Capital's claim to enforce the guarantee.

44 The legal advice provided by Mr. Shapiro rebuts the notion that OIC has the defence of *non est factum* to Trez Capital's claim on the Guarantee. *Non est factum* is a pleading of a particular kind of mistake. To establish *non est factum*, the pleader must show that when he, she, or it signed the document, without carelessness or negligence, he, she, or it was mistaken about the legal nature or legal character of the document being signed.[8]

45 In the immediate case, OIC knew that it was signing a guarantee. Mr. Jiang admitted as much. His complaint is not that he did not know that he was signing a guarantee but that he thought OIC's exposure was limited to $1.0 million. That complaint is akin to a misrepresentation complaint, but Mr. Shapiro's evidence rebuts that defence as well.

46 In short, there is no genuine issue for trial. OIC knew it was signing a guarantee and it knew the possible legal consequences of doing so. There was no misrepresentation and no *non est factum*.[9]

47 OIC was not a mere accommodation party to the transaction; independent legal advice is not required for a guarantor who is a direct beneficiary from the loan transaction.[10]

48 While separate legal entities, the interests of Mr. Jiang and his corporations Norstar Investments, 2481043 Ontario, and OIC were complimentary and unconflicted. OIC was the intended beneficiary of the purchase of the 1450 Don Mills property, which property was to be used for a campus for OIC's campus. In any event, OIC was adequately and properly advised and it has no defence to Trez Capital's claim to enforce the Guarantee.

D. Conclusion

49 For the above reasons, I grant Trez Capital a summary judgment for $2,794,929.55 plus $438.36 per day from August 15, 2018 to the date of this judgment, plus costs of $2,457.75, all inclusive.

Motion granted.

Footnotes

1 2014 SCC 7 (S.C.C.).

2 2014 SCC 8 (S.C.C.).

3 *Campana v. Mississauga (City)*, 2016 ONSC 3421 (Ont. S.C.J.); *Ghaeinizadeh (Litigation guardian of) v. Garfinkle, Biderman LLP*, 2014 ONSC 4994 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Ont. Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 (Ont. S.C.J.) at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001 (Ont. S.C.J. [Commercial List]).

4 *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (Ont. C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R. (3d) 481 (Ont. C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 (S.C.C.) at para. 11.

5 *Toronto Dominion Bank v. 466888 Ontario Ltd.*, 2010 ONSC 3798 (Ont. S.C.J.).

6 *Zwaig Associates Inc. v. Mok*, [2005] O.J. No. 89 (Ont. C.A.) at para. 2.

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7 (1989), 68 O.R. (2d) 541 (Ont. C.A.).

8 *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774 (S.C.C.); *Royal Bank v. 966566 Ontario Inc.*, [2000] O.J. No. 606 (Ont. S.C.J.); *Bifrost Commercial Credit Corp. v. Miser Lighting Inc.*, [2009] O.J. No. 6488 (Ont. S.C.J.), aff'd 2010 ONCA 426 (Ont. C.A.); *Bulut v. Carter*, 2014 ONCA 424 (Ont. C.A.).

9 *BNS v. Compas*, 2018 ONSC 3262 (Ont. S.C.J.); *Mohr v. Hayes*, 1999 SKQB 260 (Sask. Q.B.).

10 *Toronto Dominion Bank v. 1503345 Ontario Ltd.*, [2006] O.J. No. 1960 (Ont. S.C.J.) at para. 22 ; *Meridian Credit Union Limited v. 2428128 Ontario Limited*, 2017 ONSC 4578 (Ont. S.C.J.) at paras. 21-22.

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Tab 9

2013 ONSC 2947
Ontario Superior Court of Justice

Royal Bank of Canada v. 2240094 Ontario Inc.

2013 CarswellOnt 7667, 2013 ONSC 2947, 229 A.C.W.S. (3d) 99

Royal Bank of Canada, Plaintiff and 2240094 Ontario Inc., Ranjit Saraon also known as Ranjit Singh Saraon also known as Ranjit Saraom, Navjeet Saraon also known as Navjeet Singh Saraon also known as Naujeet Singh Saraon and Ravjeet Singh Saraon, Defendants

Perell J.

Heard: May 15, 2013
Judgment: May 21, 2013
Docket: 12-CV-454664

Counsel: Carla D. Manias, for Plaintiff
Ranjit Saraon, for himself
Ravjeet Singh Saraon, for himself
Carman McClelland, for Navjeet Saraon

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

Headnote

Contracts --- Remedies for breach — Specific performance — Grounds for refusal — Misrepresentation inducing contract
Bank gave loan to corporation in May, 2010 — Defendant guarantors R and his sons N and RS signed agreement with bank to be jointly and severally liable for corporation's indebtedness — Corporation defaulted on loan payments, and bank sued it and guarantors — Bank obtained separate default judgement against corporation, and brought motion for summary judgement against all three guarantors — Motion granted against guarantor R, motion dismissed against guarantors N and RS — Pleadings by guarantors N and RS hinted at defences of non est factum and misrepresentation — Guarantors N and RS could not establish defence of non est factum, however, evidentiary record disclosed enough to potentially raise defence of misrepresentation — N and RS, both young men with no business experience, received assurance from bank's representative that loan was approved based on their father's assets — N and RS appreciated that they were taking on liability, but may not have understood full extent of that liability or nature of legal and financial risk they were assuming — Bank had no obligation to ensure that guarantors obtained independent legal advice before signing, or to advise about risks associated with transaction — But had N and RS obtained independent legal advice, competent lawyer would have explained risks of this agreement and told them not to rely on advice of assurances from bank about risks associated with signing guarantee.

Contracts --- Mistake — Mistake as to nature of agreement (Non est factum) — Miscellaneous
Bank gave loan to corporation in May, 2010 — Defendant guarantors R and his sons N and RS signed agreement with bank to be jointly and severally liable for corporation's indebtedness — Corporation defaulted on loan payments, and bank sued it and guarantors — Bank obtained separate default judgement against corporation, and brought motion for summary judgement against all three guarantors — Motion granted against guarantor R, motion dismissed against guarantors N and RS — Pleadings by guarantors N and RS hinted at defences of non est factum and misrepresentation — Guarantors N and RS could not establish defence of non est factum, however, evidentiary record disclosed enough to potentially raise defence of misrepresentation — N and RS, both young men with no business experience, received assurance from bank's representative that loan was approved based on their father's assets — N and RS appreciated that they were taking on liability, but may not have understood full extent of that liability or nature of legal and financial risk they were assuming — Bank had no obligation to ensure that guarantors obtained independent legal advice before signing, or to advise about risks associated with

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transaction — But had N and RS obtained independent legal advice, competent lawyer would have explained risks of this agreement and told them not to rely on advice of assurances from bank about risks associated with signing guarantee.

Guarantee and indemnity --- Guarantee — Grounds for termination of guarantee — Non est factum — Independent legal advice
Bank gave loan to corporation in May, 2010 — Defendant guarantors R and his sons N and RS signed agreement with bank to be jointly and severally liable for corporation's indebtedness — Corporation defaulted on loan payments, and bank sued it and guarantors — Bank obtained separate default judgement against corporation, and brought motion for summary judgement against all three guarantors — Motion granted against guarantor R, motion dismissed against guarantors N and RS — Pleadings by guarantors N and RS hinted at defences of non est factum and misrepresentation — Guarantors N and RS could not establish defence of non est factum, however, evidentiary record disclosed enough to potentially raise defence of misrepresentation — N and RS, both young men with no business experience, received assurance from bank's representative that loan was approved based on their father's assets — N and RS appreciated that they were taking on liability, but may not have understood full extent of that liability or nature of legal and financial risk they were assuming — Bank had no obligation to ensure that guarantors obtained independent legal advice before signing, or to advise about risks associated with transaction — But had N and RS obtained independent legal advice, competent lawyer would have explained risks of this agreement and told them not to rely on advice of assurances from bank about risks associated with signing guarantee.

MOTION by bank for summary judgment against loan guarantors.

Perell J.:

1 The Royal Bank of Canada brings a motion for summary judgment against Ranjit Saraon and his sons Navjeet and Ravjeet Saraon. The Plaintiff Bank has already obtained a default judgment against the Defendant 2240094 Ontario Inc. The Bank's summary judgment motion against the Defendant Saraons is to enforce a limited guarantee signed by each of them for the debt of the numbered corporation. The Bank also has a claim against Ranjit based on a personal line of credit and a credit card agreement.

2 The Bank's claim against the Saraons arises because on May 13, 2010, 2240094 Ontario Inc. signed a Royal Bank of Canada Loan Agreement to borrow funds to purchase goods and services for its business. In circumstances that I will describe below, Ranjit, Navjeet, and Ravjeet signed a Guarantee and Postponement of Claim Agreement with the Bank under which they agreed to be jointly and severally liable for 2240094 Ontario Inc.'s indebtedness. The guarantee was limited to the sum of $29,325 with interest from the date of demand for payment at the Bank's prime rate plus 3 percent per annum.

3 2240094 Ontario Inc. defaulted in repayment of the loan, and on May 2, 2012, the Bank made formal demand on the Saraons for payment of $29,325 plus interest. The Saraons did not pay.

4 On May 29, 2012, the Bank sued the numbered corporation and also the guarantors. The Bank also sued Ranjit on a Royal Credit Line Agreement that he had signed in February 2004 and on a Royal Bank Visa Account that he had obtained in October 1993.

5 On July 5, 2012, Navjeet, who was then self-represented, delivered a Statement of Defence. On July 11, 2012, Ranjit, who is self-represented, delivered a Statement of Defence. On July 17, 2012, Ravjeet, who is self-represented, delivered a Statement of Defence.

6 2240094 Ontario Inc. did not defend, and on July 17, 2012, the Bank obtained a default judgment for $98,397.27 plus $1,050 for costs.

7 The Bank then brought a motion for summary judgment against the Saraons that was originally scheduled to be heard on February 5, 2013. However, with a deadline for the Defendants to file responding material set for April 1, 2013, the motion was adjourned to May 15, 2013.

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8 After the adjournment, the self-represented Ravjeet filed responding material in a timely way. However, the self-represented Ranjit did not file any responding material, but upon the return of the motion, Navjeet retained a lawyer, and at the hearing of the motion, he asked leave to deliver responding material.

9 On May 15, 2013, I received Navjet's affidavit, and I gave the Bank the alternative of arguing the summary judgment motion that day or of adjourning the motion to permit cross-examinations. The Bank chose to proceed with the motion.

10 At the motion, I heard argument from the Bank and from the self-represented Ranjit, the self-represented Ravjeet and also from Navjeet's lawyer.

11 At the hearing, I made the following endorsement granting judgment against Ranjit and reserving judgment with respect to Ravjeet and Navjeet:

> The Plaintiff Royal Bank of Canada brings a motion for summary judgment against Ranjit, Navjeet and Ravjeet Singh Saraon. I am reserving judgment with respect to the claims against Navjeet and Ravjeet. The Defendant Ranjit delivered no evidence to support his defence and having read the motion record and heard from counsel for the Plaintiff and from him, I am satisfied that there is no genuine issue requiring a trial. The Plaintiff shall have judgment as requested [. I have signed the judgment. The Plaintiff shall have costs of $5,676.30.

12 On this motion for a summary judgment under Rule 20, the question that remains is whether there is a genuine issue requiring a trial. In my opinion, there is no genuine issue that the Bank has proved its claim, and the issue then is whether there is a defence that should be tried. The respective Statements of Defence prepared by the then self-represented Defendants are extremely poor, but the pleadings hint at defences of *non est factum* and misrepresentation.

13 The defence of *non est factum* may be available when a person has been misled into signing a contract that is fundamentally different from what he or she thought was being signed. To succeed on the defence, the person must establish that: (1) the contract is fundamentally different from that which the person intended to sign; (2) the person did not consent to the contract as such; and (3) he or she did not sign the contract due to carelessness: *Gallie v. Lee*, [1970] 3 All E.R. 961 (U.K. H.L.), *Marvco Color Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577 (S.C.C.).

14 A contracting party may defend an action to enforce the contract by having the contract set aside or rescinded on the ground of misrepresentation. In the case of misrepresentation, the contracting party is misled into signing the contract because of a material representations by the other contracting party that induced the person to enter into the transaction:

15 A bank is in a creditor-debtor relationship with its borrowers, and before taking a guarantee, a bank is under no obligation to ensure that a guarantor of the loan obtain independent legal advice, and a bank has no obligation to advise about the risks associated with the transaction: *Bank of Montreal v. Featherstone* (1989), 68 O.R. (2d) 541 (Ont. C.A.); *Royal Bank v. Poisson* (1977), 26 O.R. (2d) 717 (Ont. H.C.); *Bertolo v. Bank of Montreal* (1986), 57 O.R. (2d) 577 (Ont. C.A.); *Royal Bank v. Hussain* (1997), 37 O.R. (3d) 85 (Ont. Gen. Div.); *Royal Bank v. 966566 Ontario Inc.*, [2000] O.J. No. 606 (Ont. S.C.J.).

16 Thus, independent legal advice is not a prerequisite for a bank to make a claim against a guarantor; however, the presence of independent legal advice is useful to a bank, because it provides a means to negate any pleas of *non est factum* or misrepresentation (also pleas of undue influence, duress, fraud, unconscionability). In *Bank of Montreal v. Featherstone*, *supra*, the Court of Appeal stated:

> The failure of a wife to obtain independent legal advice before executing a guarantee will not in every case entitle her to escape liability under the guarantee. The obvious purpose of the bank in requesting a certificate of independent legal advice is to avoid, if possible, the spouse's later raising defences such as *non est factum*, unconscionability, fraud, misrepresentation or undue influence. The burden of proving each of these defences rests upon the person seeking to set aside the guarantee.

17 In the case at bar, I agree with the Bank's submission that there is no genuine issue that Navjeet and Ravjeet will not

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be able to establish the defence of *non est factum*, but in my opinion, there is enough in the evidentiary record to require a trial about the defence of misrepresentation.

18 There is no genuine issue for trial that Navjeet and Ravjeet knew that they were signing a guarantee for repayment of the indebtedness of the numbered corporation. The document they signed is not fundamentally different than the document that they intended to sign.

19 The genuine issue for trial concerns why the Saraon brothers were prepared to sign the guarantee, and in this regard, based on the Statements of Defence and the affidavits delivered, my conclusion is that there is a genuine issue as to whether the guarantees signed by Navjeet and Ravjeet should be set aside on the grounds of misrepresentations associated with the gratuitous advice provided by the Bank about the legal and financial risks in signing the guarantee.

20 The evidentiary record shows that Navjeet and Ravjeet were young men at the time when they signed the guarantee. They were students with no business experience and no personal assets. I understand Navjeet to have been 21 years old and Ravjeet to have been just 19.

21 The evidentiary record shows that the numbered corporation was Ranjit's business, but he gave his sons each a 5% interest in the corporation. They were named directors and officers of the corporation, but it does not seem that they had any role in actually managing the business.

22 The evidentiary record shows that in April 2010, the numbered corporation purchased a restaurant and pool parlour business, and about a month after their father's business had begun operations, Navjeet and Ravjeet were asked by their father to go to the Bank with him, where they met with Jason Solia, the Bank's account manager, who asked them to sign the guarantee.

23 The Statements of Defence and Navjeet's and Ravjeet's affidavits about the meeting at the Bank reveal that they appreciated that they were taking on a liability, but it seems that they did not understand the full extent of that liability or the nature of the legal and financial risk that they were assuming.

24 The evidentiary record indicates that the matter of the extent of their liability and the nature of their exposure to risk were discussed with the bank's representative, but it also indicates that it is arguable that while they knew they were signing a guarantee of the numbered corporation's indebtedness, Navjeet and Ravjeet did not understand or appreciate what they were being told as to the risks that they personally were taking on. They only received information from the Bank's representative, which they relied on. Ravjeet's evidence was that Mr. Solia assured him that the loan was being approved based on Ranjit's assets.

25 Navjeet and Ravjeet did not receive independent legal advice or representation before agreeing to accommodate their father's business plans by signing the guarantee. I appreciate that the guarantor having had independent legal advice is not a prerequisite to the enforcement of a guarantee. However, in my opinion, in the case at bar had the Saraon brothers received independent legal advice, it is arguable that a competent lawyer would have advised them to refuse to sign the guarantee. The record indicates that Ranjit had health issues associated with substance abuse. A competent lawyer would have explained that the sons' risk of liability under the guarantee were substantial given that the success of the business would depend on Ranjit's health and his ability to manage the business. A competent lawyer would have told them not to rely on any advice of assurances from the lender about the risks associated with signing the guarantee.

26 I wish to be clear that I am making no findings about what occurred or about what should have occurred in this case. Rather, I simply conclude that a trial is required to determine the liability of Navjeet and Ravjeet.

27 Accordingly, I dismiss the Bank's motion for a summary judgment.

28 As for costs, I think that this is an appropriate case to order costs in the cause.

Motion granted in part.

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Tab 10

1963 CarswellSask 84
Saskatchewan Court of Appeal

Pepper v. Prudential Trust Co.

1963 CarswellSask 84, 41 D.L.R. (2d) 583, 45 W.W.R. 275

Pepper et ux (Plaintiffs) Appellants v. Prudential Trust Company Limited et al (Defendants) Respondents

Lamar and Bueno Oils Ltd. (Third Parties)

Culliton, C.J.S., Woods, Brownridge, Maguire and Hall, JJ.A.

Judgment: October 15, 1963

Counsel: *D. G. McLeod, Q.C.*, and *E. G. Miller*, for plaintiffs, appellants.
A. M. Nicol, Q.C., for defendant, respondent, Prudential Trust Co. Ltd.
J. L. McDougall, Q.C., for defendant, respondent, Can. Williston Minerals Ltd.
John Stein, for third parties, Lamar and Bueno Oils Ltd.

Subject: Contracts; Corporate and Commercial; Torts

Headnote

Fraud and Misrepresentation --- Fraudulent misrepresentation — Non est factum

Contracts — Non Est Factum — Effect of — Principles Applicable.

A contract to which the principle of *non est factum* applies is not void *ab initio* and incapable of ratification or affirmation as, e.g., an illegal contract. It is not until the plea of *non est factum* has been successfully established, that the contract can be declared in effect void *ab initio*; until that time it remains in force and binding. *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914, affirming (1955) 15 W.W.R. 385, 1956 Can Abr 304, referred to.

Said plea can be raised and relied on only by the mistaken party.

The fundamental mistake upon which said plea is based does not have to be induced by fraud.

Once the mistaken party elects to adopt the contract, said election is final and the principle referred to in *Clough v. London & N.W. Ry.* (1871) LR 7 Ex 26, 41 LJ Ex 17, applies.

The judgment of the court was delivered by *Hall, J.A.*:

1 This is an appeal from the judgment of Thomson, J., dismissing an action in which the appellant sought:

2 (1) To have declared void a transaction of May 2, 1951, by which the appellant purported to:

3 (a) Transfer and assign to the respondent Prudential Trust an undivided one-half interest in all petroleum and natural gas and related hydrocarbons in and under the appellant's land;

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4 (b) Confer upon the said respondent the exclusive option to acquire a petroleum and natural gas lease for a term of 99 years on the expiration of an existing lease, at a rental of $0.12 1/2 per acre;

5 (c) Entitle the said respondent to a transfer of the appellant's remaining interest in petroleum and natural gas and delivery of a registrable transfer thereof with the duplicate certificate of title therefor;

6 (d) Transfer to the said respondent an undivided one-half interest in all mines and minerals, except coal, within, upon and under the said land.

7 (2) To have declared void a transfer of petroleum and natural gas, dated August 4, 1954, executed by the appellant in favour of the respondent Prudential Trust and an order directing the respondent Canadian Williston to transfer the said petroleum and natural gas to the appellant, or, alternatively, an order vesting the said petroleum and natural gas in the name of the appellant.

8 (3) Damages for deceit against the respondent Prudential Trust.

9 (4) Other measures of accessory relief.

10 The learned trial judge accepted the testimony of the appellant and the pertinent findings of fact as found by the learned trial judge are as follows:

11 The appellant had been, at all times material to the action, the registered owner of all mines and minerals within, upon and under the N.W. 1/4 and the S.W. 1/4 of sec. 7, Tp. 6, rge. 13, W. 2M. in the province of Saskatchewan. On October 28, 1949, he gave to Rio Bravo Oil Ltd. a lease, in the usual form, of the petroleum and natural gas in and under the said land. In May, 1951, he was approached by one McDonald, a land agent, who stated that the company he represented wanted only the first chance, if and when the said existing lease should lapse or expire, to obtain from the appellant a lease of his petroleum, natural gas and related hydrocarbons on the same terms as were in the existing lease, except that the rental would be 25 cents an acre instead of 10 cents an acre.

12 The appellant agreed to give McDonald's principal the first chance to get a lease on those terms and McDonald thereupon agreed to have the necessary documents prepared to give effect to this agreement and to bring such documents back for execu tion. McDonald returned a few days later and produced certain documents which the appellant signed at McDonald's request. The appellant did not read the documents or have them read over to him. He said that he trusted McDonald and signed where McDonald told him to sign. One of the documents was an agreement (entitled "assignment"), which, in addition to the option to lease, contained an assignment of an undivided one-half interest in the petroleum, natural gas and related hydrocarbons in and under the appellant's lands to the respondent Prudential Trust and an undertaking to execute a registrable transfer of the appellant's interest in the petroleum and natural gas and deliver it, along with the duplicate certificate of title, to the said respondent. The other document was a transfer to the respondent of an undivided one-half interest in all of the appellant's mines and minerals excepting coal. The learned trial judge found that the documents so produced and signed by the appellant were of a totally different kind or character from what he thought them to be.

13 The learned trial judge further found that the appellant had absolutely no idea that the documents produced and signed were an agreement to sell or assign an interest in his petroleum, natural gas and related hydrocarbons and a transfer of an interest in his mines and minerals, and that the appellant first learned that he had given anything more than what could be called an option to take a lease of his petroleum and natural gas at the expiration of the existing lease some time in the summer of 1953 when one Erickson, a representative of the respondent Canadian Williston, requested delivery of the appellant's duplicate certificate of title so that the transfer of the undivided one-half interest in the mines and minerals could be registered.

14 The appellant refused to deliver up the duplicate certificate of title when requested to do so by Erickson, maintaining that he had not executed any documents by which the respondent Prudential Trust was entitled to a transfer or production of the duplicate certificate, and told Erickson that he would consult his solicitor and obtain advice. He then went to Weyburn to see his solicitor and on arrival at his solicitor's office found that Erickson had preceded him. Erickson had by then fully explained the situation to the solicitor and the appellant was, in turn, fully, advised by his solicitor as to the nature and effect

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of the documents he had signed and delivered in 1951.

15 Following a suggestion of the solicitor, the appellant went home and made a thorough search of his papers. He then discovered an unopened envelope which was found to contain the duplicate original of the agreement, or so-called assignment, which had been mailed to him by the respondent Prudential Trust in 1951. This the appellant took to his solicitor, who then again advised the appellant of the true nature or character of the documents. The appellant was told by his solicitor that he would save trouble and expense if he complied with the demand which had been made upon him. The solicitor pointed out, however, that there might be some difficulty in registering the original transfer and suggested that the respondent Canadian Williston should be satisfied with the transfer of an undivided one-half interest in the petroleum and natural gas only, which would preserve for the appellant "the related hydrocarbons" as well as all other minerals. Following correspondence between the appellant's solicitor and the respondent Canadian Williston, the respondents agreed to accept a transfer of that kind and on August 4, 1954, the appellant, under advice of his solicitor, executed a transfer in favour of the respondent Prudential Trust of an undivided one-half interest in the petroleum and natural gas in and under his land. The execution of the transfer was witnessed by the appellant's solicitor and was turned over to the respondent Canadian Williston along with the appellant's duplicate certificate of title. The respondent Prudential Trust in turn executed and delivered a transfer of the said interest to the respondent Canadian Williston. The transfers were later registered and since September 29, 1955, the respondent Canadian Williston has been the registered owner of an undivided one-half interest in the petroleum and natural gas.

16 The learned trial judge was of the opinion that until the appellant had executed and delivered the last-mentioned transfer, he had the right to say that the documents which he had previously executed in 1951 were not binding on him. In other words, that the principle of *non est factum* would apply as it did in *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914, affirming (1955) 15 W.W.R. 385, and in contemplation of the law there was no contract at all. He went on to hold, however, that when the appellant, with full knowledge of both the nature and the terms of the original documents, decided to execute and deliver the later transfer and surrendered his duplicate certificate of title so that the transfer could be registered, he, in effect, accepted and adopted the terms and conditions of the original agreement, subject to the condition that the respondents would accept a transfer of an undivided one-half interest in his petroleum and natural gas instead of a transfer of all of his petroleum and natural gas and related hydrocarbons required by the original agreement, and then for the first time an agreement came into existence. He further held that under these circumstances the claim for damages for deceit could not prevail.

17 On appeal it was submitted on behalf of the appellant that, inasmuch as the trial judge found that the principle of *non est factum* would have applied, the transaction was void *ab initio* and was therefore not subject to affirmation or ratification; and alternatively, if it were found that the transaction could be and was affirmed and ratified by the appellant, that the appellant would then be in the same position as any victim of a fraudulent misrepresentation who elected to affirm a voidable contract and could pursue a claim for damages for deceit.

18 With deference, I think that the status of the transaction prior to the execution and delivery of the transfer dated August 4, 1954, was misconstrued in the court below. There are, indeed, void contracts which cannot be ratified or affirmed, for example, a contract void for illegality; a contract beyond the powers of a corporation; or a case of *res extincta*. A contract of this type is truly void from its inception and might be referred to as a nullity. It is void as against both parties to it and neither party can recover from the other under it. These traits do not pertain to a transaction to which the principle of *non est factum* applies. The authorities dealing with this latter principle are reviewed by Nolan, J. in *Prudential Trust Co. v. Cugnet, supra*, and there would be no purpose to a further review.

19 The plea of *non est factum* can be raised and relied upon by only one of the contracting parties, the mistaken one. The other party to the contract cannot raise it. Once the plea has been successfully established, the effect is to have the transaction declared void *ab initio*. Until that time, however, the contract is in force and is binding. It seems, therefore, that the present appellant, when he first became aware of his mistake, could have followed one of three possible courses: He could (a) Refuse to carry out the agreement and, if sued, rely upon the defence of *non est factum*; (b) Take steps to have the transaction declared void: or (c) Choose to adopt the contract so that it continued to operate and, of course, continued to obligate the other contracting party. If the appellant elected to adopt the contract, the election once made is final, and the principle referred to in *Clough v. London & N.W. Ry.* (1871) LR 7 Ex 26, 41 LJ Ex 17, would apply. In my opinion, therefore, it was possible for the appellant to adopt or affirm the agreement and be bound by it. To determine whether he did so or not it is

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necessary to examine everything which transpired up to the institution of the proceedings. The execution and delivery of the transfer of August 4, 1954, coming after the appellant was fully advised of the nature of the transaction and following his solicitor's advice, was an act by which the appellant adopted or affirmed the agreement. After that he could no longer have the transaction declared void on the principle of *non est factum*.

20 The appellant's claim to be entitled to recover damages for deceit is based on the rule expressed in *Barron v. Kelly*, [1918] 2 W.W.R. 131, 56 S.C.R. 455, reversing [1917] 3 W.W.R. 65, 24 B.C.R. 283, by Anglin, J., at p. 148, as:

> It is also elementary that a party misled by such misrepresentations as the evidence here establishes has, upon discovery of their falsehood, the choice of repudiating his contract — and (if *restitutio in integrum* be practicable) he may thereupon claim the equitable relief of rescission with reimbursementr — or affirming it and pursuing the common-law remedy of damages in an action of deceit.

21 The elements of the action of deceit are set out by Cotton, L.J. in *Peek v. Derry* (1888) 37 Ch D 541, 57 LJ Ch 347, when he says at p. 566:

> What, in my opinion, is a correct statement of the law is this — that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false — that is, without any reasonable ground for believing it to be true — he is liable in an action of deceit at the suit of any one to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice.

22 At this point it is well to keep in mind that the fundamental mistake upon which the plea of *non est factum* is based does not have to be induced by fraud, although in most of the cases encountered fraudulent misrepresentation is present. In the present case the respondents argued that the findings of the trial judge did not necessarily amount to a finding of fraud, and that in the absence of such a finding the action of deceit did not lie. I do not think it is necessary to deal with the question of fraud to dispose of this portion of the claim. Here the damages alleged arise from the loss of the undivided one-half interest in the petroleum and natural gas transferred by the appellant to the respondents. The loss claimed arises out of the operation of a term of the contract which the appellant has adopted. The present appellant, having elected to have the contract continue, cannot claim as damages a loss which arises solely out of the application of the terms adopted.

23 Counsel for the appellant referred to *Arnison v. Smith* (1889) 41 Ch D 348, 37 WR 739, 5 T.L.R. 413 (C.A.), to support the proposition that damages could be recovered when the contract is allowed to carry on after notice of the fraudulent misrepresentation. That case differs from the one at hand in that the fraudulent misrepresentation did not involve a term of the contract. There it was always understood that the agreement was one to purchase shares, and the fraudulent misrepresentation was contained in statements in the prospectus. In addition, there was no clear finding that prior notice of the fraudulent misrepresentation had been received. Similarly in *Barron v. Kelly, supra*, the plaintiff affirmed the contract and successfully recovered damages for deceit. There again, however, the claim was not based upon a term of the contract, but upon misrepresentation inducing the contract. Such is not the situation here.

24 As I have come to the same conclusion as the learned trial judge, although on somewhat different grounds, the appeal is dismissed with costs.

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1965 CarswellSask 10
Supreme Court of Canada

Pepper v. Prudential Trust Co.

1965 CarswellSask 10, [1965] S.C.R. 417, 50 D.L.R. (2d) 420, 51 W.W.R. 395

Pepper (Plaintiff) Appellant v. Prudential Trust Company Limited et al (Defendants) Respondents Lamar and Bueno Oils Ltd. (Third Parties) Respondents

Cartwright, Judson, Ritchie, Hall and Spence, JJ.

Judgment: March 15, 1965

Counsel: *D. G. McLeod, Q.C.* , for plaintiff, appellant.
A. M. Nicol, Q.C. , for defendant, respondent, Prudential Trust Co. Ltd.
J. L. McDougall, Q.C. , for defendant, respondent, Canadian Williston Minerals Ltd.
J. Stein , for third parties, respondents, Lamar et al.

Subject: Contracts; Corporate and Commercial; Torts

Headnote

Fraud and Misrepresentation --- Fraudulent misrepresentation — Non est factum

Right of Action for Deceit Though Action for Rescission Lost.

Appeal from the judgment of the court of appeal for Saskatchewan (1963-64) 45 W.W.R. 275 , affirming the judgment of Thomson, J. Appeal dismissed.

Per Judson, J., Cartwright, Ritchie and Hall, JJ. concurring, Spence, J., dissenting:

Where a plaintiff is induced by false representations to execute documents disposing of an interest in land in the belief that the documents are of a different character and will produce a different result, he may establish a plea of *non est factum* as a ground for rescission and possibly damages. *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914 , affirming (1955) 15 W.W.R. 385 , 1956 Can Abr 304, applied.

But if later, with full knowledge of the false representations and of his legal rights, he executes in favour of an assignee of the original documents a transfer of the same interest in the same lands, in an atmosphere untainted by fraud, he cannot then sue for damages or rescission of the later transfer on the ground of the fraud by which his execution of the earlier documents was induced.

Per Spence, J., dissenting:

The right to take action for damages for deceit may still exist despite the loss of the right to take action for rescission. *Barron v. Kelly*, [1918] 2 W.W.R. 131, 56 S.C.R. 455 , reversing [1917] 3 W.W.R. 65, 24 B.C.R. 283 , 20 Can Abr 753, applied. And in the case at bar, since at the time of the second transaction there was no agreement that the plaintiff should release the party to the first transaction whose fraud induced it from any claim he might have for loss or damage caused thereby, the plaintiff's right to sue for damages was not extinguished.

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Cartwright, J. **concurs with Judson, J.:**

Judson, J. **:**

1 The plaintiff, appellant, James T. Pepper, seeks in this litigation to set aside certain transactions entered into in 1951 and 1954, the result of which was that he parted with an undivided one-half interest in all petroleum and natural gas under his farm. There is an alternative claim for damages for deceit against Prudential Trust Company Limited. The trial judge and a unanimous court of appeal (1963-64) 45 W.W.R. 275 , have held against both claims.

2 In 1949, Pepper, as the owner of two quarter sections, had granted a lease of all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company, Limited, subject to payment of a royalty. This lease is still subsisting, and during its term oil was discovered and production obtained on the land.

3 In 1951, one, Macdonald, came to Pepper to discuss an option for another lease if the first lease should fall in. According to Pepper this was the only subject matter of any discussion at any time with Macdonald. On the second visit, however, Macdonald came back with certain documents ready for signature. This time Pepper signed the following documents.

4 (1) A document headed "Assignment," This document purported to:

5 (a) Give an immediate assignment to Prudential Trust Company Limited of an undivided half interest in all petroleum, natural gas and related hydrocarbons in and under the lands;

6 (b) Promise that Pepper would execute a registrable transfer of this interest;

7 (c) Give an option for a new lease if the first lease should fall in.

8 (2) A transfer under *The Land Titles Act* , RSS, 1940, ch. 98, now 1960, ch. 65, of an undivided half interest in all mines and minerals under the said land.

9 (3) A receipt for $64.

10 Pepper admits that he signed all three documents but denies any contemporaneous knowledge of the land titles transfer and also denies the receipt of any money. Macdonald took all the documents away but did not ask for a certificate of title, without which the transfer could not be registered under the Saskatchewan *Land Titles Act* .

11 This certificate was not asked for until 1953 when another agent, acting for Canadian Williston Minerals Ltd., an assignee of the disputed interest, visited Pepper. Pepper immediately consulted his solicitor and discovered what he had signed. On instructions from his solicitor, he searched his private papers at home and found that the first agent, Macdonald, had sent him back an executed copy of the assignment. It had been lying unopened among his papers for some time. After some discussion with his solicitor and some delay, he executed in 1954 another transfer under *The Land Titles Act* and made available his certificate of title for the purpose of registration of this transfer of an undivided half interest in all oil and gas. It did not include "related hydrocarbons" and it departed from the terminology of "all mines and minerals" contained in the first transfer that he had signed for Macdonald. Pepper made this compromise on the advice of his solicitor, who did not think that the dispute was worth the risk of litigation.

12 At that time he had full knowledge of what he had signed in 1951 and what he was then signing and why. I wish it to be understood that I am not in any way criticising the solicitor. His client had signed a lot of documents and it is clear that at this time the oil and natural gas were not regarded as being of any significant value. The discovery of oil came later.

13 It should also be remembered that *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914 , affirming (1955) 15 W.W.R. 385 , had not been decided at that time. What the result would have been if Pepper had stood his ground in 1953 and resisted any further claim for the transfer, it is difficult to say. The transfer that he had first executed was not in accordance with the assignment. It was for an undivided half interest in mines and minerals. What he had apparently agreed to transfer was an undivided half interest in oil, gas and related hydrocarbons. Such a transfer would not be registrable under the practice of the

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Saskatchewan land titles office. But he had agreed to execute a registrable transfer.

14 Pepper brought an action for a declaration that everything that he had signed was null and void. The trial judge would have held in his favour had it not been for his execution of the second transfer on his solicitor's advice. He held that this was an affirmance of the transaction and that it precluded him both from setting it aside and claiming damages.

15 The court of appeal dismissed the appeal. They thought that the original documents were not a nullity, as found by the trial judge, but voidable on the ground of fraud. They were, however, in complete agreement with the trial judge that the second transfer ruled out any declaration of nullity, rescission or any claim for damages. With this I agree and I think that the appeal fails for the reasons given in both courts on this aspect of the case.

16 The learned trial judge found that Pepper had established a plea of *non est factum* . The difference between the trial judge and the court of appeal concerned the consequences of such a successful plea — the trial judge held that the transaction was a nullity whereas the court of appeal said that it was voidable at the option of plaintiff. I cannot see that this distinction governs the decision of this case. Both courts held that the deciding factor was the second transfer, which was untainted by any fraud and was executed with full knowledge and by way of compromise of a real dispute. To them this was a complete settlement of every item of dispute. Pepper cannot now assert that, notwithstanding the unimpeachable second transfer, he somehow held back a claim for damages if oil and gas should be subsequently discovered. As the court of appeal made clear, the claim for damages is precisely the same as the value of the property which he transferred by way of settlement.

17 I would dismiss the appeal with costs.

***Ritchie* and *Hall, JJ.* concur with Judson, J.:**

***Spence, J.* (dissenting):**

18 This is an appeal from the judgment of the court of appeal for Saskatchewan (1963-64) 45 W.W.R. 275 , affirming the judgment of Thomson, J. at trial.

19 The plaintiff was the registered owner in fee simple of all mines and minerals within, upon and under a certain quarter section of land. By a petroleum and natural gas lease dated October 28, 1949, he had granted all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company Limited, subject to the payment of a gross royalty of one-eighth of the oil produced and saved from the said lands, one-eighth of the market value at the sale of gas sold or used off the premises and one-tenth in kind or value at the well on all other materials mined and marketed. This grant was for an indefinite term and was to continue for so long as production continued. Production of oil and gas was obtained in late 1957 and continued up to the time of the hearing of this appeal. By the provisions of the said petroleum and natural gas lease, either party had the right to assign his interest under the said lease.

20 In May, 1951, the plaintiff was approached by one, Claude Macdonald. The plaintiff swore that Claude Macdonald stated to him that he represented the Prudential Trust Company, oil developers, and explained that the company he represented desired a first chance to obtain from the plaintiff a lease of his petroleum and natural gas on the same terms as those existing under the Rio Bravo Oils lease above mentioned except that the rental would be 25 cents per acre instead of 10 cents per acre and, of course, the proposed lease should only come into effect when the existing lease should lapse or expire.

21 The plaintiff testified that he agreed to give to Macdonald's principal such first chance and after further conversations he signed two documents, without reading the documents because, as he alleged, he trusted the said Macdonald who "seemed to be a very nice man." The documents so produced and signed by the plaintiff were, however, of a totally different kind and character from those which he testified he had agreed to sign. One was an agreement by which, *inter alia* , he purported to assign to Prudential Trust Company Ltd. an undivided one-half interest in the petroleum, natural gas and related hydrocarbons upon the lands, and further agreed to execute and deliver to the said company a registrable transfer of the said interest, and the other document was a transfer to the said company of an undivided one-half interest in all the mines and minerals within or upon the said lands except coal.

22 The trial judge found, as a fact, as follows:

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I am not overlooking his evidence, but after carefully reviewing all of the evidence I am convinced that when the plaintiff signed the documents which Mr. Macdonald produced to him for execution he had absolutely no idea that they were an agreement to sell or assign an interest in his petroleum, natural gas and related hydrocarbons and a transfer of an interest in his mines and minerals.

23 I agree with the learned trial judge that if the matter had rested there the plaintiff's plea of *non est factum* would have been a good plea and the plaintiff would have been entitled to claim rescission of the agreement and transfer on the basis that the same were invalid as not having been his act and deed. I need quote no further authority for that proposition than the decision of this court in *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914 , affirming (1955) 15 W.W.R. 385 . However, in 1953, one, Marty Erickson, who stated himself to be, and who evidently was, a representative of the defendant, Canadian Williston Minerals Ltd., attended the plaintiff and demanded from him delivery of the duplicate certificate of title to his land so that the aforesaid transfer of the one-half interest could be registered. The plaintiff then took the position that he had never entered into any agreement doing more than granting to the Prudential Trust Company a right to lease the lands upon the Rio Bravo lease lapsing. The plaintiff told Mr. Erickson that he wished to confer with his solicitor, a Mr. N. R. McDonald, Q.C., of Weyburn, and obtain his advice as to what he should do. The plaintiff immediately attended Mr. McDonald, Q.C., and on his arrival at the latter's office found Mr. Erickson there ahead of him.

24 The learned trial judge has found that the situation was then fully explained to Mr. McDonald by Mr. Erickson and that the plaintiff, in turn, was fully advised as to the nature and effect of the documents which he had delivered to Claude Macdonald, purporting to represent the Prudential Trust Company Ltd. in 1951.

25 Mr. N. R. McDonald, Q.C. then advised the plaintiff, and he has so admitted, that he, the plaintiff, would save trouble and expense if he complied with the demand that was made upon him. Mr. N. R. McDonald, Q.C., however, pointed out that the assignment dated May 2, 1951, purported to assign a one-half interest in all oil and gas and *related hydrocarbons* , and that it was then the prevailing legal opinion in Saskatchewan that a document referring to "related hydrocarbons" could not be registered under the land titles system. Mr. N. R. McDonald, Q.C. further pointed out that the transfer executed in 1951 by the plaintiff was of an interest in all mines and minerals except coal and that, therefore, it did not comply with the agreement to assign in the assignment dated May 2, 1951, and last referred to. After a considerable interval of time and some correspondence between Mr. N. R. McDonald, Q.C. and the legal representatives of the defendant, Canadian Williston Minerals Ltd., Mr. N. R. McDonald, Q.C. caused the plaintiff to execute a transfer dated August 4, 1954, which transfer purported to convey an undivided one-half interest in all petroleum and natural gas on the said lands. This transfer Mr. McDonald, Q.C. delivered to the defendant, Canadian Williston Company.

26 The affidavit of value attached to the said transfer sets out the sum of $80 but it is admitted by the defendant, Canadian Williston Minerals Ltd., that no such payment was made and that this amount of $80 was one and the same amount that they were advised had been paid to the plaintiff on the original transaction. The plaintiff had testified that he received no money whatsoever from Claude Macdonald at the time he executed the documents in 1951. A receipt produced at trial as Ex. D-1 was shown to him and he acknowledged that the signature in pencil thereon appeared to be his signature but he swore that he had never used a pencil to sign a document. Mr. Claude Macdonald, however, in giving his evidence, had sworn that he did make in cash the payment evidenced by such receipt.

27 The plaintiff commenced this action in May, 1958, claiming therein, *inter alia* , a declaration that the transfer was void and for an order vesting the petroleum and natural gas in the name of the plaintiff, an order removing the caveat filed against the lands by the defendant, Prudential Trust Company and, in the alternative, for damages for deceit against the defendant, Prudential Trust Company Ltd.

28 In so far as the action for rescission is concerned, I am of the opinion, with respect, that the judgment of the court of appeal for Saskatchewan refusing such remedy is correct. It would appear that it is unnecessary to determine whether the original agreement of May 2, 1951, was altogether void or simply voidable. Since the agreement could only be attacked by the plaintiff and unless so attacked always bound the defendant, Prudential Trust Company, it would appear to have been voidable, although once the plaintiff established his plea of *non est factum* thereto, the contract was avoided as of its inception. Therefore, the plaintiff, upon having been fully informed of the fraudulent representation which caused his execution of that contract, and fully advised by his solicitor of his rights when he chose to affirm the agreement rather than avoid it, is bound by that election and cannot now obtain rescission: *Clough v. London & N.W.* Ry. (1871) LR 7 Ex 26, at 34,

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41 LJ Ex 17, and *Barron v. Kelly*, [1918] 2 W.W.R. 131, 56 S.C.R. 455 , reversing [1917] 3 W.W.R. 65, 24 B.C.R. 283 , *per* Anglin, J. at p. 148, and Brodeur, J. at pp. 153-4.

29 On the other hand, if the agreement of May 2, 1951, were altogether void and not merely voidable, the plaintiff made a new agreement in 1954 when all of the information as to the fraud and as to his rights had been furnishd him by his solicitor. The consideration for that new agreement may be found in the forbearance of the defendant, Canadian Williston Com pany, from engaging the plaintiff in litigation and, further, in the result of the new agreement that the plaintiff retain the related hydrocarbons and all mines and minerals except oil and natural gas. In so far as the mines and minerals except natural gas are concerned, it is probable that the transfer delivered in May, 1951, not being in accordance with the assignment, would have been subject to rectification but that in itself would not have entailed litigation. The omission, however, of "related hydrocarbons" is a variation from the original alleged invalid assignment of May, 1951, and even if a document containing those words had not been subject to registration under *The Land Titles Act* , RSS, 1940, ch. 98, now 1960, ch. 65, the agreement, if valid, would have bound the parties thereto. We were informed during argument in this court that there may well have been a value in such related hydrocarbons.

30 There is no doubt, however, that the right to take action for damages for deceit may still exist despite the loss of the right to take action for rescission: *Barron v. Kelly, supra* . The issues upon which it must be determined whether the plaintiff has lost this right are whether in executing the conveyance of August, 1954 and delivering the same to the defendant, Canadian Williston Company, he has entered into a compromise of that right or whether his conduct has estopped him from asserting it. *In Barron v. Kelly* (at p. 141) the plaintiff's solicitor, in forwarding further payments to the defendant after the plaintiff had discovered the fraud, wrote:

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

31 It may be argued that the plaintiff represented as he was by his solicitor, Mr. N. R. McDonald, Q.C., in 1953 and 1954, upon executing the transfer of August, 1954 and causing it to be forwarded to the defendant, Canadian Williston Company, should have had his solicitor advise the defendant in terms to the same effect as those used above. It may, of course, also be argued that the defendant, Canadian Williston, was effectively represented by legal advisers and had it been intended that the plaintiff upon executing the transfer should release all his claims of any kind, it was quite within that defendant's power to require the execution of a release in proper form.

32 Not only did the defendant, Canadian Williston Company not require such release but the defendant, Canadian Williston, did not deliver to the plaintiff or to his solicitor the assignment of May 2, 1951, which had been acquired by the original alleged fraud. This document was produced by the defendant upon the examination *de bene esse* of the agent, Claude Macdonald, held in Toronto. It should be noted that that document had, in addition to the covenants granting a transfer of the mineral rights, i.e., the covenants which were alleged to have been fraudulently inserted, an option to the defendant, Prudential Trust Company, of a 99-year petroleum and natural gas lease upon the plaintiff's lands when the existing lease should lapse, i.e., the only covenant which the plaintiff has testified he thought he was executing. Although neither defendant has since 1954 asserted any right under that agreement of May 2, 1951, there has been no occasion to do so. I am of the opinion that counsel for the appellant, plaintiff, in this court rightly argued that the failure to deliver that document to his client in August, 1954, is evidence of considerable weight that no compromise was intended.

33 The evidence of Mr. N. R. McDonald, Q.C., on the question of a possible compromise or release of claims, is enlightening. Mr. McDonald, Q.C. testified that the only reason for the variation in the form of the transfer between that executed by the plaintiff in 1951 and the one executed in 1954, was because he had pointed out to the plaintiff that the term "mines and minerals" included more than the term "petroleum and natural gas" and that his purpose was to make the transfer conform with the original agreement to that extent. This question was put to him:

> Q. Well, specifically, was there any discussion of a release for any claim that Pepper might have against the companies or either of them?

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34 And Mr. McDonald replied: "Oh no." And to a further question:

> Q. As I understand you then, Mr. McDonald, the sole purpose in executing and delivering a new transfer was to bring the transfer, the document of conveyance, in conformity with the original agreement, Exhibit P.2?

35 Mr. McDonald replied: "That is right, to enable Canadian Williston to effect registration."

36 The plaintiff testified in cross-examination that when he executed the document in 1954 he was not thinking about claiming damages and did not consider that subject until he found that many other persons were similarly involved. It would appear that the plaintiff came to this opinion in November, 1956, when he joined an association known as the Mineral Owners' Protective Association.

37 These questions and answers are relevant:

By Mr. Nicol:

> Q. For better than two years you were sure that you had settled your own case? A. Yes, I knew I had settled that, I knew that, but then I wasn't satisfied with it after I had found out so many were in it.
>
> Q. When you talked to your friends in the Mineral Owners Protective Association, then you decided that the settlement you had made was no good is that it? A. No, I didn't figure it was no good, but I didn't see that these men should go around through the country points and take what us old people had made during our lifetime.

38 Upon the whole of the evidence, I am of the view that even as between the plaintiff and the defendant, Canadian Williston, there was no discussion of any compromise or mutual release and no intention by either that this transaction should constitute a compromise or mutual release. Moreover, although Claude Macdonald in 1951 had represented himself as being the agent of the defendant, Prudential Trust Company Limited, Mr. Erickson in 1954 only represented himself as agent for the defendant, Canadian Williston. Mr. N. R. McDonald, Q.C.'s dealings were with Canadian Williston alone and the Prudential Trust Company did not know of the existence of either the 1951 assignment and transfer or the 1954 transfer until it was called upon to execute a transfer of all petroleum and natural gas rights which it held as trustee for the defendant, Canadian Williston. This document was dated September 22, 1955. Mr. George Douglas Ash, the manager of the defendant, Prudential Trust Company, Calgary branch, in cross-examination, was asked:

> Q. Yes. And was there any suggestion made to you that in some fashion there had been some kind of a settlement made on behalf of the Prudential Trust Company by somebody? A. Not to my knowledge, no.
>
> Q. No. So that as far as your Company is concerned, you have never had — you had no knowledge of the matters in dispute in this action until the action was commenced?
>
> A. That's right.

39 I, therefore, am unable to conclude that any transaction between the plaintiff and the defendant, Canadian Williston, as represented by Mr. Erickson and by its solicitors in 1953 and 1954 could have any effect as a compromise of a claim against the defendant, Prudential Trust Company, which arose in May, 1951, at the time the original documents were executed by the plaintiff.

40 The alternative claim for the damages for deceit is made against the defendant, Prudential Trust Company Limited, alone. One of the defences against such claim as submitted by counsel for the defendant, Prudential Trust Company, was that Claude Macdonald was never its employee or agent. It would appear that a group of persons and probably the third parties,

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Edward P. Lamar and Bueno Oils Ltd., had entered into a plan for acquiring interests in lands which might have in or under them oil or natural gas, and that for that purpose it sent around the countryside various agents including the said Claude Macdonald. Edward P. Lamar and the defendant, Prudential Trust Company, had entered into an agreement in title to the deed of indemnity on November 1, 1950. This agreement was produced at trial as Ex. D-3. Under that agreement, the Prudential Trust Company covenanted to act as trustee for Lamar's interest and on Lamar's instructions and at his expense to file caveats in the name of a trustee to protect Lamar's interest and to take any and all proceedings necessary to protect or enforce his interests. Lamar covenanted in the said agreement to indemnify the Prudential Trust Company from all liability incurred by reason of its having acted on his behalf, which might result from the filing of the caveats or accepting any registrable title or "by reason of all actions, suits, proceedings whatsoever." On September 22, 1955, when the Prudential Trust Company conveyed to Canadian Williston all the interests it had held as bare trustee it executed a similar covenant of indemnification from the latter. Although the Prudential Trust Company did not print the form of assignment which was tendered to the plaintiff for execution in May, 1951, by Claude Macdonald, it knew of the existence of that most deceptive form of document. It had had complaints prior to that date and, in fact, prior to that date had insisted on the drafting of a new form entitled not merely "Assignment" but "Assignment of an undivided one-half interest in mines and minerals." The form presented in May, 1951, and produced at trial as Ex. P-2, purports in the printed words to be an assignment to the "Prudential Trust Company Limited of the City of Calgary in the Province of Alberta (hereinafter called the 'Assignee')."

41 The plaintiff swore that when Claude Macdonald came to him he said "I am representing the Prudential Trust Company, Prudential Trust Oil Company ... ." Claude Macdonald was examined de *bene esse* and testified that he would purchase petroleum and natural gas rights in the name of the Prudential Trust Company and that the documents were always taken in the name of the Prudential Trust Company.

42 I am ready to hold that the defendant, Prudential Trust Company Limited, when it permitted Claude Macdonald to be armed with documents such as the assignment, Ex. P-2, in form which I have outlined, and when it undertook to have the titles to the petroleum and natural gas interest put in its name and caveats filed in its name, constituted Claude Macdonald its agent for the purpose of obtaining such conveyances of petroleum and natural gas interests. Therefore, the defendant, Prudential Trust Company, is liable for the fraud or deceit of its agent.

43 *Kerr on Fraud and Mistake* , 7th ed., said at p. 492:

> A principal is liable to third persons for frauds, deceits, concealments, torts, and omissions of duty of his agent, when acting in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.

44 I have, therefore, come to the conclusion that despite the fact that the plaintiff's action for rescission is barred, he is entitled to recover damages against the defendant, Prudential Trust Company Limited, for deceit.

45 Turning to the quantum of such damages, there is a sparsity of evidence in the record of the trial. A witness, Robert S. Blackett, was called by the plaintiff to give expert evidence as to the quantum of damages, and the defendant, Prudential Trust Company Limited, called another expert, Peter B. Watkins, for such purpose. It would appear from an examination of the evidence of each of them that they did not differ greatly in their estimate of the damages which, of course, must be the present value of the undivided one-half interest in the royalties payable under the Rio Bravo lease.

46 Taking the evidence of Mr. Watkins, which cannot be viewed as being unfavourable to the defendant who called him, that sum would appear to be $140,100. Such amount includes the royalties which were payable from the commencement of the drilling by Rio Bravo Oil Company in 1957 up to the date of the trial. It does not appear in the record whether the plaintiff received the full 12 1/2 per cent of the royalties during the whole or any part of that period, or whether he received only one-half, 1. e., 6 1/4 per cent.

47 I, therefore, am of the opinion that there should be judgment for the plaintiff for the sum of $140,100 but subject to the proviso that the defendant, Prudential Trust Company, may, at its option to be exercised within two months from the date of this judgment, proceed to a reference before the proper officer of the Court of Queen's Bench for the province of Saskatchewan, the costs of such reference to be paid by such defendant if it should result in an assessment of damages at or above the said sum of $140,100 but otherwise by the plaintiff.

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Tab 11

2003 CarswellOnt 3290
Ontario Superior Court of Justice

Royal Bank v. 131864 Ontario Ltd.

2003 CarswellOnt 3290, [2003] O.J. No. 6281

Royal Bank of Canada, Plaintiff and 1318364 Ontario Inc., W. Garth Fair Holdings Ltd., 1153579 Ontario Inc., W. Garth Fair and Michael Kelly, Defendants

W. Garth Fair Holdings Ltd. and, W. Garth Fair, Plaintiffs by Counterclaim and Royal Bank of Canada and Dwight Hoit and Dave Cross, Defendants to the Counterclaim

Swinton J.

Heard: February 13, 2003
Judgment: February 21, 2003
Docket: C-691/2001

Proceedings: affirmed *Royal Bank v. 131864 Ontario Ltd.* (2003), 2003 CarswellOnt 3239 (Ont. C.A.)

Counsel: *Bruce S. Dawe*, for Plaintiff / Moving Party
Derek A.J. D'Oliveira, for Defendants / Responding Parties, W. Garth Fair, W. Garth Fair Holdings Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Guarantee and indemnity --- Guarantee — Grounds for termination of guarantee — Duress
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment, as three companies were in default of their obligations to plaintiff, and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant alleged duress in formation of forbearance agreement — Plaintiff's motion granted — Economic duress may make contract voidable if there is illegitimate pressure that amounts to coercion of will or puts victim in position where he has no realistic alternative — Economic duress may make contract voidable unless victim by conduct, express or implied, affirms impugned contract when no longer victim of duress — Although validity of original guarantee might be subject to attack on grounds of duress, there was no evidence of duress in formation of forbearance agreement — At most, defendant feared that threat of criminal proceedings would be resurrected in future — Surrounding circumstances negated claim of duress in forming of forbearance agreement — Defendant took part in negotiations of forbearance agreement with assistance of legal counsel — There was no evidence of continuing duress after formation of forbearance agreement.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment, as three companies were in default of their obligations to plaintiff, and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant alleged duress in formation of forbearance agreement — Plaintiff's motion granted — Economic duress may make contract voidable if there is illegitimate pressure that amounts to coercion of will or puts victim in position where he has no realistic alternative — Economic duress may make contract voidable unless victim by conduct, express or implied, affirms impugned contract when no longer victim of duress — Although validity of original guarantee might be subject to attack on grounds of duress, there was no evidence of duress in formation of forbearance agreement — At most, defendant feared that threat of criminal proceedings would be resurrected in future — Surrounding circumstances negated claim of duress in forming of forbearance agreement — Defendant took part in

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negotiations of forbearance agreement with assistance of legal counsel — There was no evidence of continuing duress after formation of forbearance agreement — There was no issue of credibility which required trial, nor were there contested facts which required trial — On uncontested evidence, particularly that of defendant, there was no illegitimate pressure imposed on him by bank when he signed forbearance agreement — Furthermore defendant affirmed forbearance agreement by his conduct — There was no evidence of protest about enforceability of forbearance agreement until after bank demanded payment in 2001 — Plaintiff did not breach confidentiality provisions of forbearance agreement — Even if plaintiff had breached confidentiality provisions of forbearance agreement, it would only excuse future performance, not existing liability under loans and guarantees — There was no triable issue with respect to defendant's counterclaim — Monies paid prior to forbearance agreement could not be recovered, given release of claims against plaintiff in forbearance agreement.

Civil practice and procedure --- Summary judgment — Evidence on application — Affidavit evidence — Based on information and belief
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment, as three companies were in default of their obligations to plaintiff, and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant alleged duress in formation of forbearance agreement — Plaintiff's motion granted — Economic duress may make contract voidable if there is illegitimate pressure that amounts to coercion of will or puts victim in position where he has no realistic alternative — Economic duress may make contract voidable unless victim by conduct, express or implied, affirms impugned contract when no longer victim of duress — Although validity of original guarantee might be subject to attack on grounds of duress, there was no evidence of duress in formation of forbearance agreement — Plaintiff did not breach confidentiality provisions of forbearance agreement — Even if plaintiff had breached confidentiality provisions of forbearance agreement, it would only excuse future performance, not existing liability under loans and guarantees — Defendant failed to provide affidavit from bank official allegedly in receipt of confidential information or threats against plaintiff; only evidence was defendant's affidavit on information and belief — While affidavit may be on information and belief, adverse inference may be drawn from failure of a party to provide evidence of persons having personal knowledge of contested facts.

MOTION by plaintiff for summary judgment.

***Swinton J.*:**

1 The plaintiff, the Royal Bank of Canada, has brought a motion for summary judgment against the defendants W. Garth Fair Holdings Ltd., W. Garth Fair and Michael Kelly. The plaintiff has claimed against the defendants in respect of indebtedness arising out of certain loans and guarantees. Mr. Kelly did not oppose the motion, and judgment against him was given at the end of the oral argument of the motion. The two numbered companies, referred to as 131 and 115 in these reasons, have been noted in default.

The Facts

2 Around December 10, 1998, the defendant Garth Fair signed a guarantee for the loans of each of the numbered companies, 131 and 115, and for Holdings. As well, Holdings signed a guarantee for the indebtedness of 131. Mr. Fair has provided an affidavit in which he claims that he signed the guarantees because of duress. Specifically, around this time, be was told by Keith Vanhinsberg, his Royal Bank account manager, that the plaintiff was investigating him with respect to suspicions that he was kiting cheques in his personal bank accounts. He claims that he was forced to sign the guarantee personally and on behalf of Holdings or risk criminal charges. He claims to have spoken to the defendant Dave Cross, also an employee of the plaintiff, who also raised false allegations of kiting.

3 On April 8, 1999, the plaintiff demanded payment from the defendants of the amounts owing pursuant to the various credit facilities and guarantees, as 131, 115 and Holdings were in default of their obligations to the bank, Subsequently, the parties entered into a Forbearance Agreement dated April 30, 1999. In the recitals to the agreement, the various credit facilities and guarantees are set out in detail, and the parties agreed in paragraph 1 that the recitals are true and accurate. In

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paragraph 2, Holdings, 115 and 131 acknowledge their liability under the credit facilities. In paragraph 3, Holdings, 131, 115, Fair and Kelly acknowledge that the guarantees are good and valid and "shall remain good and valid, binding and enforceable as if the Credit Facilities, as amended by this Forbearance Agreement, had been in effect prior to giving or granting of the guarantees".

4 In paragraph 19 of the agreement, Mr. Fair and Mr. Kelly released and discharged the plaintiff and its agents, servants and employees from all claims existing up to the date of the agreement. Paragraph 21 and 22 contain confidentiality promises to Holdings. Specifically, paragraph 22 provides that the plaintiff shall not provide credit information to third parties in respect of Holdings except as permitted by paragraph 21, and any oral requests by third parties will not be answered by the plaintiff other than to advise that the bank is not authorized to respond other than in respect of a credit information request in the standard form. Paragraph 21 states that the credit information with respect to Holdings will be provided consistent with a draft credit inquiry report attached as Schedule E, provided that there has been no default under the agreement. As well, the agreement provides that if there is a default thereunder, 131, 115, Holdings, Fair and Kelly are jointly and severally liable to the bank for costs and expenses incurred in connection with the preparation of the agreement and enforcement of any remedies.

5 As of January 26, 2001, 131, 115, and Holdings were in default of their obligations under the Forbearance Agreement, and on January 29, 2001, the plaintiff demanded payment.

6 Mr. Fair argues that the initial guarantees were obtained by duress, and duress also tainted the Forbearance Agreement. Therefore, he claims that the guarantees are not enforceable. Alternatively, he argues that the plaintiff has breached the confidentiality provisions of the Forbearance Agreement, and this is a fundamental breach which excuses him and Holdings from performance on the guarantees. There is also a counterclaim in which damages are sought against the bank for breach of the agreement and against two employees, Dwight Hoyt and Dave Cross, for inducing breach of contract. As well, Mr. Fair claims the return of $180,000 paid on behalf of the companies in 1999 and 2000. Finally, Mr. Fair claims that the damages owing to him should be set off against the claim by the bank.

The Test on a Motion for Summary Judgment

7 On a motion for summary judgment, the onus is on the moving party to put forward evidence that, in conjunction with all the material filed, shows that there is no genuine issue of material fact that requires a trial for resolution (Rule 20.04(2)). However, the responding party can not rest on allegations or denials in the pleadings, but has an evidential burden to provide material from which the judge can conclude that there is a genuine issue for trial (Rule 20.04(1); *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (Ont. C.A.), at 104). The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial (*Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank* (1999), 173 D.L.R. (4th) 468 (Ont. C.A.), at 482-83).

8 Ultimately, the purpose of the summary judgment motion is, in the words of Borins J.A. in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 111 O.A.C. 201 (Ont. C.A.), at 207, "to isolate, and then terminate, claims and defences that are factually unsupported". In making that determination, the role of the motions judge is not to assess credibility, make findings of fact, nor weigh the evidence (*Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.), at 235-6). However, where a motions judge is satisfied that the only issue is a question of law, he or she may determine the question (Rule 20.04(4)).

Duress

9 Counsel for the plaintiff rests his case on the terms of the Forbearance Agreement. He wisely conceded that there would be a genuine issue for trial with respect to the validity of the original guarantees, given the evidence of duress from Mr. Fair and the contradictory evidence of Mr. Cross. Clearly, there is an issue of credibility here which requires a trial. However, counsel argues that there is no genuine issue for trial with respect to the validity of the Forbearance Agreement, and the bank's claim rests on the terms of that agreement. Once again, Mr. Fair takes the position that the agreement was obtained through economic duress.

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10 Economic duress may make a contract voidable. However, a party claiming to have been a victim of economic duress must prove that there has been illegitimate pressure of such a degree that it amounts to a coercion of the will or puts the victim in a position where he has no realistic alternative but to submit (*Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (Ont. C.A.) at p. 15 (Quicklaw)). In that case, the Court went on to state that duress makes an agreement voidable, unless the victim, through conduct, express or implied, affirms the impugned contract at a time when he is no longer the victim of duress.

11 Mr. Fair's only evidence with respect to duress at the time that he signed the Forbearance Agreement is found in paragraph 8 of his affidavit, where he says, "I executed said forbearance agreement and related documentation in large part because I was afraid that the Plaintiff would resurrect its threats of criminal prosecution if I failed to do so and I had not at that time located the tape recording". The tape referred to is one in which Mr. Vanhinsberg allegedly said things which would have confirmed the falsity of the kiting allegations.

12 This paragraph must be read with the earlier paragraph in Mr. Fair's affidavit where he states that he received a letter from Mr. Cross dated January 8, 1999 confirming that the Plaintiff would not be "pursuing its investigation into the activities surrounding your personal account, 1318364 Ontario, 1153579 Ontario, W. Garth Fair Holdings, and 1278127 Ontario Inc. with respect to transactions which have occurred to the date of this letter".

13 There is no evidence from Mr. Fair that representatives of the plaintiff made references to the earlier allegations of kiting or made any threats in the course of negotiations with respect to the Forbearance Agreement. It should also be noted that the agreement was the subject of negotiations between the parties, and the defendants had legal representation during this period. In fact, there is in evidence a letter from their counsel seeking to modify the language in the draft agreement.

14 Mr. Fair also states that he has been advised by Franca Berlingiera, a TD bank manager, that prior to the Forbearance Agreement, in January, 1999, she received a telephone call from Dan Morris at the Royal Bank stating that the plaintiff believed that there had been kiting going on in Mr. Fair's accounts. Mr. Fair puts no date on when he was advised of this information, nor does he provide an affidavit from Ms. Berlingiera.

15 Mr. Cross filed an affidavit in response which denies that he ever threatened Mr. Fair with criminal prosecution if Mr. Fair did not sign the guarantee or Forbearance Agreement. In particular, he states that between his January 8, 1999 letter and April 30, 1999, he did not raise any concerns about possible cheque kiting with Mr. Fair and never threatened him with criminal prosecution if he failed to execute the Forbearance Agreement. Daniel Morris, an account manager, makes the same statements in his affidavit.

16 The plaintiff argues that there is no genuine issue for trial with respect to the validity of the Forbearance Agreement, because there is no factual basis for a trial judge to find economic duress. On a motion such as this, I am required to take a good hard look at the evidence to determine whether there is a genuine issue of fact requiring a trial. To succeed on a claim of economic duress, Mr. Fair must prove that there was illegitimate pressure put on him by the bank that coerced him into signing the agreement. Here, there is no direct evidence from Mr. Fair of any communication by any Royal Bank employee of a threat to prosecute him for kiting at any time after January 8, 1999. Indeed, he included the letter of January 8, 1999 from Mr. Cross in his materials, which indicated that there would be no further investigation. At most, Mr. Fair states that during the negotiation of the Forbearance Agreement, he *feared* that the threat of criminal proceedings would be resurrected in the future. That is not evidence of illegitimate pressure imposed on him by the bank at the time of the signing of the Forbearance Agreement.

17 Moreover, the surrounding circumstances negate the claim of duress at the time of the agreement. Mr. Fair engaged in negotiations with respect to the terms of the agreement. He sought and obtained confidentiality provisions. He had the benefit of legal counsel, and he gave a release of his legal claims against the bank and affirmed the guarantee which he had given. Moreover, there is a letter in Schedule F of the agreement, to be sent to Mr. Fair in accordance with paragraph 23, in which the bank again states that it is not pursuing any investigation into the accounts of Holdings, 115, 131 and Fair with respect to transactions which have occurred to the date of this letter.

18 There is no issue of credibility here which requires a trial, nor are there contested facts which require a trial. On the uncontested evidence, particularly that of Mr. Fair, there was no illegitimate pressure imposed on him by the bank when he

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signed the Forbearance Agreement. Therefore, he can not prove an essential element of duress. Pursuant to Rule 20.04(4), a motions judge can determine a question of law on uncontested facts. In my view, duress is not made out here.

19 Furthermore, if an individual who has been the subject of duress affirms an otherwise voidable agreement when he is no longer subject to duress, the agreement is valid and enforceable, Here, even if there had been duress at the time that the agreement was signed, Mr. Fair appears to have affirmed the agreement by his conduct. There is no evidence of any protest about the enforceability of the Forbearance Agreement until sometime after the bank demanded payment on the loans and guarantees in January, 2001.

20 The only evidence that could possibly show continuing duress after the agreement was made is Mr. Fair's reference to Marika Cantwell, the replacement of Franca Berlingiera as TD bank manager. Mr. Fair says that Marika Cantwell informed him that she was aware, from discussions with Ms. Berlingiera, of the telephone call in January, 1999. This conversation is not proof of duress by the plaintiff following the agreement, since the communication pre-dates the signing of the Forbearance Agreement. Moreover, the alleged communication was not made by a representative of the plaintiff to Mr. Fair, but by Ms. Berlingiera. However, Mr. Fair goes on to say that Ms. Cantwell stated that "she herself had been contacted by an undisclosed person at the Royal Bank, subsequent to the execution of the forbearance agreement, and given similar information to that given to Franca." No date of the communication to Ms. Cantwell is given, nor is there evidence of the date of the communication to Mr. Fair.

21 There is a serious problem with this statement, because the information is given on the basis of information and belief. While this is permissible in an affidavit on a motion for summary judgment, Rule 20.02 states that while an affidavit may be on information and belief, at the hearing, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts. Ms. Cantwell's evidence is very important to the claim of ongoing duress, as well as the claim that the confidentiality provisions of the agreement were breached. Therefore, I feel it appropriate to draw an adverse inference from the fact that Mr. Fair did not seek to have Ms. Cantwell provide an affidavit nor examine her as a witness. I am not satisfied with counsel's explanation as to why Mr. Fair chose not to do so.

22 As events developed, the plaintiff obtained an affidavit from Ms. Cantwell shortly before the hearing. She denied receiving information from any one at the Royal Bank that Mr. Fair was kiting cheques or telling Mr. Fair that a representative of the Bank told her that Mr. Fair was kiting cheques. This caused Mr. Fair to make a further affidavit, which changed the tenor of what he had said in his first affidavit. He suggested that Ms. Cantwell was not being forthright, and then stated that Ms. Cantwell had told him that someone at the Royal Bank told her of "suspicious conduct" on his part, rather than kiting.

23 In fact, the reference in her affidavit to kiting is reasonable, as the implication in Mr. Fair's first affidavit was that there was a reference to kiting made to the TD. The fact that Mr. Fair now says she was told of "suspicious conduct" suggests that he is trying to create an issue of credibility, where there is really no *genuine* issue for trial with respect to duress.

24 Once again, when this evidence is considered, it does not show that there was duress after the agreement was signed. Again, duress occurs when there is illegitimate pressure placed on the victim. Even if a bank employee at some time made a comment to Ms. Cantwell about suspicious conduct by Mr. Fair, that does not constitute illegitimate pressure on him by the bank that would have prevented him from objecting to the enforceability of the Forbearance Agreement. Indeed, such a claim seems spurious, given that the agreement expressly provided confidentiality provisions for his protection. As Borins J. observed in *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Ont. Gen. Div.), it is not enough for a responding party to show that there is an issue of credibility; there must be a *genuine* issue of credibility (at 29). Here, the defendant's evidence of duress after the signing the agreement does not create a such a genuine issue of fact requiring a trial.

25 In sum, there is insufficient evidence to prove duress, either prior to the signing of the agreement or after. Therefore, the Forbearance Agreement is valid and binding, as are the guarantees, given the terms of the agreement.

26 The defendants have also argued that there was no consideration for the Forbearance Agreement. Clearly, there was consideration in the form of the bank's promise to forbear after the default on the loans by the various corporate borrowers (see *Toronto Dominion Bank v. Cordi*, [1997] O.J. No. 1280 (Ont. Gen. Div.)) at paragraph 9).

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27 W. Garth Fair Holdings Ltd. (Holdings) is directly indebted to the plaintiff for $94,891.08, as a result of loans received from the plaintiff. Arrangements for the credit facilities were made around December 4, 1998. No evidence has been entered by the defendants to call into question that funds were advanced, and that this is the correct amount owing. Indeed, that is acknowledged in the Forbearance Agreement. Thus, at a minimum, there is no genuine issue for trial with respect to this indebtedness.

Breach of the Forbearance Agreement

28 This brings me to the issue of the breach of the Forbearance Agreement. Mr. Fair states in his affidavit that the plaintiff fundamentally breached the agreement in three ways: the communications to Marika Cantwell outlined above; the fact that the plaintiff provided a client signature card in respect of his account to M. Steven Alizadeh, a solicitor with Lafleur, Brown; and the fact that the plaintiff transferred his accounts to its Risk Management Facility, with the result that people inquiring about his account were aware that the accounts were risky. He also complains that he was subject to a campaign of harassment by Dwight Hoyt. On the one hand, he argues that this is a fundamental breach of the agreement, which excuses him and Holdings from their obligations and entitles him to the return of monies paid in 1999 and 2000; alternatively, the breach gives rise to damages against the bank for breach of contract and against Hoyt and Cross for inducing breach of contract.

29 I note that the confidentiality provisions speak only of the release of credit information about Holdings, and not Mr. Fair personally, yet his evidence seems to indicate that the offending communications were about him personally, rather than Holdings. Therefore, on that ground alone, there appears to be no evidence of a breach of the agreement.

30 Even if the agreement extends protection to Mr. Fair personally, the evidence does not support a claim for damages for breach of contract. Any complaint with respect to communications to Ms. Berlingiera in January, 1999 is irrelevant, as any claim arising from this comment was released pursuant to the Forbearance Agreement.

31 While the alleged communication to Ms. Cantwell is said to be after the Forbearance Agreement, the evidence with respect to Ms. Cantwell suffers from the deficiencies noted above, in that it is on information and belief on a key issue. Moreover, at most it suggests that some unnamed person made a comment about Mr. Fair's "suspicious conduct" at some unknown time, and Ms. Cantwell has denied any communication about kiting from the bank. In my view, there is no genuine issue for trial here with respect to the breach of the promise to provide credit information about Holding in the standard written form. However, even if there was the communication about suspicious conduct to Ms. Cantwell, there is no evidence of any damages suffered as a result of the breach. At most, Mr. Fair says that he believes the communications impaired his relations with TD Bank. Thus, there is no genuine issue requiring a trial here, as there is no evidence of breach of the confidentiality provisions, nor damage flowing therefrom.

32 Mr. Fair also states that a signature card from his account was improperly provided to Mr. Alizadeh in the course of other litigation. Again, this appears to be a personal account matter, not a matter affecting Holdings. As well, I do not see how this violates the confidentiality provisions, since the commitment is not to provide credit information respecting Holdings to third parties, except in the standard written form. The signature card is not credit information. As well, there is no indication of any damages suffered as a result. Indeed, if this card was produced because it was relevant in the other litigation, I can not see how any damage was caused to Mr. Fair, as he would be under an obligation personally to provide relevant documents in that action.

33 Finally, the transfer of the accounts to the Risk Management Facility does not constitute a breach of the confidentiality provisions, which limit the information which is to be disclosed about Holdings. This does not prevent the bank from dealing with problem loans in accordance with normal practice. Again, there is no indication of loss caused by this transfer, except for Mr. Fair's statement, "I undoubtedly lost business as a result of this handicap", without any detail. This appears to me the type of self-serving statement, without detailed facts, about which the Supreme Court of Canada spoke in disapproving terms in *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 (S.C.C.), at 12.

34 In my view, the evidence does not make out the claim of breach of the confidentiality provisions. I am entitled to assume that the defendants have put their best foot forward, and this would be the evidence presented at trial. In my view,

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there is no triable issue with respect to damages for breach of contract. Obviously, then, there is no evidence of a fundamental breach. In any event, while the defendants argue that breach of these provisions would be a fundamental breach excusing them from performance under the agreement, this is a misunderstanding of the effect of any breach of the confidentiality provisions. At most, it might excuse the defendants from further performance, but it would not excuse the existing liability under the loans and the guarantees.

35 Moreover, the claim for the return of $180,000 paid in 1999 and 2000 does not raise a triable issue. Any monies paid prior to the Forbearance Agreement can not be recovered, given that the release of claims against the bank in that agreement precludes an action for recovery of these sums. With respect to any funds paid after the agreement, no legal basis has been shown to support a claim for their return.

36 Finally, there is an allegation of harassment by Hoyt, in the form of letters and other actions. There is no detail about the content of this harassment. While this is said to be in violation of the Forbearance Agreement, I see nothing in that document which prevents Mr. Hoyt from communicating with Mr. Fair. However, more importantly, the claim against Mr. Hoyt is in tort, for inducing breach of contract. There is no evidence that any contract between the bank and Mr. Fair was breached, and therefore, the defendants can not prove an essential element of the tort. Nor is there any evidence that Mr. Cross did anything in relation to the breach of the agreement Therefore, there is no triable issue with respect to the liability of these two individuals, and the claims against these two defendants to the counterclaim must fail.

Conclusion

37 I have concluded that there is no genuine issue for trial, either with respect to the plaintiff's claim or with respect to the counterclaim. Therefore, there is no need to deal with the issues of set-off or stay. The motion for summary judgment is granted, and the plaintiff shall have judgement against Holdings for a principal amount of $102,277.21 and against Mr. Fair for a principal amount of $183,303.13. Pre- and post-judgement interest shall be at the rates set out in the chart which was attached to the Motion Record after the hearing of the motion on February 13, 2003. The counterclaim of Fair and Holdings is dismissed.

38 If the parties can not agree with respect to costs, they may make brief written submissions within 21 days of the release of this decision, after exchanging draft bills of costs.

Motion granted.

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2003 CarswellOnt 3239
Ontario Court of Appeal

Royal Bank v. 131864 Ontario Ltd.

2003 CarswellOnt 3239

ROYAL BANK OF CANADA (Plaintiff / Respondent) and 131864 ONTARIO LTD., W. GARTH FAIR HOLDINGS LTD., 1153579 ONTARIO INC., W. GARTH FAIR and MICHAEL KELLY (Defendants / Appellants)

W. GARTH FAIR HOLDINGS LTD. and W. GARTH FAIR (Plaintiffs by counterclaim / Appellants) and ROYAL BANK OF CANADA, DWIGHT HOIT and DAVE CROSS (Defendants to the counterclaim / Respondents)

Abella J.A., Cronk J.A., and Labrosse J.A.

Heard: September 3, 2003
Judgment: September 3, 2003
Docket: CA C39788

Proceedings: affirming *Royal Bank v. 131864 Ontario Ltd.* (2003), 2003 CarswellOnt 3290 (Ont. S.C.J.)

Counsel: Derek A.J. D'Oliveira for Defendants / Appellants
B. Dawe for Plaintiff / Respondent

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Amending pleadings
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment as three companies were in default of their obligations to plaintiff and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant appealed — Appeal dismissed — Defendant was refused permission to amend his factum to include ground of appeal that would have changed fundamental nature of case — Ground of appeal sought to be added by appellant was neither pleaded nor raised before motions judge.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Hearing new issues on appeal
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment as three companies were in default of their obligations to plaintiff and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant appealed — Appeal dismissed — Defendant was refused permission to amend his factum to include ground of appeal that would have changed fundamental nature of case — Ground of appeal sought to be added by appellant was neither pleaded nor raised before motions judge.

Civil practice and procedure --- Practice on appeal — General principles
In 1998 defendant signed guarantee for debts of two numbered companies and GFH Ltd. — In 1999 plaintiff bank demanded payment as three companies were in default of their obligations to plaintiff and parties entered into forbearance agreement — In 2001 plaintiff demanded payment under forbearance agreement — Plaintiff brought action for payment — Plaintiff brought motion for summary judgment — Defendant appealed — Appeal dismissed — Detailed reasons of motions judge revealed no error.

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APPEAL by defendant from judgment reported at *Royal Bank v. 131864 Ontario Ltd.* (2003), 2003 CarswellOnt 3290 (Ont. S.C.J.) .

***Per curiam*:**

1 At the opening of the hearing of this appeal, we denied a motion by the appellant to amend his factum by pleading a ground of appeal that would have changed the fundamental nature of the case.

2 The ground of appeal sought to be added by the appellant was neither pleaded nor raised before the motion judge.

3 The detailed reasons of the motion judge reveal no error.

4 The appeal is dismissed with costs fixed at $7,000.00.

Appeal dismissed.

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Tab 12

1970 CarswellBC 165
Supreme Court of Canada

Westerlund v. Ayer

1970 CarswellBC 165, 1970 CarswellBC 231, [1971] S.C.R. 131, 13 D.L.R. (3d) 334, 74 W.W.R. 348

Westerlund v. Ayer

Martland, Judson, Ritchie, Hall and Spence, JJ.

Judgment: June 29, 1970

Counsel: *C. D. McQuarrie, Q.C.*, for appellant.
A. W. Johnson, for respondent.

Subject: Contracts; Family

Headnote

Contracts --- Formation of contract — Mistake — Mistake as to nature of agreement (non est factum) — Onus of proof

Family Law --- Domestic contracts and settlements — Attacking validity of contract — Practice and procedure

Deeds and Documents — Agreement between Husband and Wife To Share Property — Written Instrument — Non Est Factum.

Appeal from the judgment of the Court of Appeal for British Columbia (1969) 68 W.W.R. 689, 5 D.L.R. (3d) 507, allowing an appeal from the judgment of Gregory, J. Appeal allowed.

The issue on the appeal was whether a document establishing the ownership of certain shares and admittedly bearing the appellant's signature was, in fact, his deed.

It was *held, per curiam*, that the finding of *non est factum* made by Gregory, J. and concurred in by Davey, C.J.B.C. was based on specific findings of fact and, in particular, that the impugned document was not entered into as the respondent said it was; this was a specific finding that her evidence was not to be believed on the most crucial aspect of the case, and such a finding should not be disturbed.

:
The judgment of the Court was delivered by *Hall, J.*
This appeal arises out of an action brought by the appellant against his former wife from whom he was divorced in December, 1964, for the partition and sale of certain lands registered in the names of appellant and respondent as joint tenants and for an accounting. In defending the action, the respondent claimed to be the beneficial owner of a one-half interest in the shares of a private company known as Fred Westerlund & Sons Limited which will hereafter be referred to as "the company". The question of the ownership of the shares in this company became the principal issue at the trial and in the Court of Appeal (1969) 68 W.W.R. 689, 5 D.L.R. (3d) 507, as well as in this Court. The determination of this issue turned almost wholly on whether a document dated August 8, 1958, Ex. 10, and purporting to be an agreement between the appellant and the respondent, had or had not been entered into between the parties.
The factual situation is somewhat unique in that while appellant denies all knowledge of the document dated August 8, 1958 or of entering into or signing any such document or agreement, he does not deny that it contains his signature. However, in

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acknowledging that the signature was his, he testified that when he was first faced with the document he did not believe the signature on it to be his. In that situation his solicitor, Mr. Ray Hughes, submitted the document to a handwriting expert who said that the signature was that of the appellant. Accordingly, although persisting in his denial that there was any such agreement and that he had ever signed any such agreement, he admitted the signature was his because the handwriting expert said it was. This expert was not a witness at the trial.

The appellant, while in this manner admitting the signature to be his, says it must have been put on the paper dated August 8, 1958 when he was drunk or by some trick when he was unaware that he was putting his signature to what now appears as an actual agreement.

In these circumstances there was a heavy onus on the appellant if he was to succeed in his plea of *non est factum*. The issue between the parties as to the shares fell to be decided on the very contradictory evidence given at the trial and on discovery by the appellant on the one hand and by the respondent on the other.

The learned trial Judge found as a fact the document bearing date August 8, 1958, although signed by the appellant, was not what on its face it purported to be. Accordingly, he gave judgment in favour of the appellant for partition and sale of the real estate held in the joint names of the parties and he dismissed the respondent's counterclaim in respect of the shares in the company. The respondent appealed to the Court of Appeal for British Columbia and that Court (Davey, C.J. B.C. dissenting) allowed her appeal in respect of her claim to one-half of the shares in the company. The judgment of the trial Court was upheld in respect of the partition and sale of the real estate. The appellant now appeals to this Court to restore the judgment of the trial Court in respect of the shares.

The learned trial Judge dealt at length with the alleged agreement of August 8, 1958 and with the contradictory evidence given relative thereto, and he made specific findings of fact and of credibility as follows:

> In support of her position the defendant has produced an agreement in writing purporting to be signed by both parties and to have been executed by them on August 8, 1958, a few days after they had returned from their honeymoon. The defendant swears that it was signed by both of them on the date it bears, that its wording was agreed upon after a discussion lasting half to three-quarters of an hour, and that it set out the understanding they reached on their honeymoon that there should be one pocket-book and that everything should be equal between them and that it was never rescinded or amended. The plaintiff swears that he has no recollection whatever of signing, that if he signed it he must have been too drunk to know that he was signing it, that it does not set out their understanding and that he never even saw the agreement until 1964, by which time of course the marriage was well and truly on the rocks.
>
> On the whole of the evidence I am satisfied that the agreement, Exhibit 10, is not what, on its face, it purports to be. I reject the defendant's evidence that the plaintiff signed it on the date it bears while sober and in full possession of his faculties, and find that if he did sign it he did so without any comprehension of its meaning and without any agreement having been reached between the parties that the shares in the company were to be included in the 50 - 50 division of assets.
>
> As I have made a finding of credibility adverse to the defendant, I believe I owe it to her and to her counsel to give at least some intimation of my reasons for doing so.
>
> First was the manner in which the defendant gave her evidence. It did not impress me favourably that she could remember figures to the last dollar involved in transactions nine years ago and yet, for example, be unable to remember whether or not she had instructed Mr. Nyack to give a copy of the agreement to Mr. McQuarrie. The defendant's memory was either too good when giving evidence favourable to herself in chief or too poor when answering embarrassing questions put to her on cross-examination — perhaps both. Neither her demeanour nor the evidence she gave impressed me favourably.
>
> Second is the inconsistency between the existence of an agreement such as Exhibit 10 sets out and the conduct of both parties. It is common ground that following their return from their honeymoon the parties set about sharing their assets, other than the company, 50 - 50. A chartered accountant was engaged to keep track of their financial affairs. It simply does not make sense to me that everything that was done should be done in such a business-like manner and yet something as valuable as the shares of the company left out. The defendant's evidence was that she was not prepared to transfer any of her assets to joint ownership until their sharing agreement had been put in writing and signed. Her acquiescence until January, 1963, or later in financial statements showing that she had no interest in the company is inconsistent with what she asserts to have been the agreement in force since 1958. At the meeting in Mr. Nyack's office in January, 1963, there was some discussion about dividing the shares in the company. The defendant testified that the

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> plaintiff agreed to divide the shares 50 - 50 provided she would be a wife for the rest of his life. Mr. Nyack's evidence was to the same general effect, that the plaintiff intended to give her a half interest if she was a good wife. It is stretching credulity too far to believe that the defendant would allow any such statement as this to go unchallenged, if, as she asserts, she had an agreement in writing evidencing her entitlement to the shares since August, 1958. If there was such an agreement surely the defendant's claim to the shares would have been based on the agreement, yet it was not even produced, even though the plaintiff and his accountant had gone to Mr. Nyack's office for the very purpose of hearing the defendant's objections to and rectifying the accounts between the parties. Not only was the agreement not produced, but the objections made to matters as shown in the accounts while Mr. Russell was present included no mention whatever of the shares of the company. The agreement was not only not asserted as the foundation of the defendant's claim as of right to be entitled to half the shares and not produced to the accountant who was supposed to rectify the financial statement to show the true state of affairs — it had not, according to Mr. Nyack's recollection, even been produced to him by that time. Mr. Nyack's inability to remember whether it was before or after that meeting that he first saw the agreement is understandable enough because he had some time later given up his file to the defendant at her request and was relying on memory. But the file could have been produced to him to refresh his recollection as to the date on which he first saw the agreement. It was not produced and its nonproduction was not accounted for. I draw the inference that it was not produced because it would have indicated to Mr. Nyack that he had not seen the agreement when the meeting was held. This, coupled with the facts that Mr. Nyack never sent a copy to Mr. McQuarrie, although invited to do so, and that the defendant could not recall whether she had ever instructed Mr. Nyack to send Mr. McQuarrie a copy, leads me to conclude either that it was not in existence on January 17th, 1963 or that the defendant knew that it did not truly set out the understanding that the parties had reached. I rather anticipate myself to observe at this point that I do not find that there was any acquiescence or laches such as Mr. Johnson argued against, which, if it had existed, might have barred the defendant from relying on the agreement now to obtain her shares. On the contrary I find that there was no agreement that she should have any shares. One further inconsistency is the defendant's acquiescence in the plaintiff's giving of six shares to his children and four to her children. The defendant's conduct and that of her former solicitor are quite inconsistent with her belief in the existence of any authentic document such as Exhibit 10 purports to be.
>
> I have no hesitation in rejecting her evidence where it is contradicted by that of the plaintiff or any of his witnesses. In case it might be thought that I have overlooked the defendant's evidence that she inquired about her shares around the time the wills were made in 1959 and that she accepted the plaintiff's assurance that her share certificate had been left with Mr. McQuarrie for safekeeping, let me say that I have considered her evidence but reject it and accept the plaintiff's evidence that no such conversation took place.
>
> . . . . .
>
> I am satisfied on the whole of the evidence that it was never any part of the agreement made between the parties that the defendant would receive half of the plaintiff's interest in the Westerlund Company, and I am satisfied that the agreement they did reach was fully performed by both parties when they put title to their real property in joint tenancy and their money in joint bank accounts.

And in respect of the claim for partition of the real estate, he found as follows:

> I find that they intended to be and became in law equal co-owners of the assets they pooled. I hold as a matter of law that the plaintiff is entitled to partition and an accounting and I so order.

In the Court of Appeal Davey, C.J.B.C., in dealing with the trial Judge's findings of fact, said at p. 690:

> There is ample evidence to support those findings of fact. Since the learned trial judge was justified in disbelieving the evidence of the appellant I shall say little more about that, except to comment later on several attacks on his reasoning, and to emphasize one point lightly touched on by him that in my respectful opinion is conclusive.
>
> I agree that the evidence tendered to support a plea of *non est factum* or fraud must be carefully considered because it is no light thing to relieve a person from a contract in writing on which his signature appears. Some of the niceties of a plea of *non est factum* do not arise in this appeal, because this is not a case of the respondent contending against an innocent party that the document was not his contract, but a case of his asserting against the alleged guilty person that she procured his signature by fraud or a trick, and so cannot rely on the document. If so, the agreement is unavailable to the appellant whether her fraud made the agreement void, as in the case of *non est factum*, or merely voidable, as in the

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> case of ordinary fraud.
>
> The respondent does not remember signing the document, and so he cannot say how the appellant secured his signature. He says he must have been drunk. His firm signature does not appear to be that of a completely drunken man, so I do not think that is the explanation, nor did the learned trial judge proceed on that ground. The respondent must have been tricked in some way into signing it, if his evidence is believed; the learned trial judge believed him, and his evidence does *seem* to have a ring of truth.
>
> When a person pleads that his signature was secured by fraud or a trick, but he cannot say when he signed the document or under what circumstances, the evidence must be examined very carefully. Several ways occur to one by which a person may be tricked into signing a document without knowing that he is doing so, or intending it. In some forms of this type of fraud the more skilful the trick the less likely the victim will know he has been tricked. The moment the respondent's evidence in this case is believed and the appellant's rejected, and the moment it appears that the appellant did not produce the agreement, when its production was called for by circumstances, and she would have produced it if it had been genuine, the inference is inescapable that it is not a genuine document.
>
> Appellant's counsel did not take the ground before us that any finding that the respondent was tricked in some other way into signing the document was outside the allegations made by the respondent in par. 6 of his reply. Indeed, on the trial and before us the appellant made no attempt to confine respondent's case, that he had been tricked into signing the document, to the allegation in his reply that appellant had secured his signature when she knew he was so drunk he could not understand it.

And after directing his attention to several of the attacks made on the learned trial Judge's reasons for disbelieving the respondent, Davey, C.J.B.C. continued at p. 694:

> The most telling circumstance against the appellant, apart from her demeanour, is the fact that in 1959 the respondent secured from his sons 40 out of 100 issued shares in the company, and had two each transferred to his three children and her two children. When he showed her the five share certificates in the children's names, she says she inquired about the certificate for her 45 shares and was told that Mr. G. R. McQuarrie had kept it for safe-keeping. If her evidence was true she believed the certificate for 45 shares in the company had been made out in her name in 1959 and was being held by Mr. McQuarrie. When the respondent told her and Nyack in January or February, 1963 that he had always intended to give her half the company provided she was a good wife, she must have surely replied, if her evidence was true: 'You have already given me half the shares and Mr. McQuarrie holds them for me. I want them.' But she did not say that; she neither called for the share certificate nor produced the agreement. She says she did not want to produce the agreement, because she was trying to hold her marriage together; this notwithstanding it must have been apparent from the respondent's remark that he had grossly deceived her about the share certificate having been made out in her name and left with Mr. McQuarrie for safe-keeping. Her evidence is simply incredible.

Robertson, J.A., with whom Tysoe, J.A. agreed, was of the view that the appellant was not entitled to succeed on his plea of *non est factum*. He said at p. 704:

> In the final analysis, my opinion comes down to this: There is no doubt that the signature on the August 8 agreement is the husband's. One may suspect that it was obtained by the wife by representing that the document was of a different nature from what it was, or that she had him sign on a sheet of paper protruding below another that was placed on top of it and that appeared to be the one he was signing, or that the signature was obtained by some other trick. But there is not a tittle of evidence to support a conclusion that such was the case. Belief that the wife is generally not to be believed does not supply such evidence. There is, therefore, nothing to displace the written agreement.

I do not think that this Court can, in the light of the evidence, disturb the findings of fact made by the learned trial Judge and concurred in by the learned Chief Justice of British Columbia. There was evidence upon which those findings could be made and they are supported by the circumstances emphasized by Gregory, J. and by Davey, C.J.B.C. Robertson, J.A.'s view of the evidence ignored, I think, the specific finding by the learned trial Judge that the document of August 8, 1958 was not entered into as the respondent says it was. This was not a finding that the respondent was generally not to be believed, as Robertson, J.A. suggests, but was a specific finding that her evidence could not be believed on this most crucial aspect of the case. I am unable to discern that in reaching the conclusion that the respondent was not to be believed and in accepting the evidence of the appellant, Gregory, J. acted upon any wrong principle or was influenced by any irrelevant matter. He had the great

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advantage which the Court of Appeal had not and which this Court has not of hearing the parties give their evidence, observing their demeanour and judging as to their veracity with this assistance. Nothing in the record suggests that he failed to use or that he misused the advantage afforded to him of seeing and hearing the witnesses.

I would, accordingly, allow the appeal and restore the judgment at trial, with costs in this Court and in the Court of Appeal. The cross-appeal will be dismissed without costs.

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Tab 13

1988 CarswellOnt 370
Ontario District Court, Judicial District of Peel

Prentice v. Barrie Community Credit Union Ltd.

1988 CarswellOnt 370, [1988] O.J. No. 1888, 26 C.P.C. (2d) 178, 8 A.C.W.S. (3d) 262

PRENTICE v. BARRIE COMMUNITY CREDIT UNION LTD. et al.

West D.C.J.

Judgment: February 4, 1988
Docket: No. 2059/86

Counsel: *Hans J. Saamen*, for moving party (defendant) Barrie Community Credit Union Ltd.
R. Heyd, for moving party (defendant) Orv-Kay Investments Ltd.
O. Bremer, for moving party (defendant) R. John Mitchell.
Wayne Novak, for responding party (plaintiff).

Subject: Civil Practice and Procedure

Headnote

Practice --- Summary judgment — Requirement to show no triable issue

Practice --- Summary judgment — Evidence on application — Affidavit evidence — Sufficiency — Affidavit in defence

Summary judgment — Requirement to show no triable issue — Summary dismissal — Action to rescind mortgages — Plaintiff alleging non est factum — Plaintiff suffering from Alzheimer's disease and being incapable of giving evidence — Plaintiff failing to file material in opposition to motion — No genuine issue for trial — Unlikelihood of any evidence becoming available by trial — Summary dismissal granted — Ontario Rules of Civil Procedure, r. 20.04(2).

Contracts — Rescission — Duress — Action to rescind mortgages — Plaintiff alleging duress and undue influence — Plaintiff suffering from Alzheimer's disease and being incapable of giving evidence — Plaintiff failing to file evidence in opposition to motion for summary dismissal — Plaintiff failing to meet heavy onus to produce evidence in support of claim of non est factum — No genuine issue for trial — Summary dismissal granted — Ontario Rules of Civil Procedure, r. 20.04(2).

Fraud and misrepresentation — Duress and undue influence — Duress — Action to rescind mortgages — Plaintiff failing to file material in opposition to motion for summary dismissal — Plaintiff suffering from Alzheimer's disease and being incapable of giving evidence — Plaintiff failing to meet heavy onus to support claim for non est factum and duress — No genuine issue for trial in light of absence of any evidence supporting plaintiff's claim and unlikelihood of any evidence becoming available by trial — Summary dismissal granted — Ontario Rules of Civil Procedure, r. 20.04(2).

The plaintiff's grandson O needed money to establish a new business. The plaintiff agreed to provide financial assistance and granted a first mortgage on her home to the defendant B Ltd. The mortgage was guaranteed by O and the mortgage loan was advanced to him. The mortgage went into default but before any action was taken by the first mortgagee, a second mortgage was arranged with O Ltd. O again signed as guarantor. The proceeds of the second mortgage were used to pay the arrears on the first mortgage. Both mortgages went into default.

Before any action was taken by the mortgagees the plaintiff commenced an action claiming that when she signed the mortgages she did not understand the consequences to her of default by O and that O had exercised undue influence on her. The plaintiff also alleged that the defendant solicitor had acted for both borrower and lender in each case and had not fully

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explained his position to her.

The defendant mortgagees and the defendant solicitor moved for summary judgment dismissing the plaintiff's claim. Shortly after the motion was launched, the plaintiff's daughter was appointed her litigation guardian on the basis of supporting material disclosing that the plaintiff suffered from Alzheimer's disease and that she was incapable of conducting the action and giving evidence. The plaintiff cross-examined on the affidavit material filed by the mortgagees in support of the motion for summary judgment but did not file any of her own material.

Held:

The motion was granted. The action was dismissed against all defendants other than O.

No allegation of fraud or undue influence was made against any of the defendants, except the defendant O. The statement of claim alleged simply that the plaintiff did not understand the consequences of her actions. In these circumstances, there was a heavy onus of proof resting on the plaintiff if she was to succeed in a claim based on non est factum. The evidence on cross-examination, while it raised questions, fell far short of establishing the facts required to be proven in order for the plaintiff to succeed in her action. The absence of evidence in support of the plaintiff's claim and the unlikelihood of such evidence becoming available by the time of trial militated against a finding that the questions raised were genuine issues for trial.

MOTION by defendants for summary judgment dismissing action.

West D.C.J.:

1 Each of the defendants in this action except the defendant David Osborne has moved pursuant to r. 20.04(2) for judgment dismissing the plaintiff's action as disclosing no genuine issue for trial. In addition, the defendant Barrie Community Credit Union Limited has moved for leave to proceed with power of sale proceedings under its mortgage.

2 The plaintiff owns the north half of Lot 38, Concession 9 in the Township of Nottawasaga in the County of Simcoe. She is the grandmother of the defendant Osborne. In December 1985 Osborne was endeavouring to establish himself in a car renovation business. He approached the plaintiff for financial assistance. She agreed to assist him and was introduced to Denis Bertrand, a mortgage broker. Mr. Bertrand proceeded to arrange a loan from Barrie Community Credit Union Limited. The loan was secured by a first mortgage of the subject lands in the sum of $22,000 with Osborne signing as guarantor. The mortgage was registered December 19, 1985 and the proceeds were advanced to Osborne.

3 The mortgage soon fell into default and Osborne requested further assistance. Mr. Bertrand then arranged a second mortgage from the plaintiff to Orv-Kay Investments Limited in the sum of $12,000. Once again, Osborne signed as guarantor. That mortgage was registered April 1, 1986. When the proceeds from the second mortgage were advanced the arrears under the first mortgage were paid.

4 Both mortgages soon fell into default but before any action was taken by the mortgagees the plaintiff commenced the within action. In her statement of claim which was issued in July 1986 she alleged that she did not understand the consequences to her of default by Osborne. She also alleged that Osborne had exerted undue influence on her and that the mortgagees did not make sufficient effort to assure themselves that she knew of the importance of the documents she had executed. She also alleged that the defendant Mitchell, a solicitor, had acted for the lender and the borrower in each case and did not fully explain his position to her, thereby failing in a duty to her to ensure that she was fully aware of the consequences of her action.

5 The mortgagees and the defendant Mitchell filed statements of defence. As well, the mortgagees cross-claimed against Osborne and Mitchell and counterclaimed against the plaintiff for judgment on the covenants in the respective mortgages.

6 The motions were launched in June 1987. In August of that year counsel for the plaintiff obtained an order appointing Gail Kuchta, daughter of the plaintiff, as litigation guardian. The material filed on that application disclosed that the plaintiff

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suffered from Alzheimer's disease and that she was incapable of conducting the action and of giving evidence.

7 The notices of motion of the mortgagees were supported by affidavits. The defendant Mitchell did not file a supporting affidavit but relied on the material filed on behalf of the mortgagees. No material was filed on behalf of the plaintiff.

8 In one of the affidavits which was filed, Mr. Bertrand deposed that at the time the first mortgage was arranged he asked the plaintiff if she realized what would happen if the payments were not kept up by Osborne. He said that the plaintiff responded in words to the effect "yes, I could lose my cottage." Later he said she commented that she should be able to help out a family member. Mr. Bertrand also deposed that at the time the second mortgage was arranged the plaintiff said words to the effect "if things go badly, I'll help you out David."

9 When the second mortgage was arranged, Mitchell referred the plaintiff to David Hogben for independent legal advice. Mr. Hogben, swore an affidavit in which he deposed that he reviewed the nature and effect of the mortgage with the plaintiff although he did not have the actual mortgage document before him. He stated, however, that when he asked her if she knew what she was embarking upon she replied that it was a second mortgage for $12,000 at 16-3/4 per cent for 1 year. Those were the actual terms of the second mortgage.

10 The moving parties contend that there is no material before the Court upon which the plaintiff could succeed in her action. They further contend that in view of the plaintiff's medical condition there is no possibility of such evidence becoming available.

11 No allegation of fraud or undue influence was made against any of the defendants, except the defendant Osborne. The statement of claim alleges simply that the plaintiff did not understand the consequences of her actions.

12 Counsel for both mortgagees relied on the judgment of the Supreme Court of Canada in *Marvco Colour Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 20 B.L.R. 143, 26 R.P.R. 48, 141 D.L.R. (3d) 577, 45 N.R. 302. At p. 785 [S.C.R.] Estey J. referring to the principle of non est factum said:

> The rationale of the rule is simple and clear. As between an innocent party (the appellant) and the respondents, the law must take into account the fact that the appellant was completely innocent of any negligence, carelessness or wrongdoing, whereas the respondents by their careless conduct have made it possible for the wrongdoers to inflict a loss. As between the appellant and the respondents, simple justice requires that the party, who by the application of reasonable care was in a position to avoid a loss to any of the parties, should bear any loss that results when the only alternative available to the courts would be to place the loss upon the innocent appellant. In the final analysis, therefore, the question raised cannot be put more aptly than in the words of Cartwright J. in *Prudential, supra*, at p. 929: '... which of two innocent parties is to suffer for the fraud of a third'. The two parties are innocent in the sense that they were not guilty of wrongdoing as against any other person, but as between the two innocent parties there remains a distinction significant in the law, namely that the respondents, by their carelessness, have exposed the innocent appellant to risk of loss, and even though no duty in law was owed by the respondents to the appellant to safeguard the appellant from such loss, nonetheless the law must take this discarded opportunity into account.

13 In the present case Osborne is the wrongdoer. The mortgagees having advanced substantial sums of money and the plaintiff having granted mortgages of her property are the victims. Under those circumstances there is a very heavy onus of proof resting upon the plaintiff if she is to succeed in a claim based on non est factum.

14 So far as the defendant Mitchell is concerned, there is nothing in the material including the statement of claim itself which establishes that there was any duty owed by Mitchell to the plaintiff.

15 Under the former rules the test to be applied on a motion for summary judgment was whether there was a triable issue between the parties. The leading authority was *Arnoldson y Serpa v. Confederation Life Assn.*, 3 O.R. (2d) 721, [1974] I.L.R. 1-606, 46 D.L.R. (3d) 641 (Ont. C.A.). The essence of that judgment was that on a motion for summary judgment on a specially endorsed writ the plaintiff must make out a case that is so clear that there is no reason for doubt as to what the judgment of the Court would be if the matter proceeded to trial.

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16 The test to be applied under the present Rule is whether there is a genuine issue for trial. The distinction between the former and the present Rules has been noted by Sutherland J. in *Greenbaum v. 619908 Ont. Ltd.* (1986), 11 C.P.C. 26 (Ont. H.C.). At p. 48 he said:

> Under the former Rules, a motion for summary judgment was not available to a defendant. Rule 20 differs in significant other ways from its predecessor not the least of which is that it is now expressly provided that summary judgment can be granted on a question of law, I assume no matter how strenuously and seriously it is disputed. Also, the fact that R. 20 requires affidavits setting out specific facts and the fact that the parties are under r. 39.02, permitted to cross-examine on such affidavits means that proceedings under R. 20 should require less diffidence and more assurance on the part of the motions Judge than was the case under the former Rules.

17 Given the unfortunate condition of the plaintiff it is difficult to see how counsel for the plaintiff could possibly succeed in the action. While counsel for the plaintiff has raised a number of questions with respect to the material filed by the defendants and with respect to the evidence given on the cross-examinations these questions fall far short of establishing the facts required to be proven in order for the plaintiff to succeed in her action. Indeed, the material before me suggests just the opposite. The plaintiff may well have raised issues which could be pursued if there were evidence to support them. The absence of any such evidence at this time and the likelihood that such evidence will not become available by the time of trial militates against a finding that such issues are in fact genuine issues for trial.

18 Having reached that conclusion it follows that the defendants are entitled to succeed on their motions. The action as against all of the defendants except David Osborne will be dismissed. In addition, the defendant Barrie Community Credit Union Limited will be granted leave to commence power of sale proceedings under its mortgage. The defendants are also entitled to their costs against the plaintiff. While each of the mortgages provides for recovery of costs as between solicitor-and-client in respect of proceedings taken to enforce the mortgages, the action by the plaintiff herein is not such a proceeding. There is therefore no basis for awarding costs other than party-and-party costs.

Motion granted.

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Tab 14

2016 SCC 56, 2016 CSC 56
Supreme Court of Canada

Canada (Attorney General) v. Fairmont Hotels Inc.

2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 2016 SCC 56, 2016 CSC 56, [2016] 2 S.C.R. 720, [2016] S.C.J. No. 56, [2017] 1 C.T.C. 149, 2016 D.T.C. 5135, 272 A.C.W.S. (3d) 525, 404 D.L.R. (4th) 201, 58 B.L.R. (5th) 171, J.E. 2016-2123

Attorney General of Canada (Appellant) and Fairmont Hotels Inc., FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. (Respondents)

McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: May 18, 2016
Judgment: December 9, 2016
Docket: 36606

Proceedings: reversing *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 45 B.L.R. (5th) 230, 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), E.A. Cronk J.A., Janet Simmons J.A., R.A. Blair J.A. (Ont. C.A.); affirming *Fairmont Hotels Inc. v. Canada (Attorney General)* (2014), [2015] 3 C.T.C. 9, 2014 CarswellOnt 17975, 2014 ONSC 7302, 36 B.L.R. (5th) 215, 2015 D.T.C. 5019 (Eng.), 123 O.R. (3d) 241, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Daniel Bourgeois, Eric Noble, for Appellant
Geoff R. Hall, Chia-yi Chua, for Respondents

Subject: Contracts; Income Tax (Federal)

Headnote

Contracts --- Rectification or reformation — General principles
Business entered into reciprocal loan transaction with real estate investment trust, and money was routed through related corporation — Potential foreign exchange tax issue was made neutral by establishing two subsidiaries to business — Because of sale of business, possibility existed that foreign exchange gain or loss would be realized in connection with reciprocal loan arrangements — Reciprocal loan agreements were unwound with regard to certain hotels, and subsidiaries cashed preferential shares by mistake, which triggered unintended taxable foreign exchange gains — Chambers judge granted business' application to rectify plan documents — Judge found that purpose of unwind of loans was to unwind loans on tax-free basis, and redemption of preference shares was mistakenly chosen as means to do so — Court of Appeal dismissed Attorney General of Canada's appeal — Court held that business had specific and unwavering intention that transactions would be tax neutral and that no redemptions of relevant preferential shares should occur, but redemptions was authorized by mistake — Attorney General of Canada appealed — Appeal allowed — Rectification was limited to cases where agreement between parties was not correctly recorded in instrument that became final expression of their agreement — Party seeking rectification must show not only putative error in instrument, but also way in which instrument should be rectified in order to correctly record what parties intended to do — Business was not entitled to rectification as it could not show having reached prior agreement with definite and ascertainable terms — Parties' intention of tax neutrality could not support grant of rectification.

Tax --- Income tax — Miscellaneous
Rectification — Business entered into reciprocal loan transaction with real estate investment trust, and money was routed through related corporation — Potential foreign exchange tax issue was made neutral by establishing two subsidiaries to business — Because of sale of business, possibility existed that foreign exchange gain or loss would be realized in connection with reciprocal loan arrangements — Tax plan to address situation did not hedge foreign exchange exposure of subsidiaries

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— Reciprocal loan agreements were unwound with regard to certain hotels, and subsidiaries cashed preferential shares, by mistake, which triggered unintended taxable foreign exchange gains — Chambers judge granted business's application to rectify plan documents — Judge held that tax planning had not been done on retroactive basis after audit — Judge found that purpose of unwind of loans was to unwind loans on tax-free basis, and redemption of preference shares was mistakenly chosen as means to do so — Court of Appeal dismissed Attorney General of Canada's appeal — Court held that business had specific and unwavering intention that transactions would be tax neutral and that no redemptions of relevant preferential shares should occur but redemptions were authorized by mistake — Attorney General of Canada appealed — Appeal allowed — Parties' intention of tax neutrality could not support grant of rectification — Court may not modify instrument merely because party discovered that its operation generated adverse and unplanned tax liability — Business could not show having reached prior agreement with definite and ascertainable terms so it was not entitled to rectification.

Contrats --- Rectification ou réformation — Principes généraux
Entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée — Problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales — En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change — Liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables — Juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario — Juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir — Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada — Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne et que le rachat avait été autorisé par erreur — Procureur général du Canada a formé un pourvoi — Pourvoi accueilli — Rectification n'est justifiée que dans les cas où une entente entre des parties n'a pas été correctement consignée dans l'instrument qui est devenu l'expression finale de leur entente — Partie qui sollicite la rectification doit non seulement démontrer l'erreur putative, mais également la façon dont l'instrument devrait être rectifié afin de consigner correctement ce que les parties avaient l'intention de faire — Entreprise n'avait pas droit à la rectification dans la mesure où elle ne pouvait démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables — Intention des parties concernant la neutralité fiscale ne justifiait pas l'octroi d'une rectification.

Taxation --- Impôt sur le revenu — Divers
Rectification — Entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée — Problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales — En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change — Scénario fiscal visant à gérer cette situation n'a pas protégé les filiales contre les risques découlant des opérations de change — Liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables — Juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario — Juge a estimé que la planification fiscale n'avait pas été faite rétroactivement après la vérification — Juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir — Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada — Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne et que le rachat avait été autorisé par erreur — Procureur général du Canada a formé un pourvoi — Pourvoi accueilli — Intention des parties concernant la neutralité fiscale ne justifiait pas l'octroi d'une rectification — Tribunal ne peut modifier un instrument simplement parce qu'une partie a découvert que son exécution faisait naître une obligation fiscale préjudiciable et imprévue — Entreprise n'avait pas droit à la rectification dans la mesure où elle ne pouvait démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables.

A business entered into a reciprocal loan transaction with a real estate investment trust, and money was routed through a related corporation. The potential foreign exchange tax issue was made neutral by establishing two subsidiaries to the business. Because of the sale of the business, the possibility existed that a foreign exchange gain or loss would be realized in connection with the reciprocal loan arrangements. The tax plan to address this situation did not hedge the foreign exchange

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exposure of the subsidiaries. The reciprocal loan agreements were unwound with regard to certain hotels, and the subsidiaries cashed preferential shares, by mistake, which triggered unintended taxable foreign exchange gains.

The chambers judge granted the business's application to rectify the plan documents. The judge held that tax planning had not been done on a retroactive basis after the audit. The judge found that the purpose of the unwinding of the loans was to unwind the loans on a tax-free basis, and the redemption of the preference shares was mistakenly chosen as the means to do so.

The Court of Appeal dismissed the Attorney General of Canada's appeal. The Court held that the business had a specific and unwavering intention, that the transactions would be tax neutral, and that no redemptions of relevant preferential shares should occur. The redemptions were authorized by mistake. The Court found it unnecessary for the business to prove that it had determined to use a specific transaction device of loans to achieve the intended tax result.

The Attorney General of Canada appealed.

Held: The appeal was allowed.

Per Brown J. (McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring): Tax neutrality was the parties' intention, but this intention could not support a grant of rectification. Rectification was limited to cases where the agreement between parties was not correctly recorded in the instrument that became the final expression of their agreement. Rectification did not undo unanticipated effects of an agreement.

The Ontario Court of Appeal case that was relied on by the chambers judge and the Court of Appeal was irreconcilable with the narrowly confined circumstances to which the Supreme Court of Canada had restricted the availability of rectification. Tax consequences, including those which followed an assessment by the Canada Revenue Agency, flowed from freely chosen legal arrangements, not from intended or unintended effects of those arrangements.

The party seeking rectification must show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. The court may not modify an instrument merely because a party discovered that its operation generated an adverse and unplanned tax liability.

The application of these principles to this case led to the conclusion that the business's application for rectification should be dismissed, since it could not show having reached a prior agreement with definite and ascertainable terms. The business intended to limit its tax liability and that intention was frustrated, but this did not support a grant of rectification.

Per Abella J. (dissenting) (Côté J. concurring): The appeal should be dismissed.

Rectification was an equitable remedy that sought to prevent unfairness which resulted from enforcing a mistake, including the unfairness inherent in unjust enrichment and windfalls. The approach by the majority unduly narrowed the scope of rectification. A common, continuing, definite and ascertainable intention to pursue a transaction in a tax-neutral manner had usually satisfied the threshold of granting rectification. The additional requirement that the parties clearly identify the precise mechanism by which they intended to achieve tax neutrality, and how that mechanism was mistakenly transcribed in the document, had the effect of raising the threshold. Since unjust enrichment can result from a mistake in carrying out the intention of parties, the remedy was available to correct errors in implementation.

Allowing tax authorities to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounted to unjust enrichment. However, allowing parties to rewrite documents and restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes was not consistent with the equitable principles that informed rectification.

The test for rectification was met in this case. The chambers judge was satisfied that the business had an unwavering intention to unwind the reciprocal loan structure in way that ensured that any foreign exchange gains and losses would be offset against each other. By mistake, the preferred share redemption terms were included in the directors' resolutions, which was the type of mistake that rectification existed to remedy. To require an exhaustive account of how a transaction was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context.

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Une entreprise a conclu un contrat de prêt réciproque avec une fiducie canadienne d'investissement immobilier et l'argent a été acheminé par le truchement d'une société liée. Le problème fiscal potentiel concernant les opérations de change a été neutralisé par l'entreprise à la suite de la création de deux filiales. En raison de la vente de l'entreprise, il y avait une possibilité que le contrat de prêt réciproque donne ouverture à la réalisation d'un gain ou d'une perte sur change. Le scénario fiscal visant à gérer cette situation n'a pas protégé les filiales contre les risques découlant des opérations de change. Les liens contractuels découlant du contrat de prêt réciproque ont été dénoués à l'égard de certains hôtels et les filiales ont encaissé des actions privilégiées par erreur, ce qui a involontairement provoqué des gains sur change imposables.

Le juge siégeant en son cabinet a accordé la demande déposée par l'entreprise visant à faire rectifier les documents relatifs au scénario. Le juge a estimé que la planification fiscale n'avait pas été faite rétroactivement après la vérification. Le juge a conclu que le dénouement des prêts avait pour but de dénouer les prêts sans incidences fiscales et le rachat des actions privilégiées a été choisi par erreur comme le moyen d'y parvenir.

La Cour d'appel a rejeté l'appel interjeté par le procureur général du Canada. La Cour a estimé que l'entreprise avait exprimé l'intention spécifique et inébranlable que les opérations n'aient aucune incidence fiscale et qu'aucun rachat des actions privilégiées en question ne survienne. Le rachat a été autorisé par erreur. La Cour a conclu qu'il n'était pas nécessaire que l'entreprise prouve que son intention était que les prêts soient utilisés comme mécanisme opérationnel pour atteindre le résultat fiscal voulu.

Le procureur général du Canada a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Brown, J. (McLachlin, J.C.C., Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, JJ., souscrivant à son opinion) : La neutralité fiscale était l'intention des parties, mais cette intention ne justifiait pas l'octroi d'une rectification. Une rectification n'est justifiée que dans les cas où une entente entre des parties n'a pas été correctement consignée dans l'instrument qui est devenu l'expression finale de leur entente. Elle n'annule pas les effets imprévus de cette entente.

La décision de la Cour d'appel de l'Ontario sur laquelle le juge siégeant en son cabinet et la Cour d'appel se sont appuyés pour trancher le litige était incompatible avec les circonstances très restreintes auxquelles la Cour suprême du Canada a limité le recours en rectification. Les conséquences fiscales, y compris celles qui font suite à une cotisation de l'Agence du revenu du Canada, découlent directement d'ententes juridiques librement choisies, et non des effets recherchés ou non recherchés de ces ententes.

La partie qui sollicite la rectification doit non seulement démontrer l'erreur putative, mais également la façon dont l'instrument devrait être rectifié afin de consigner correctement ce que les parties avaient l'intention de faire. Le tribunal ne peut modifier un instrument simplement parce qu'une partie a découvert que son exécution faisait naître une obligation fiscale préjudiciable et imprévue.

L'application de ces principes au présent dossier menait à la conclusion que la demande de rectification de l'entreprise devrait être rejetée, puisqu'elle n'a pu démontrer qu'elle avait conclu une entente antérieure dont les modalités étaient déterminées et déterminables. Il était vrai que l'entreprise comptait limiter son obligation fiscale et que cette intention a été contrecarrée, mais ceci ne justifiait pas l'octroi d'une rectification.

Abella, J. (dissidente) (Côté, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté.

La rectification est une réparation en equity visant à prévenir l'injustice qui découle du fait d'avoir donné effet à une erreur, y compris l'injustice inhérente à l'enrichissement injustifié et aux gains fortuits. L'approche suivie par les juges majoritaires restreignait indûment la portée de cette réparation. L'intention commune, constante, déterminée et déterminable de réaliser une opération sans incidences fiscales satisfait habituellement au critère permettant l'octroi d'une rectification. L'exigence supplémentaire selon laquelle les parties doivent désigner clairement le mécanisme précis au moyen duquel elles ont l'intention d'atteindre la neutralité fiscale, ainsi que la manière dont ce mécanisme a été incorrectement transcrit dans le document, avait pour effet de restreindre le critère. Puisque l'enrichissement injustifié peut résulter d'une erreur dans la réalisation de l'intention des parties, on pouvait aussi recourir à la rectification pour corriger les erreurs de mise en oeuvre.

Permettre aux autorités fiscales de tirer profit des erreurs commises dans une planification fiscale légitime, alors qu'il n'a été

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nullement porté atteinte à ses droits, équivalait à un enrichissement injustifié. En revanche, le fait de permettre aux parties de réécrire des documents et de réorganiser leurs affaires simplement parce qu'elles préfèrent généralement et globalement payer moins d'impôt n'était pas compatible avec les principes d'equity qui régissent la rectification.

Le test permettant la rectification était satisfait en l'espèce. Le juge siégeant en son cabinet était convaincu que l'entreprise avait fait preuve d'une intention inébranlable de dénouer la structure de prêts réciproques de façon à ce qu'il y ait compensation entre les gains et les pertes sur change. Or, par erreur, les modalités de rachat des actions privilégiées ont été incluses dans les résolutions adoptées par les administrateurs, ce qui était le genre d'erreur que la rectification visait à corriger. Exiger une description détaillée de la manière dont l'opération était censée se dérouler reviendrait à imposer un critère exceptionnellement strict de rectification dans le domaine fiscal.

APPEAL by Attorney General of Canada from judgment reported at *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), 45 B.L.R. (5th) 230 (Ont. C.A.), dismissing Attorney General of Canada's appeal from judgment granting business's application to rectify plan documents.

POURVOI formé par le procureur général du Canada à l'encontre d'une décision publiée à *Fairmont Hotels Inc. v. Canada (Attorney General)* (2015), 2015 ONCA 441, 2015 CarswellOnt 8955, 2015 D.T.C. 5073 (Eng.), 45 B.L.R. (5th) 230 (Ont. C.A.), ayant rejeté l'appel interjeté par le procureur général du Canada à l'encontre d'un jugement ayant accordé la demande d'une entreprise visant à faire rectifier les documents relatifs à une planification.

Brown J. **(McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring):**

I. Introduction

1 This appeal concerns the conditions under which a taxpayer may ask a court to exercise its equitable jurisdiction to rectify a written legal instrument, where the effect of that instrument was to produce an unexpected tax consequence. As I will explain, this entails inquiring into the nature and particularity of the terms which the taxpayer had intended to record in the instrument, whether the instrument contains those intended terms and, if not, whether those intended terms are sufficiently precise such that they may now be included in the instrument.

2 The present case arises from a financing arrangement which the parties had intended, both at its inception and ongoing, to operate on a tax-neutral basis. Because of the particular financing mechanism chosen, an unanticipated tax liability was incurred. Both the chambers judge at the Ontario Superior Court of Justice and the Court of Appeal for Ontario granted rectification on the grounds of the parties' intended tax neutrality.

3 Without disputing that tax neutrality was the parties' intention, for the reasons that follow it is my respectful view that both courts below erred in holding that this intention could support a grant of rectification. Rectification is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement: A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at §8.229; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 817. It does not undo unanticipated effects of that agreement. While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. Moreover, these rules confining the availability of rectification are generally applicable, including where (as here) the unanticipated effect takes the form of a tax liability. To be clear, a court may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability. I would therefore allow the appeal.

II. Overview of Facts and Proceedings

A. Background

4 The respondent Fairmont Hotels Inc. and its subsidiaries FHIW Hotel Investments (Canada) Inc. and FHIS Hotel

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Investments (Canada) Inc. ask the Court to rectify instruments recording a complex financing arrangement made in 2002 and 2003 between Fairmont and Legacy Hotels REIT, a Canadian real estate investment trust in which Fairmont owned a minority interest. While Fairmont's aim in participating in this financing arrangement was to obtain the management contract for the two hotels which Legacy purchased with the financing, its participation exposed it to a potential foreign exchange tax liability, since the financing was in U.S. currency. With the goal of ensuring foreign exchange tax neutrality, Fairmont — through its subsidiaries FHIW and FHIS — entered into reciprocal loan agreements with Legacy, all of which were transacted in U.S. currency.

5 When Fairmont was acquired by Kingdom Hotels International and Colony Capital LLC in 2006, however, that goal of foreign exchange tax neutrality was frustrated, since this acquisition would cause Fairmont and its subsidiaries to realize a deemed foreign exchange loss, without corresponding foreign exchange gains, on the financing arrangement with Legacy. Fairmont, Kingdom Hotels and Colony Capital agreed on a "modified plan" which allowed Fairmont (but not its subsidiaries) to realize both its gains and losses in 2006, thereby fully hedging it against exposure to prospective foreign exchange tax liability. The matter of similarly protecting the subsidiaries from exposure was deferred, without any specific plan as to how that might be achieved.

6 In 2007, Legacy asked Fairmont to terminate the reciprocal loan arrangements "on an urgent basis" so as to allow for the sale of the hotels. Four days later, and on the incorrect assumption that the matter of the subsidiaries' foreign exchange tax neutrality had been secured, Fairmont complied with Legacy's request by redeeming its shares in its subsidiaries via resolutions passed by the directors of FHIW and FHIS. This resulted in an unanticipated tax liability, discovered only after the Canada Revenue Agency ("CRA") audited the 2007 tax returns of FHIW and FHIS and questioned Fairmont on those returns.

7 The respondents now seek to avoid that liability to Fairmont by asking the Court to rectify the 2007 resolutions passed by the directors of FHIW and FHIS. Specifically, they wish to convert Fairmont's share redemption into a loan whereby FHIW and FHIS will loan to Fairmont the same amount that they paid to Fairmont for the share redemption.

B. Judicial History

(1) Superior Court of Justice — Newbould J. (2014 ONSC 7302, 123 O.R. (3d) 241 (Ont. S.C.J. [Commercial List]))

8 Relying on the decision of the Ontario Court of Appeal in *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), aff'd (2000), 50 O.R. (3d) 728 (Ont. C.A.), the chambers judge allowed the application for rectification. He found that, since 2002, Fairmont had intended that its financing arrangement with Legacy be tax-neutral in effect, and that this intention subsisted after Fairmont's 2006 acquisition by Kingdom Hotels and Colony Capital (para. 32).

9 The chambers judge also found that, in light of the foreign exchange tax exposure presented to Fairmont's subsidiaries by that acquisition, Fairmont intended "at some point in the future" to address "the unhedged position of [FHIW] and [FHIS] in a way that would be tax ... neutral although they had no specific plan as to how they would do that" (para. 33). Observing (at para. 42) that the tax liability arose as a result of inadvertence by a member of Fairmont's senior management team, he said that this was not "a case in which tax planning has been done on a retroactive basis after a CRA audit", but rather a case in which a "redemption of the preference shares was mistakenly chosen as the means" to "unwind the loans on a tax-free basis" (para. 43). "[D]enial of the application to rectify would", he concluded, "result in a tax burden which Fairmont sought to avoid from the inception of the 2002 reciprocal loan arrangement" while "giv[ing] CRA an unintended gain" (para. 44). And, in any event, he noted that *Juliar* was binding on him in the circumstances (para. 41).

(2) Court of Appeal — Simmons, Cronk and Blair JJ.A. (2015 ONCA 441, 45 B.L.R. (5th) 230 (Ont. C.A.))

10 In brief reasons for judgment, the Court of Appeal affirmed the chambers judge's decision, taking note of his findings regarding Fairmont's continuing intention from 2002 that its financing arrangement with Legacy would be carried out on a tax neutral basis; that this intention subsisted after Fairmont's acquisition in 2006; that the adverse tax consequence was triggered by a mistake in 2007 on the part of a member of Fairmont's senior management; and that the purpose of the 2007 resolutions was not to redeem the shares, but rather "to unwind [the Legacy transactions] on a tax free basis" (para. 7).

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11 The Court of Appeal also commented on the evidentiary burden resting on the party seeking rectification. *Juliar*, it said, "does not require that the party seeking rectification must have determined the precise mechanics or means by which [its] settled intention to achieve a specific tax outcome would be realized" (para. 10). Rather, "*Juliar* holds, in effect, that the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis" (para. 10). In this case, then, it was in the court's view unnecessary for Fairmont to prove that it had resolved to use "a specific transactional device — loans — to achieve the intended tax result" (para. 12). Rather, the chambers judge's findings regarding Fairmont's intention, coupled with *Juliar*'s direction regarding the prerequisite intention to obtain rectification, were dispositive of the application in the respondents' favour.

III. Analysis

A. General Principles and Operation of Rectification

12 If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).

13 Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.), at para. 56, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.), at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": *Performance Industries*, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 (Eng. V.-C.), at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries Ltd.* (at para. 31), "[t]he court's task in a rectification case is... to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

14 Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: *"M.F. Whalen" (The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109 (S.C.C.), at p. 126; McInnes, at p. 820; *Snell's Equity*, at p. 424; *Hanbury and Martin Modern Equity* (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 622.

15 In *Performance Industries Ltd.* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries Ltd.* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries Ltd.* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

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B. Juliar

16 As I have recounted, both courts below considered the Court of Appeal's decision in *Juliar*, coupled with the chambers judge's findings, to be dispositive. In my respectful view, however, *Juliar* is irreconcilable with this Court's jurisprudence and with the narrowly confined circumstances to which this Court has restricted the availability of rectification.

17 In *Juliar*, the parties had, by a written agreement and in the course of the restructuring of a family business, transferred shares to a corporation in exchange for promissory notes for an amount equal to what the parties believed to be the value of the shares. Upon discovering that the promissory notes were worth more than the shares' value (resulting in the taxpaying party being assessed as having received a taxable deemed dividend), the parties sought rectification in order to convert what had originally been structured as a shares-for-promissory notes transfer into a shares-for-shares transfer (which would have been tax-deferred). For the Court of Appeal, and citing the decision of *Slocock's Will Trusts, Re* (1978), [1979] 1 All E.R. 358 (Eng. Ch. Div.), Austin J.A. held that the written agreement could be rectified as sought, citing the trial judge's finding that the parties had "a common ... continuing intention" to transfer shares in a way that would avoid immediate tax liability (para. 19). In order to achieve that objective, Austin J.A. said, the deal "had to be ... a shares for shares transaction" (para. 25).

18 This reasoning presents several difficulties. First, as many commentators have observed, it is indisputable that *Juliar* has relaxed the requirements for obtaining rectification, and correspondingly expanded the scope of cases in which rectification may be sought and granted beyond that which the governing principles allow (C. Brown and A. J. Cockfield, "Rectification of Tax Mistakes Versus Retroactive Tax Laws: Reconciling Competing Visions of the Rule of Law" (2013), 61 *Can. Tax J.* 563, at p. 571; N. Brooks and K. Brooks, "The Supreme Court's 2013 Tax Cases: Side-Stepping the Interesting, Important and Difficult Issues" (2015), 68 *S.C.L.R.* (2d) 335, at p. 385; K. Janke-Curliss et al., "Rectification in Tax Law: An Overview of Current Cases", in *Tax Dispute Resolution, Compliance, and Administration in Canada* (2013), 21:1, at pp. 21:8 and 21:9).

19 I agree with this observation. As I have stressed, rectification is available not to cure a party's error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. The parties' mistake in *Juliar*, however, was not in the recording of their intended agreement to transfer shares for a promissory note, but in selecting that mechanism instead of a shares-for-shares transfer. By granting the sought-after change of mechanism, the Court of Appeal in *Juliar* purported to "rectify" not merely the instrument recording the parties' antecedent agreement, but that agreement itself where it failed to achieve the desired result or produced an unanticipated adverse consequence — that is, where it was the product of an error in judgment. As J. Berryman observed (in *The Law of Equitable Remedies* (2nd ed. 2013), at p. 510):

> In *Juliar*, the applicants had acted directly on the advice of their accountant. The accountant made a mistake as to the nature of the business ownership and the taxes that were paid prior to the arrangement he advised his clients to pursue. This is not a case for rectification. The clients intended to use the instrument given to them by their accountant. Their motive may have been to avoid tax but that is different from their intent which was to use the very form in front of them.

20 Secondly, even on its own terms, *Juliar*'s expansion of the availability of rectification cannot be justified. By way of explanation, in the case upon which Austin J.A. relied, *Slocock's Will Trusts*, the plaintiff was the life beneficiary of her father's residuary estate, with the capital and income after her death to be paid to her issue as she should appoint. She appointed her children to take after her death. Later, lands owned by her father's family were sold to a development company, with the proceeds to be received and distributed by a management company in which the plaintiff received an allotment of shares, proportionate to her interest in the proceeds. After taking legal advice, the plaintiff and her children decided that she should surrender by deed her life interest in those proceeds as well as her shares in the management company (pp. 359-60). The deed, however, did not faithfully record the parties' agreement, because it released only the plaintiff's shares in the management company, and not her beneficial interest in the proceeds of sale (p. 360).

21 While the outcome sought by the plaintiff and her children would have also secured a tax advantage for the children (specifically, avoidance of capital transfer tax upon the plaintiff's death), Graham J. granted rectification *not* to secure that

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tax advantage, but on the strength of his finding (*Slocock's Will Trusts*, at p. 361) that the deed as recorded omitted the proceeds of the sale of the lands, thereby failing to record fully the terms of the parties' original agreement. This was, therefore, an unremarkable application of rectification to cure an omission in the instrument recording an antecedent agreement. Nothing in *Slocock's Will Trusts* justifies *Juliar*'s modified threshold for granting rectification solely to avoid an unanticipated tax liability. *Slocock's Will Trusts* simply confirmed that, provided that the underlying mechanism by which the parties had agreed to seek a particular tax outcome was omitted or incorrectly recorded, and provided that all other conditions for granting rectification are satisfied, a court retains discretion to grant rectification. The focus of the inquiry remained properly fixed on whether that originally intended mechanism was properly recorded, and not on whether it achieved the desired tax outcome or resulted in a party incurring an undesired or unexpected tax outcome.

22 Subsequent English authorities confirm that *Slocock's Will Trusts* created no distinct threshold for granting rectification in the tax context. In *Racal Group Services Ltd. v. Ashmore* (1995), 68 T.C. 86 (Eng. C.A.), the English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: "... the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification" (p. 106). Similarly, the court in *Ashcroft v. Barnsdale*, [2010] EWHC 1948, [2010] S.T.C. 2544 (Eng. Ch. Div.), held that it could not rectify an instrument "*merely* because it fails to achieve the fiscal objectives of the parties to it": para. 17 (emphasis in original). See also D. Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed. 2016), at para. 4-145:

> A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties (or the grantor or covenantor) as to how the objective was to be achieved must be shown if the court is to order rectification.
>
> [Emphasis deleted.]

23 Finally, *Juliar* does not account for this Court's direction, in *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), at para. 45, that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done". While this statement in *Shell Canada Ltd.* was applied to support the proposition that a taxpayer should not be denied a sought-after fiscal objective merely because others had not availed themselves of the same advantage, it cuts the other way, too: taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better.

24 This point goes to the respondents' submission that "[r]ectification is necessary to ... avoid unjust enrichment of the Crown" (R.F., at para. 76), echoing the Court of Appeal's concern in *Juliar* (at paras. 33-34, quoting *Slocock's Will Trusts*, at p. 363) for the Crown's "accidental and unexpected windfall" and the chambers judge's concern in the present appeal (at para. 44) about the CRA's "unintended gain" and (at para. 52) the Crown's "tax windfall". With respect, the premise underlying such concerns misses the point of the inquiry, inasmuch as it concerns the CRA. Tax consequences, including those which follow an assessment by the CRA, flow from freely chosen legal arrangements, not from the intended or unintended effects of those arrangements, whether upon the taxpayer or upon the public treasury. The proper inquiry is no more into the "windfall" for the public treasury when a taxpayer loses a benefit than it is into the "windfall" for the taxpayer when that taxpayer secures a benefit. The inquiry, rather, is into what the taxpayer agreed to do. *Juliar* erroneously departed from this principle, and in so doing allowed for impermissible retroactive tax planning: *Harvest Operations Corp. v. Canada (Attorney General)*, 2015 ABQB 327, [2015] 6 C.T.C. 78 (Alta. Q.B.), at para. 49.

C. Two Further Concerns

25 Before applying the test for rectification — which test, I emphasize, is to be applied in a tax context just as it is in a non-tax context — to the facts of this appeal, I turn to two matters in need of clarification, the first of which was raised by the respondents.

(1) "Common Continuing Intention" to Avoid Tax Liability

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26 The respondents argue that, in the case of a common mistake, it is unnecessary for the party seeking rectification to prove a prior agreement concerning the term or terms for which rectification is sought. Rather, they say that evidence of a "common continuing intention" — in this case, their common continuing intention that the value of the shares in FHIW and FHIS should be transferred in a way that would avoid immediate tax liability — should suffice to ground a grant of rectification.

27 This was, of course, the view of the Court of Appeal, both in *Juliar* and in the present appeal. The respondents also rely upon the decision of the English Court of Appeal in *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), in which the court (at p. 95) approved of this statement of Simonds J. in *Crane v. Hegeman-Harris Co.*, [1939] 1 All E.R. 662 (Eng. Ch. Div.):

> ... in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. ... [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. [p. 664]

28 *Joscelyne* 's statement on the sufficiency of a common continuing intention has been adopted by the Ontario Court of Appeal in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 (Ont. C.A.), at para. 77, and the Newfoundland and Labrador Supreme Court in *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.), at paras. 23 and 27. It is not immediately apparent, however, that it supports the respondents' position here. *Joscelyne* 's reference to "a common continuing intention in regard to a particular provision or aspect of the agreement", coupled with its reference to the later discovery that "the formal instrument does not conform with that common agreement", strongly suggests that — howsoever often *Joscelyne* has been taken as suggesting otherwise by Canadian courts — it does not posit that, in the case of a common mistake, anything less than a prior *agreement* with respect to the term to be rectified is sufficient to support a grant of rectification. While *Joscelyne* allows for situations in which a contract will be unenforceable until a corresponding written instrument is executed (for example, in the case of a transfer of an interest in realty) and for situations in which there may not have been agreement on all essential terms before the written instrument was executed, this does not detract from its implicit affirmation that rectification requires the parties to show an antecedent agreement with respect to the term or terms for which rectification is sought.

29 In any event, *Joscelyne* should not be taken as authorizing any departure from this Court's direction that a party seeking to correct an erroneously drafted written instrument on the basis of a common mistake must first demonstrate its inconsistency with an antecedent agreement with respect to that term. In *Shafron*, this Court unambiguously rejected the sufficiency of showing mere *intentions* to ground a grant of rectification, insisting instead on erroneously recorded *terms*. As Denning L.J. said in *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 Q.B. 450 (Eng. C.A.), at p. 461 (quoted in *Shafron*, at para. 52):

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract.

30 This Court's statement in *Performance Industries Ltd.* (at para. 31) that "[r]ectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable" is to the same effect. The point, again, is that rectification corrects the recording in an instrument of an agreement (here, to redeem shares). Rectification does not operate simply because an agreement failed to achieve an intended effect (here, tax neutrality) — irrespective of whether the intention to achieve that effect was "common" and "continuing".

31 In this regard, my colleague Justice Abella relies upon the chambers judge's finding that "when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future [it] would have to deal with the unhedged position of

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[FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that" (para. 33, cited by Abella J. at para. 87). In my respectful view, however, it was an error for the chambers judge to ascribe any significance to that finding. Rectification does not correct common mistakes in judgment that frustrate contracting parties' aspirations or, as here, unspecified "plans"; it corrects common mistakes in instruments recording the terms by which parties, wisely or unwisely, agreed to pursue those aspirations. While my colleague suggests that the jurisprudence of this Court undermines this reasoning (paras. 79-85), that very jurisprudence requires the party seeking rectification of an instrument to show not merely an inchoate or otherwise undeveloped "intent", but rather the term of an antecedent *agreement* which was not correctly recorded therein: *Performance Industries Ltd.*, at para. 37.

32 It therefore falls to a party seeking rectification to show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. "The court's task in a rectification case is corrective, not speculative": *Performance Industries Ltd.*, at para. 31. Where, therefore, an instrument recording an agreed-upon course of action is sought to be rectified, the party seeking rectification must identify terms which were omitted or recorded incorrectly and which, correctly recorded, are sufficiently precise to constitute the terms of an enforceable agreement. The inclusion of imprecise terms in an instrument is, on its own, not enough to obtain rectification; absent evidence of what the parties had specifically agreed to do, rectification is not available. While imprecision may justify setting aside an instrument, it cannot invite courts to find an agreement where none is present. It was for this reason that the Court in *Shafron* declined to enforce the restrictive covenant covering the "Metropolitan City of Vancouver". The term was imprecise, but there was "no indication that the parties agreed on something and then mistakenly included something else in the written contract": *Shafron*, at para. 57.

33 As is apparent from the reasons of my colleague Justice Wagner in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 (S.C.C.), on this question both equity and the civil law are *ad idem*, despite each legal system arriving at that same conclusion via different paths — the former being concerned with correcting the document, and the latter focusing on its interpretation. This convergence is undoubtedly desirable in the context of applying federal tax legislation. More particularly, the cautionary note struck by the Court in *Archambault c. Canada (Agence du Revenu)*, 2013 SCC 65, [2013] 3 S.C.R. 838 (S.C.C.), [hereinafter *AES*] at para. 54, regarding "common intention" as a factor in rewriting parties' agreements under art. 1425 of the *Civil Code of Québec* — which precaution is expressly relied upon by Wagner J. in *Jean Coutu Group (PJC) Inc.* (at para. 21) — is equally apposite in applying the equitable doctrine of rectification:

> Taxpayers should not view this ... as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. A taxpayer's intention to reduce his or her tax liability would not on its own constitute the object of an obligation within the meaning of art. 1373 *C.C.Q.*, since it would not be sufficiently determinate or determinable. Nor would it even constitute the object of a contract within the meaning of art. 1412 *C.C.Q.* Absent a more precise and more clearly defined object, no contract would be formed. In such a case, art. 1425 could not be relied on to justify seeking the common intention of the parties in order to give effect to that intention despite the words of the writings prepared to record it.

(2) Standard of Proof

34 The second point requiring clarification is the standard of proof. In *Performance Industries Ltd.*, at para. 41, this Court held that a party seeking rectification will have to meet all elements of the test by "convincing proof", which it described as "proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard". This, as was observed in *Performance Industries Ltd.*, was a relaxation of the standard from the Court's earlier jurisprudence, in which the criminal standard of proof was applied: see *"M.F. Whalen" (The)*, at p. 127, and *Hart*, at p. 630, per Duff J.

35 In light, however, of this Court's more recent statement in *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at para. 40, that there is "only one civil standard of proof at common law and that is proof on a balance of probabilities", the question obviously arises of whether the Court's description in *Performance Industries Ltd.* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.

36 In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is

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that which *McDougall* identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged. As the Court also said in *McDougall* (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action. This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd.* (1980), [1981] 1 W.L.R. 505 (Eng. C.A.), at p. 521:

> The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.

37 In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries Ltd.* remains applicable, being (at para. 42) "to promote the utility of written agreements by closing the 'floodgate' against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification".

D. Application to the Present Appeal

38 To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.

39 A straightforward application of these principles to the present appeal leads unavoidably to the conclusion that the respondents' application for rectification should have been dismissed, since they could not show having reached a prior agreement with definite and ascertainable terms. I have already noted (1) the chambers judge's finding that, in 2006, Fairmont intended to address the "unhedged position of [FHIW and FHIS] in a way that would be tax and accounting neutral although [it] had no specific plan as to how [it] would do that" (para. 33); and (2) the Court of Appeal's description of Fairmont's intention as being "to unwind [the Legacy transactions] on a tax free basis" (para. 7). It is therefore clear that Fairmont intended to limit, if not avoid altogether, its tax liability in unwinding the Legacy transactions. And, by redeeming the shares in 2007, this intention was frustrated. Without more, however, these facts do not support a grant of rectification. The error in the courts below is of a piece with the principal flaw I have identified in the Court of Appeal's earlier reasoning in *Juliar*. Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.

40 Relatedly, the respondents do not show how Fairmont's intention, held in common and on a continuing basis with FHIW and FHIS, was to be achieved in definite and ascertainable terms while unwinding the Legacy transactions. The respondents' factum refers to "the original 2006 plan", but that plan was not only imprecise: it really was not a plan at all, being at best an inchoate wish to protect, by unspecified means, FHIW and FHIS from foreign exchange tax liability.

41 The respondents' application for rectification therefore fails at the first hurdle. They show no prior agreement whose terms were definite and ascertainable.

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IV. Conclusion and Disposition

42 I would allow the appeal, with costs in this Court and in the courts below.

***Abella J.* (dissenting) (Côté J. concurring):**

43 I agree that there is no adjustment to the test for rectification if the context is a tax case. With respect, however, I do not agree that the test was not met in this case.

44 The doctrine of rectification has many strands. The jurisprudence addresses errors in the transcription and implementation of documents, different types of mistakes, the rights of third parties, and how the remedy applies in various legal contexts. A coherent approach to all of these strands flows from the underlying theory that parties should not be prevented from having their true intentions implemented because of these errors. It is, after all, an equitable remedy that seeks to prevent the unfairness that results from enforcing a mistake, including the unfairness inherent in unjust enrichment and windfalls.

45 I see the approach applied by my colleague as unduly narrowing its scope. A common, continuing, definite, and ascertainable intention to pursue a transaction in a tax-neutral manner has usually satisfied the threshold for granting rectification. The additional requirement that the parties clearly identify the precise mechanism by which they intended to achieve tax neutrality, and how that mechanism was mistakenly transcribed in a document, has the effect of raising the threshold and frustrating the purpose of the remedy. It also has the regrettable effect of imposing a narrower remedy in the common law than exists under civil law.

46 The Application Judge concluded that the intention of the parties had been mistakenly implemented and that rectification was justified. The Court of Appeal agreed. As do I. Based on the factual findings and the applicable jurisprudence, the threshold has been met. I would dismiss the appeal.

Background

47 Fairmont Hotels Inc. is a hotel management company. In 2002 and 2003, Fairmont agreed to help Legacy Hotels REIT, a Canadian real estate investment trust in which it owned a minority interest, finance the purchase of two hotels in Washington, D.C. and Seattle, Washington. For tax reasons, Legacy did not directly purchase the hotels. Instead, Legacy and Fairmont created a complex reciprocal loan structure, set up in U.S. dollars, whereby Legacy and Fairmont loaned each other money through their subsidiary corporations. The reciprocal loan structure was designed so that no foreign exchange gains or losses would be realized by Fairmont or its subsidiaries. It was expected to remain in place for 10 years.

48 In 2006, two companies, Kingdom Hotels International and Colony Capital LLC, purchased Fairmont. Fairmont's tax advisors realized that the change of control would immediately cause Fairmont and its subsidiaries to experience net foreign exchange losses. Fairmont's advisors, in a memo dated March 3, 2006, therefore initially proposed a plan to protect Fairmont and its subsidiaries from those losses. Under this plan, the reciprocal loan structure could later be unwound with a preferred share redemption without triggering any taxable foreign exchange gains. But the tax advisors of Kingdom Hotels and Colony Capital expressed concern that this plan would create other tax problems.

49 Fairmont, Kingdom Hotels, and Colony Capital eventually agreed on a *modified* plan, described in a memo dated March 23, 2006, in which Fairmont would realize certain accrued foreign exchange gains and losses while protecting itself from new gains and losses going forward. This modified plan did not address Fairmont's subsidiaries, which, due to the acquisition, would no longer be protected from foreign exchange exposure. Fairmont was aware that its subsidiaries' exposure would result in a taxable foreign exchange gain if the reciprocal loan structure was later unwound with a share redemption. Since the reciprocal loan structure was to remain in place for several more years, Fairmont decided that, at a later date, it would determine how to unwind the structure without a share redemption so that no accrued gains or losses would be triggered.

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50 In 2007, Legacy asked Fairmont to end the reciprocal loan agreement ahead of schedule so that it could sell the two hotels it had acquired in 2003. Fairmont's Vice-President of Tax, under the mistaken impression that it was the initial March 3, 2006 plan that had been implemented, instructed the directors of Fairmont's subsidiaries to pass resolutions that would unwind the reciprocal loan structure with a share redemption. The directors passed these resolutions implementing the redemption of the preferred shares on September 14, 2007.

51 The share redemption would have been tax-neutral if the initial plan had in fact been the plan that was implemented. The result of the mistake was to trigger a significantly larger tax liability.

52 Fairmont learned of this mistake after an audit by the Canada Revenue Agency. It applied to the Ontario Superior Court of Justice to rectify the September 14, 2007 directors' resolutions that had authorized the preferred share redemption. Newbould J. allowed rectification of these resolutions on the grounds that Fairmont never intended to redeem the preferred shares and always intended to unwind the reciprocal loan structure on a tax-neutral basis.

53 The Ontario Court of Appeal unanimously dismissed the appeal (Simmons, Cronk, and Blair JJ.A.).

Analysis

54 Rectification is a centuries-old equitable remedy that gave courts discretion to correct "errors in integration" if signed documents did not reflect the true intention of the parties: see John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 589; see also Geoff R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 188-89. Where such an error occurs, "[t]he court will therefore put the agreement right ... to conform with the parties' true intentions" (S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at p. 240).

55 The available judicial discretion to retroactively implement the parties' true intention has been described as follows:

> The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done. ...

(*H.F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57 (Ont. C.A.), at p. 65, per Brooke J.A., rev'd on other grounds, (1974), [1976] 1 S.C.R. 319 (S.C.C.), at pp. 323-24. See also Waddams, at pp. 240-41; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 776; McCamus, at p. 587.)

56 While the remedy of rectification had been historically confined to cases of mutual mistake, in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.), this Court expanded its scope to include circumstances where the mistake was unilateral.

57 The rationale for the remedy is that no one should be allowed "to take unfair advantage of another's mistake": Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (7th ed. 2007), at p. 299; see also Hall, at pp. 190-91. In accordance with this purpose, rectification "should not be circumscribed by anomalous or artificial rules, but should be applied where appropriate in order to give better effect to equitable doctrines": I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 632.

58 The test for rectification requires courts to assess the true intention of the parties:

> In order for rectification to be available, it is necessary to identify a "true agreement" which precedes (and is not accurately recorded by) the written instrument. Such an agreement may itself be contained in a written instrument; but it may be oral, and need not itself have contractual force.

(*Snell's Equity* (31st ed. 2005), by John McGhee, ed., at p. 332. See also Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 820; Angela Swan and Jakub Adamski, *Canadian Contract Law* (3rd ed. 2012), at pp. 772-73; Goff and Jones, at p. 295; *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at pp. 621-22 and 630; *Mitchell v.*

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MacMillan (1980), 5 Sask. R. 160 (Sask. C.A.), at para. 8; *Reed Shaw Osler Ltd. v. Wilson* (1981), 17 Alta. L.R. (2d) 81 (Alta. C.A.), at p. 89; *Bryndon Ventures Inc. v. Bragg* (1991), 82 D.L.R. (4th) 383 (B.C. C.A.), at pp. 402-3; *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. C.A.), at para. 23; *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 (Ont. C.A.), at para. 77.)

59 Nor does the parties' prior intention have to amount to a fully enforceable agreement: *Joscelyne v. Nissen* (1969), [1970] 2 Q.B. 86 (Eng. C.A.), followed in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (Ont. H.C.), aff'd (1980), 26 O.R. (2d) 746 (Ont. C.A.). As Brown J. explained in *Graymar Equipment (2008) Inc. v. Canada (Attorney General)* (2014), 97 Alta. L.R. (5th) 288 (Alta. Q.B.):

> Rectification is available ... even where the parties have not concluded an agreement, so long as there is sufficiently convincing evidence that the parties had arrived upon a common intention. [para. 36]

(See also *Snell's Equity* (33rd ed. 2015), by John McGhee, at pp. 424-25; McCamus, at p. 558; Waddams, at p. 243.)

60 But the intention does have to be sufficiently clear and certain that courts can correct the error without resorting to speculation about what the parties had wanted to do in the first place: see *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72 (B.C. C.A.).

61 While parties seeking rectification must provide evidence of what they actually intended, they are not required to provide "an expressed antecedent agreement in order to found a successful claim": *Peter Pan Drive-In Ltd.*, at p. 296. Courts have long recognized that "the exact form of words in which the common intention is to be expressed is immaterial" (*McLean v. McLean* (2013), 118 O.R. (3d) 216 (Ont. C.A.), at para. 46, citing *Swainland Builders Ltd. v. Freehold Properties Ltd.*, [2002] EWCA Civ 560 (Eng. & Wales C.A. (Civil)), at para. 34; see also *Co-operative Insurance Society Ltd. v Centremoor Ltd.*, [1983] 2 E.G.L.R. 52, at p. 54, per Dillon L.J.; *Snell's Equity* (33rd ed. 2015), at pp. 426-37). In other words, as Professor Swan explains:

> ... it is "sufficient if [the party] establishes a common continuing intention in regard to the particular provision in question". There is no need to hedge the remedy about with requirements that are no more than technical and to require precise agreement on every point in the actual agreement to prevent the court from giving relief where it is clearly justified in doing so to prevent injustice. [Footnote omitted; p. 773.]

62 What matters instead is that the substance of the intention "can be ascertained with a reasonable level of comfort": *Performance Industries Ltd.*, at para. 47. In ascertaining these intentions, courts are free to make logical inferences based on the evidence before them. In *McLean*, for example, a husband and wife transferred property to their son and daughter-in-law. The wife later sought rectification of the memorandum of agreement that contained the terms of the transfer, claiming that the total purchase price was incorrect. The Ontario Court of Appeal rectified the memorandum even though it was not immediately obvious what the correct price was supposed to be. The court deduced the correct price based on "the totality of the evidence", noting that "[o]nly when the related documents are considered as a whole does the intention of the parties emerge": paras. 60 and 62. Similarly, in *Royal Bank v. El-Bris Ltd.* (2008), 92 O.R. (3d) 779 (Ont. C.A.), a business owner mistakenly signed a personal guarantee for $700,000 *and* a collateral mortgage for the same amount, when he had only intended to create one debt obligation. The Ontario Court of Appeal allowed rectification of both the guaranteed loan and the mortgage based on the true intention of the parties, even though the mechanics of the necessary corrective transactions had never been previously set out.

63 Whether a mistake is unilateral or mutual, rectification is, ultimately, an equitable remedy that seeks to give effect to the true intention of the parties, and prevent errors from causing windfalls. The doctrine is also "based on simple notions of relief against unjust enrichment", namely, that it would be unfair to rigidly enforce an error that enriches one party at the expense of another: Waddams, at p. 240. As Professor Waddams notes, "[t]he doctrine is a far-reaching and flexible tool of justice" (p. 243). (See also McInnes, at pp. 820-21; Fridman, at pp. 782-83; *El-Bris*, at paras. 13 and 36; *McLean*, at para. 73; Patrick Hartford, "Clarifying the Doctrine of Rectification in Canada: A Comment on *Shafron v KRG Insurance Brokers (Western) Inc.*" (2013), 54 *Can. Bus. L. J.* 87, at p. 88.)

64 The common law principles of rectification were recently applied in *KRG Insurance Brokers (Western) Inc. v. Shafron*,

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[2009] 1 S.C.R. 157 (S.C.C.). *Shafron* involved an employment contract that included a restrictive covenant, prohibiting Mr. Shafron from working as an insurance broker in the "Metropolitan City of Vancouver" for three years after his employment with KRG Western ended. "Metropolitan City of Vancouver" was not a legally defined term, but Mr. Shafron thought it referred to the City of Vancouver, while KRG Western thought it referred to the larger Greater Vancouver Regional District.

65 KRG Western applied to rectify the contract by substituting "Greater Vancouver Regional District" for "Metropolitan City of Vancouver", to prevent Mr. Shafron from working as an insurance broker in the suburb of Richmond. The Court held that rectification was unavailable because KRG Western could not establish that there had been a prior agreement in which "Metropolitan City of Vancouver" was defined in sufficiently precise terms.

66 While I acknowledge that rectification seems most often to have been granted in the context of agreed upon terms having been *transcribed* incorrectly, since unjust enrichment can also result from a mistake in *carrying out* the intention of the parties, the remedy is also available to correct errors in implementation. Courts have, as a result, granted rectification where a corporate transaction was conducted in the wrong sequence (*GT Group Telecom Inc., Re* (2004), 5 C.B.R. (5th) 230 (Ont. S.C.J. [Commercial List]), where an underlying calculation in a contract was incorrect (*Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.* (1981), 27 A.R. 411 (Alta. C.A.)), and where the requisite steps of an amalgamation were not correctly carried out (*Prospera Credit Union, Re* (2002), 32 B.L.R. (3d) 145 (B.C. S.C.)).

67 Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*, [1954] O.W.N. 822 (Ont. C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray* (1974), [1975] 2 S.C.R. 354 (S.C.C.), this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Ltd. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (Ont. H.C.), at p. 766, aff'd (1990), 72 O.R. (2d) 703 (Ont. C.A.): "... the proper test is whether the third party relied on the document as executed and took action based on that document." (See also McCamus, at p. 595; Spry, at pp. 630-31; *Kolias v. Condominium Plan 309 CDC* (2008), 440 A.R. 389 (Alta. C.A.); *Carlson v. Big Bud Tractor of Canada Ltd.*. (1981), 7 Sask. R. 337 (Sask. C.A.), at paras. 24-26.)

68 This is consistent with one of the underlying purposes of rectification, namely to prevent unjust enrichment: Waddams, at p. 240; *El-Bris*, at paras. 13 and 36; *McLean*, at para. 73. Just as rectification can prevent one party from enforcing an error and being unjustly enriched by the other's mistake, rectification can also prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall. This theory was on display in *Love v. Love*, [2013] 5 W.W.R. 662 (Sask. C.A.). The Saskatchewan Court of Appeal allowed the rectification of a life insurance contract, in which a husband had designated his wife as the beneficiary of his life insurance policy. When the couple divorced, the husband completed a new form to designate his son as the policy's beneficiary instead of his former wife. He filled the paperwork out incorrectly. After he died, the former wife and the son both attempted to claim the proceeds of the insurance policy. The court rectified the contract to reflect what it saw as the husband's true intention, namely to designate his son as the beneficiary.

69 This brings us to the tax context.

70 Allowing the tax authorities, a third party, to profit from legitimate tax planning errors, when its own rights have not been prejudiced in any way, amounts to unjust enrichment. Businesses and individuals are legally entitled to structure their affairs in a way that minimizes their tax burden. The General Anti-Avoidance Rule in s. 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for example, permits transactions that are primarily designed to avoid taxes so long as they do not circumvent the *Act* in an abusive manner: *Copthorne Holdings Ltd. v. R.*, [2011] 3 S.C.R. 721 (S.C.C.), at para. 32. There is, as a result, an inherent unfairness in enforcing errors in transcription or implementation that result in allowing the tax authorities to collect a windfall.

71 It is true that a taxpayer should expect to be taxed based on what is actually done, not based on what could have been done (*Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.), at para. 45), but this principle does not deprive equity of a role where what a party or parties genuinely intended to do was transcribed *or* implemented incorrectly.

72 On the other hand, parties should not be given *carte blanche* to exploit rectification for purposes of engaging in retroactive tax planning. Courts will not permit parties to undo decisions simply because they have come to regret them later.

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Allowing parties to rewrite documents and restructure their affairs based solely on a generalized and all-encompassing preference for paying lower taxes is not consistent with the equitable principles that inform rectification.

73 As the trial judge noted in *Kanji v. Canada (Attorney General)* (2013), 114 O.R. (3d) 1 (Ont. S.C.J. [Commercial List]), "[t]ax-driven claims for rectification must be approached with care since common sense tells us that most taxpayers would like to minimize the amount of tax they must pay to the government": para. 36. The British Columbia Court of Appeal expressed similar views in *Pallen Trust, Re* (2015), 385 D.L.R. (4th) 499 (B.C. C.A.), when it said:

> Carrying out a fact-focussed analysis should ensure that the "social evil" of aggressive tax avoidance can, where it is just to do so, be appropriately disincentivized, and on the other hand that where the taxpayer's conduct has been reasonable ... he or she is not unfairly penalized. ... [para. 53]

74 How then should rectification be seen in the tax context? In my view, the two most helpful common law cases on rectification in the tax context were decided by the Ontario Court of Appeal. In *771225 Ontario Inc. v. Bramco Holdings Co.* (1995), 21 O.R. (3d) 739 (Ont. C.A.), a purchaser utilized a company she owned to buy property, intending to minimize her personal income tax. She erroneously thought that her company was an Ontario company and assumed that she would pay the residential land transfer tax rate of 2 percent. The company, it turned out, was subject to the higher rate of 20 percent. This mistake resulted in a liability of $1.7 million instead of $84,745. The court denied rectification on the grounds that this was an "attemp[t] to rewrite history in order to obtain more favourable tax treatment" (p. 742). The purchaser intended the transaction to minimize her income tax — which it did — and was simply caught off-guard by land transfer tax consequences.

75 A different result occurred in *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (Ont. C.A.). Two couples co-owned a company through which they operated a convenience store chain. They decided to split the business into two separate corporations so that each couple could operate independently. They mistakenly believed, based on an erroneous assumption by their tax advisor, that this would not trigger any immediate income taxes. When it did, they applied for rectification. Austin J.A. granted the remedy, stating:

> ... the true agreement between the parties here was the acquisition of the half interest in the ... tobacco business ... in a manner that would not attract immediate liability for income tax.
>
> . . . . .
>
> ... The plain and obvious fact ... is that the proposed division had to be carried out on a no immediate tax basis or not at all. [paras. 25-27]

76 The Court of Appeal distinguished this case from *Bramco* on the grounds that the couples' intention to avoid income tax was a primary and continuing objective of the transaction, whereas in *Bramco* the concern over the land transfer tax arose only after the transaction had been completed.

77 I am aware that this distinction has attracted some negative commentary: Lionel Smith, "Can I Change My Mind? Undoing Trustee Decisions" (2008), 27 *E.T.P.J.* 284, at pp. 289-90; Swan and Adamski, at pp. 768-69. But in my view, the Court of Appeal's decision to allow rectification in *Juliar* can easily be explained by — and flows seamlessly from — the factual findings of the Application Judge in that case. In particular, the decision to grant rectification resulted from the factual finding that the Juliars had a continuing, ascertainable intention to pursue the transaction on a tax-free basis or not at all. Seen in this way, *Juliar* did not relax the standards for rectification in the tax context. Rather, it represents a straightforward application of the test for rectification: see Joel Nitikman, "Many Questions (and a Few Possible Answers) About the Application of Rectification in Tax Law" (2005), 53 *Can. Tax J.* 941, at p. 963.

78 Nor do I accept the floodgates concern that courts will be unable to distinguish between legitimate mistakes and attempts at retroactive tax planning. Those courts which have applied *Juliar* appear to have very comfortably recognized the distinction. Sometimes rectification was granted (see *McPeake v. Canada (Attorney General)*, [2012] 4 C.T.C. 203 (B.C. S.C.), at paras. 21-22 and 46; *Slate Management Corp. v. Canada (Attorney General)*, 2016 ONSC 4216 (Ont. S.C.J. [Commercial List]), at paras. 10 and 16 (CanLII); *Fraser Valley Refrigeration, Re*, [2009] 6 C.T.C. 73 (B.C. S.C.), at paras. 22-24 and 48, aff'd (2009), 280 B.C.A.C. 317 (B.C. C.A.)). But at other times, it was denied because, while the parties had a

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general desire to minimize their tax burden, they could not prove that the tax objective was an intended and fundamental aspect of the transaction: *Birch Hill Equity Partners Management Inc. v. Rogers Communications Inc.* (2015), 128 O.R. (3d) 1 (Ont. S.C.J.), at paras. 32 and 40-41; *Binder v. Saffron Rouge Inc.* (2008), 89 O.R. (3d) 54 (Ont. S.C.J.), at paras. 16-18 and 22-25; *Aboriginal Diamonds Group Ltd., Re*, 2007 NWTSC 37 (N.W.T. S.C.), at paras. 38-43 (CanLII); *Zhang v. Canada*, 2015 D.T.C. 5084 (B.C. S.C.), at paras. 21 and 34; *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)* (2014), 443 Sask. R. 172 (Sask. Q.B.), at paras. 417 and 424-25; *JAFT Corp. v. Jones* (2014), 304 Man. R. (2d) 86 (Man. Q.B.), at paras. 31, 39 and 43-44, aff'd (2015), 323 Man. R. (2d) 57 (Man. C.A.); *Capstone Power Corp. v. 1177719 Alberta Ltd.*, 2016 BCSC 1274 (B.C. S.C.), at paras. 27-54 (CanLII); *Kanji*, at paras. 22 and 33.

79 This brings us to this Court's most recent, and in my view most pertinent, discussion of rectification in the tax context in the companion appeals of *AES* and *Riopel*: *Archambault c. Canada (Agence du Revenu)*, [2013] 3 S.C.R. 838 (S.C.C.). Although LeBel J. expressly declined to comment on *Juliar* because he was applying the *Civil Code of Québec*, he took an approach to the rectification of tax planning errors consistent with *Juliar*.

80 In *AES*, the company underwent a reorganization which involved transferring 25 percent of its shares to a subsidiary. It intended that this transaction be tax-neutral, but AES's advisors made an error when calculating the value of the shares, resulting in a large, unintended, and entirely avoidable tax liability. Similarly, in the companion appeal of *Riopel*, a couple attempted to amalgamate two companies. To minimize taxes, they structured the amalgamation in a particular sequence of transactions that involved selling shares, and issuing new shares and promissory notes. The couple's tax advisors erroneously enacted the sequence out of order, resulting in a significant tax liability. LeBel J. explained that under the *Code*, if the true intention is erroneously expressed in writing, courts will rectify the mistake as long as the intention was sufficiently precise:

> ... the dispute in the two appeals before us necessarily concerns the [Agence du revenu du Québec] and the [Canada Revenue Agency]. Because of their situations, it must be asked whether they can rely on acquired rights to have an erroneous writing continue to apply even though the existence of an error has been established and it has been shown that the documents filed with the tax authorities are inconsistent with the parties' true intention.
>
> ... For now, therefore, what must be determined is the true nature of the operations transacted in *AES* and *Riopel*. ... This Court must decide whether the parties' juridical acts, which led to the notices of assessment, are consistent with their true common intention and whether the tax authorities are entitled to have an erroneous declaration of intention continue to apply. [paras 44-46]

81 Rectification was granted in both *AES* and *Riopel* based on these principles. As LeBel J. explained, "the agreements between the parties in both appeals were validly formed in that ... they provided for obligations whose objects were sufficiently determinable": para. 54.

82 LeBel J. concluded that "the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent": *AES*, at para. 52. In other words, the tax authorities were not entitled to get a windfall from the errors. But he also warned that these principles do not allow parties to engage in retroactive tax planning:

> Taxpayers should not view this recognition of the primacy of the parties' internal will — or common intention — as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. [para. 54]

83 The requirements for rectification in the tax context articulated in *AES* are, in my respectful view, functionally equivalent to the test under the common law. Civil law and common law rectification in the tax context are clearly based on analogous principles, namely, that the true intention of the parties has primacy over errors in the transcription or implementation of that agreement, subject to a need for precision and the rights of third parties who detrimentally rely on the agreement.

84 That means that there is no principled basis in either the common or civil law for a stricter standard in the tax context simply because it is the government which is positioned to benefit from a mistake. The tax department is not entitled to play

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"Gotcha" any more than any other third party who did not rely to its detriment on the mistake.

85 Notably, both *AES* and *Riopel* involved errors of implementation: the error in *AES* was a faulty calculation and the error in *Riopel* was that a complex transaction was conducted in the wrong sequence. The application of rectification in these circumstances clearly confirms that rectification is *not* confined only to correcting terms that were omitted, accidentally added, or articulated incorrectly in a written document, but is no less available when the parties' true intention is erroneously implemented.

86 In the case before us, as the Application Judge noted, this was not a situation where Fairmont merely misapprehended the consequences of unwinding the reciprocal loan structure with a share redemption. Newbould J. made explicit findings of fact that Fairmont had a continuing intention *never* to unwind the reciprocal loan structure by redeeming the preferred shares, because doing so would trigger taxable exchange gains or losses. The parties, he concluded, were aware that unwinding the reciprocal loan structure with a share redemption would trigger a substantial tax liability, and expressly agreed in emails and in-person discussions that "no redemption of the preferred shares should occur at any time". They agreed to decide at a later date what the exact mechanics of unwinding the reciprocal loan structure in a tax-neutral way would be.

87 Relying on this evidence, Newbould J. concluded that

> there was a continuing intention on the part of Fairmont from the time of the 2002 loan arrangements with Legacy that the loan arrangements would be carried out with a view to being tax and accounting neutral *and a continuing intention from the time of the 2006 transaction in which control of Fairmont passed to the purchaser of its shares that the preference shares of [Fairmont's subsidiaries] would not be redeemed in light of the modified plan that was carried out at that time.*
>
> I also think a fair conclusion from the evidence ... that when the 2006 transaction was undertaken, Fairmont had an intent that at some point in the future they would have to deal with the unhedged position of [Fairmont's subsidiaries] in a way that would be tax and accounting neutral although they had no specific plan as to how they would do that.
>
> [Emphasis added.]
>
> ((2014), 123 O.R. (3d) 241, at paras. 32-33)

88 Newbould J. was accordingly satisfied that Fairmont had an unwavering intention to unwind the reciprocal loan structure in a way that ensured that any foreign exchange gains and losses would be offset against each other:

> In this case, the intention of Fairmont from 2002 was to carry out the reciprocal loan arrangements with Legacy on a tax and accounting neutral basis so that any foreign exchange gain would be offset by a corresponding foreign exchange loss. When control of Fairmont changed in 2006, that intention did not change and when the loan unwind occurred in 2007, that intention did not change....
>
> I do not see this as a case in which tax planning has been done on a retroactive basis after a [Canada Revenue Agency] audit. The purpose of the 2007 unwind of the loans was not to redeem the preference shares of [Fairmont's subsidiaries], but to unwind the loans on a tax-free basis. The redemption of the preference shares was mistakenly chosen as the means to do so. [paras. 42-43]

89 This means that Fairmont was not attempting to change its original intention because of unanticipated tax consequences. It *had* anticipated the tax consequences of unwinding the reciprocal loan structure with a preferred share redemption, and it rejected this course of action.

90 Fairmont was found by Newbould J. to have always had a clear, continuing intention to unwind the reciprocal loan structure on a tax-neutral basis and never to redeem the preferred shares. But, by mistake, the preferred share redemption terms were included in the directors' resolutions. This is exactly the kind of mistake rectification exists to remedy. Once Newbould J. was satisfied of the true intention of the parties, he was entitled to give effect to it by allowing the replacement loan arrangement terms to be inserted into the directors' resolutions.

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91 To require an exhaustive account of how the transaction was supposed to have proceeded would amount to imposing a uniquely high threshold for rectification in the tax context. As Newbould J. explained, denying the application to rectify the agreement in these circumstances would "give [the Canada Revenue Agency] an unintended gain because of the mistake": para. 44. There is no basis for permitting a windfall to the Canada Revenue Agency that no other third party would have been entitled to.

92 I would dismiss the appeal with costs.

Appeal allowed.
Pourvoi accueilli.

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Tab 15

2002 SCC 19, 2002 CSC 19
Supreme Court of Canada

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.

2002 CarswellAlta 186, 2002 CarswellAlta 187, 2002 SCC 19, 2002 CSC 19, [2002] 1 S.C.R. 678, [2002] 5 W.W.R. 193, [2002] S.C.J. No. 20, 111 A.C.W.S. (3d) 733, 209 D.L.R. (4th) 318, 20 B.L.R. (3d) 1, 266 W.A.C. 201, 283 N.R. 233, 299 A.R. 201, 50 R.P.R. (3d) 212, 98 Alta. L.R. (3d) 1, J.E. 2002-448, REJB 2002-28038

Performance Industries Ltd. and Terrance O'Connor, Appellants/Respondents on Cross-Appeal v. Sylvan Lake Golf & Tennis Club Ltd., Respondent/Appellant on Cross-Appeal

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour, LeBel JJ.

Heard: December 14, 2000
Judgment: February 22, 2002*
Docket: 27934

Proceedings: affirming (2000), 185 D.L.R. (4th) 269 (Alta C.A.); reversing in part (1999), 49 B.L.R. 284 (Alta. Q.B.)

Counsel: *David R. Haigh, Q.C.*, and *Brian Beck*, for appellants/respondents on cross-appeal
Lowell Westersund and *Munaf Mohamed*, for respondent/appellant on cross-appeal

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

Headnote

Contracts --- Rectification or reformation — Prerequisites — Mistake — Unilateral
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification.

Contracts --- Rectification or reformation — Bars to rectification
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification — Plaintiff's lack of due diligence was not defence to rectification.

Damages --- Damages in contract — Loss of profits consequent to breach — General principles
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to compensatory damages for breach of contract as rectified, including losses flowing from special circumstances known to parties when contract was made.

Damages --- Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Fraud
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification — Punitive damages award was not appropriate because compensatory damages adequately achieved objectives of retribution, deterrence, and denunciation.

Sale of land --- Remedies — Rectification — Of agreement
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement — Plaintiff was entitled to rectification.

Sale of land --- Remedies — Damages — Measure of damages
Parties entered into written agreement, which, by virtue of defendant's fraud, did not reflect their earlier oral agreement —

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Plaintiff was entitled to compensatory damages for breach of contract as rectified, including losses flowing from special circumstances known to parties when contract was made.

Contrats --- Rectification ou réformation — Conditions préalables — Erreur — Unilatérale
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification.

Contrats --- Rectification ou réformation — Motifs interdisant la rectification
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification — Manque de diligence raisonnable de la part de la demanderesse n'empêchait pas la rectification.

Dommages --- Dommages contractuels — Perte de profits à la suite du manquement — Principes généraux
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir des dommages-intérêts compensatoires pour la rupture du contrat rectifié, y compris pour les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat.

Dommages --- Dommages exemplaires, punitifs ou additionnels — Motifs permettant d'accorder des dommages exemplaires, punitifs ou additionnels — Fraude
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification — Décision d'accorder des dommages punitifs n'était pas appropriée vu que les dommages-intérêts compensatoires permettaient de répondre adéquatement aux objectifs de punition, dissuasion et dénonciation.

Vente de bien-fonds --- Réparations — Rectification — Du contrat
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir la rectification.

Vente de bien-fonds --- Réparations — Dommages-intérêts — Évaluation des dommages
Parties ont conclu un contrat écrit qui ne reflétait pas leur entente verbale antérieure en raison de la fraude commise par le défendeur — Demanderesse avait le droit d'obtenir des dommages-intérêts compensatoires pour la rupture du contrat rectifié, y compris pour les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat.

The plaintiff and the individual defendant entered into a verbal agreement to purchase a golf course as a joint venture, with the plaintiff and the corporate defendant each holding a one-half interest as tenants in common. The plaintiff would operate the facilities for five years for its own account, at the end of which time the defendants would buy out the plaintiff. The parties verbally agreed that the plaintiff had an option for a residential development on part of the property. The parties signed a written agreement, prepared by the defendants' lawyer, permitting the development of a strip of land 110 feet wide, rather than the 110 yards wide to which the parties had verbally agreed. The president of the plaintiff did not read the agreement before signing it. When the plaintiff proposed to build a residential development on part of the property, the individual defendant rejected the plan by invoking the clause that restricted development to 110 feet. At the end of the five-year term, the plaintiff refused to relinquish possession of the land. The defendants obtained an order for specific performance and built a clubhouse on the disputed property. The plaintiff brought an action for rectification of the agreement, or damages in lieu, and for punitive damages and solicitor and client costs.

The trial judge allowed the plaintiff's action for damages and found that the plaintiff had mistakenly believed that the written agreement reflected the verbal agreement and that the individual defendant had chosen not to inform the plaintiff of the mistake. The trial judge found that the individual defendant's actions were fraudulent, dishonest, and deceitful, and provided the necessary support for lifting the corporate veil. The trial judge held the individual defendant personally liable, jointly and severally with his company, for $620,100 in damages, the amount of money to which the president of the plaintiff would have been entitled had he been permitted to complete the residential development in accordance with the terms of the rectified option clause. The trial judge awarded the plaintiff $200,000 for punitive damages. For their misbehaviour in the conduct of the action, the defendants were required to pay solicitor and client costs.

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The Court of Appeal allowed the defendants' appeal in part. The court found that the trial judge had sufficient evidence upon which to base his conclusions on the plaintiff's unilateral mistake and the individual defendant's misconduct. The quantum of damages for loss of opportunity was generous but the court did not interfere with the award. The misconduct of the defendants was outrageous, but the compensatory damages awarded adequately satisfied the goals of punishment and deterrence. No valid reason was given for imposing punitive damages, so that award was disallowed. The trial judge had ample bases upon which to exercise his discretion and award solicitor and client costs.

The defendants appealed. The plaintiff cross-appealed, seeking restoration of the punitive damages award.

Held: The appeal and the cross-appeal were dismissed with costs.

Per Binnie J. (McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Arbour JJ. concurring): The plaintiff was entitled to rectification as it met all the conditions precedent required for the remedy. The plaintiff established that the terms to which it had orally agreed were not properly written down. The trial judge found that the parties had made a verbal agreement with respect to a definite project in a definite location, although they did not discuss a metes and bounds description. The individual defendant fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that the plaintiff would not sign an agreement without the option for sufficient land to create a development with two rows of housing as specified in the prior oral contract; therefore, he knew that when the plaintiff signed the document, the plaintiff had not detected the substitution of 110 feet for 110 yards. The trial judge characterized the individual defendant's actions as "fraudulent, dishonest and deceitful." The trial judge made his key findings in respect of the prior oral agreement, the unilateral mistake of the plaintiff's president, and the individual defendant's knowledge of that mistake to a standard of "beyond any reasonable doubt."

The plaintiff's lack of due diligence was not a defence to rectification because the plaintiff sought no more than to enforce the prior oral agreement to which the defendants had already bound themselves. The president of the plaintiff had left the documentation to his lawyer without appreciating that he had given his lawyer insufficient information to check the individual defendant's figures, and, at that time, he no reason to question the individual defendant's integrity. Furthermore, the plaintiff's lack of due diligence provided no defence because of the individual defendant's fraud. The individual defendant undertook, as part of the verbal agreement, to have a document prepared setting out the terms of the agreement. The trial judge found that part of the individual defendant's fraudulent scheme was to have the document wrongly state the terms of the option, to misrepresent fraudulently to the plaintiff that the document accurately set out their verbal agreement, to allow the plaintiff to sign the document when the individual defendant knew that the plaintiff was mistaken in doing so, and then to delay any response to the plaintiff's development proposals until it was almost too late for the development to proceed. The individual defendant admitted providing his lawyer with the erroneous metes and bounds description in the option clause.

There was no reason to disturb the trial judge's award of $620,100 in compensatory damages. The parties specifically contemplated that the optioned land would be used for residential housing and the damages for breach of the contract, as rectified, therefore properly included losses flowing from the special circumstances known to the parties when they made their contract. Although the Court of Appeal characterized the compensatory award as "substantial and generous," it was not prepared to interfere with the award and, in the absence of an error of principle or a factual record that supported the defendants' criticisms, there was no reason to interfere with the award.

The award of punitive damages did not serve a rational purpose. Punitive damages are rational only if compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation, which was not the case here. This case involved a commercial relationship between businessmen who were equals. Although the individual defendant's misconduct was planned and deliberate and lasted for four and one-half years, the plaintiff obtained full compensation plus costs on a solicitor and client basis, which had a punitive effect on the individual defendant.

La demanderesse et le défendeur, un particulier, ont conclu une entente verbale selon laquelle ils devaient former une coentreprise pour acheter un terrain de golf par laquelle la demanderesse et la défenderesse, une personne morale, seraient copropriétaires et détiendraient chacune une participation de 50 pour cent. La demanderesse devait exploiter les installations pendant cinq ans pour son propre compte et, par la suite, les défendeurs devaient racheter la part de la demanderesse. Les parties se sont entendues verbalement sur une option que pouvait soulever la demanderesse dans le but de construire un complexe résidentiel sur une partie du terrain. Les parties ont signé un contrat écrit, rédigé par l'avocat des défendeurs, qui

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autorisait la construction sur une bande de terrain large de 110 pieds plutôt que de 110 verges, comme il avait été convenu verbalement par les parties. Le président de la demanderesse n'a pas lu le contrat avant de le signer. La demanderesse a soumis une proposition pour construire le complexe résidentiel sur une partie du terrain, mais le défendeur a refusé le projet en invoquant la clause du contrat qui limitait le développement sur une largeur de 110 pieds. Lorsque le délai de cinq ans a expiré, la demanderesse a refusé d'abandonner la possession du terrain. Les défendeurs ont obtenu un jugement ordonnant l'exécution forcée et ont construit un pavillon sur le terrain en litige. La demanderesse a intenté une action pour obtenir la rectification du contrat ou bien des dommages-intérêts; elle a aussi réclamé des dommages punitifs et les dépens sur une base avocat-client.

Le juge de première instance a accueilli l'action en dommages-intérêts de la demanderesse; il a estimé que la demanderesse avait cru par erreur que le contrat écrit reflétait les termes de l'entente verbale et que le défendeur avait décidé ne pas informer la demanderesse qu'il y avait une erreur dans le contrat. Le juge de première instance a conclu que la conduite du défendeur avait été frauduleuse, malhonnête et dolosive et qu'elle constituait un motif suffisant pour lever le voile corporatif. Il a déclaré le défendeur solidairement responsable avec sa société du paiement des dommages-intérêts de 620 100 $, lesquels dommages étaient équivalents au montant auquel aurait eu droit la demanderesse si elle avait eu la possibilité de compléter son projet résidentiel conformément aux termes de la clause d'option rectifiée. Le juge a accordé 200 000 $ à la demanderesse à titre de dommages punitifs. À cause de leur mauvaise conduite lors du déroulement de l'instance, les défendeurs ont été condamnés à payer les dépens sur une base avocat-client.

La Cour d'appel a accueilli en partie le pourvoi des défendeurs. La Cour a estimé que le juge de première instance avait suffisamment de preuve pour fonder ses conclusions relatives à l'erreur unilatérale de la demanderesse et à la mauvaise conduite du défendeur. Même si les dommages-intérêts accordés pour la perte d'une possibilité étaient généreux, ils n'ont pas été modifiés. La conduite du défendeur était scandaleuse, mais les dommages-intérêts compensatoires accordés répondaient de façon adéquate aux objectifs de punition et de dissuasion. Aucune raison valable n'a été donnée pour l'attribution de dommages punitifs et l'attribution de ces dommages a été annulée. Le juge de première instance avait amplement de preuve pouvant lui permettre d'exercer son pouvoir discrétionnaire et d'accorder des dépens sur une base avocat-client.

Les défendeurs ont interjeté appel. La demanderesse a formé un appel incident dans lequel elle a demandé que la décision relative aux dommages punitifs soit rétablie.

Arrêt: Le pourvoi et le pourvoi incident ont été rejetés avec dépens.

Binnie, J. (McLachlin, J.C.C., L'Heureux-Dubé, Gonthier, Major, Arbour, JJ., souscrivant) : La demanderesse avait le droit d'obtenir la rectification parce qu'elle a satisfait à toutes les conditions préalables donnant ouverture à ce moyen de réparation. La demanderesse a prouvé que les termes du contrat sur lesquels elle s'était entendue verbalement avec les défendeurs n'avaient pas été transcrits convenablement. Le juge de première instance a déterminé que les parties avaient conclu une entente verbale relativement à un projet précis devant être construit à un endroit précis, bien que les parties n'avaient pas discuté de la description technique du terrain. Le défendeur a fait une assertion inexacte et frauduleuse en laissant croire que le document écrit représentait fidèlement les termes de l'entente verbale antérieure. Il savait que la demanderesse ne signerait pas le contrat si ce dernier ne contenait pas une option visant suffisamment de terrain pour pouvoir y développer un complexe de deux rangées de maisons tel qu'il avait été spécifié dans le cadre de l'entente verbale antérieure. Par conséquent, il savait que la demanderesse n'avait pas vu que 110 verges avait été remplacé par 110 pieds lorsque celle-ci a signé le contrat. Le juge de première instance a qualifié les actions du défendeur de « frauduleuses, malhonnêtes et dolosives ». C'est au regard de la norme de preuve « hors de tout doute raisonnable » que le juge a tiré ses conclusions clés à l'égard de l'entente verbale antérieure, de l'erreur principale et unilatérale de la demanderesse et de la connaissance par le défendeur de l'erreur.

Le manque de diligence raisonnable de la part de la demanderesse ne l'empêchait pas d'obtenir la rectification puisqu'elle voulait seulement faire respecter l'entente verbale antérieure qui liait déjà le défendeur. La demanderesse a laissé aux avocats la charge de rédiger le contrat sans se rendre compte qu'elle n'avait pas donné assez d'information à son avocat pour lui permettre de vérifier les chiffres du défendeur. De plus, elle n'avait pas de raison, à ce moment-là, de douter du défendeur. En outre, le manque de diligence raisonnable de la part de la demanderesse ne constituait pas une défense vu la fraude perpétrée par le défendeur. Dans le cadre de l'entente verbale, le défendeur s'était engagé à faire mettre par écrit les modalités du contrat. Le juge de première instance a estimé que le défendeur, dans le cadre de son stratagème frauduleux, avait fait en sorte que le document énonce erronément les modalités de l'option; que le défendeur avait laissé croire à la

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demanderesse, de manière frauduleuse et inexacte, que le document reflétait adéquatement leur entente verbale; que le défendeur avait laissé la demanderesse signer le contrat alors qu'il savait très bien que la demanderesse commettait une erreur en le signant; et que le défendeur avait retardé toute réponse aux propositions de développement de la demanderesse jusqu'à ce qu'il soit devenu presque trop tard pour réaliser le projet de construction. Le défendeur a admis avoir donné à son avocat la description technique erronée qui figurait dans la clause relative à l'option.

Il n'y avait aucun motif pouvant justifier de modifier la somme de 620 000 $ que le juge de première instance avait accordé à titre de dommages-intérêts compensatoires. Les parties avaient spécifiquement envisagé que le terrain faisant l'objet de l'option serait utilisé pour y construire un projet résidentiel. Par conséquent, les dommages-intérêts compensatoires accordés pour la rupture du contrat rectifié incluaient à bon droit les pertes découlant des circonstances spéciales qui étaient connues des parties au moment de la conclusion du contrat. Même si la Cour d'appel a qualifié les dommages-intérêts compensatoires de « substantiels et généreux », elle n'était pas disposée à les modifier et, en l'absence d'une erreur de principe ou d'éléments factuels pouvant appuyer les critiques formulées par les défendeurs, il n'y avait pas de raison de modifier cette conclusion.

La décision d'accorder des dommages punitifs ne répondait à aucun objectif rationnel. Une telle décision n'est rationnelle que lorsque les dommages compensatoires ne permettent pas de répondre adéquatement aux objectifs de punition, dissuasion et dénonciation, ce qui n'était pas le cas en l'espèce. Il s'agissait d'une relation commerciale entre des hommes d'affaires qui étaient tous deux sur un pied d'égalité. Même si la conduite du défendeur a été préméditée, délibérée et qu'elle a duré pendant quatre ans et demie, la demanderesse a été pleinement indemnisée et elle s'est vu adjugé les dépens sur une base avocat-client, ce qui a eu un effet punitif sur le défendeur.

APPEAL by defendants from judgment reported at 2000 CarswellAlta 360, [2000] A.J. No. 408, 2000 ABCA 116, (sub nom. *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (No. 2))* 255 A.R. 329, 220 W.A.C. 329, 6 B.L.R. (3d) 24 (Alta. C.A.), allowing in part defendants' appeal from judgment allowing plaintiff's action for damages and holding individual defendant personally liable jointly and severally with his company for $620,100 in damages, awarding plaintiff $200,000 in punitive damages, and solicitor and client costs, reported at 1999 CarswellAlta 599, [1999] A.J. No. 741, 49 B.L.R. (2d) 284, 246 A.R. 272 (Alta. Q.B.); CROSS-APPEAL by plaintiff seeking restoration of punitive damages award.

POURVOI des défendeurs à l'encontre de l'arrêt publié à 2000 CarswellAlta 360, [2000] A.J. No. 408, 2000 ABCA 116, (sub nom. *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (No. 2))* 255 A.R. 329, 220 W.A.C. 329, 6 B.L.R. (3d) 24 (Alta. C.A.), qui a accueilli en partie le pourvoi des défendeurs à l'encontre du jugement qui avait accueilli l'action intentée par la demanderesse, déclaré le défendeur particulier solidairement responsable avec sa société du paiement d'une somme de 620 000 $ à titre de dommages-intérêts et accordé à la demanderesse une somme de 200 000 $ à titre de dommages punitifs ainsi que les dépens sur une base avocat-client, publié à 1999 CarswellAlta 599, [1999] A.J. No. 741, 49 B.L.R. (2d) 284, 246 A.R. 272 (Alta. Q.B.); POURVOI INCIDENT de la demanderesse afin que soit rétablie l'attribution de dommages punitifs.

***Binnie J. (McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major, Arbour JJ.* concurring):**

1 In this appeal the Court is called on to deal with rectification of a contract for a real estate development dream that turned into a nightmare for the warring partners. Houses were to have been built along the 18th fairway of the Sylvan Lake Golf Course, within commuting distance of Red Deer, Alberta. It did not happen because the parties fell out over the amount of land to be included in the development contract.

2 There was a written contract but the respondent's President did not bother to read it before it was signed. Had he done so, the error in reducing the parties' prior oral agreement to writing would likely have been detected and the development would have gone ahead. The appellants, who rely on the written document, say that a party who fails to exercise due diligence in its business affairs should be refused the equitable remedy of rectification. That is their strongest argument.

3 The principal witness and "directing mind" of the appellant Performance Industries Ltd. ("Performance"), which stands firm on the written document, is Terrance O'Connor. For him, the joint venture ended with his actions being characterized by the trial judge as "fraudulent, dishonest and deceitful" ((1999), 246 A.R. 272 , at para. 114). The trial judgment made him

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personally liable (jointly and severally with his company Performance Industries Ltd.) for $1,047,810, including a $200,000 award of punitive damages, plus costs on a solicitor-client basis. He and his company appeal to this Court on various errors of law, few of which were argued before the trial judge.

4 For his erstwhile partner, Frederick Bell, whose corporate vehicle is Sylvan Lake Golf & Tennis Club Ltd. ("Sylvan"), his commercial aspirations have been trapped in the courts for seven years. This was because, so the trial judge found, O'Connor swore false affidavits, refused to produce relevant documents, gave false testimony in the course of two separate trials, and did "everything in his power to prevent the truth from coming to light" (para. 115). Bell is now said to be a spent force, "divorced [and lacking] the initiative or drive and determination to proceed with such a development at his present age" (para. 90). Bell obtained a $200,000 punitive damage award at trial, but this was disallowed by the Alberta Court of Appeal ((2000), 255 A.R. 329, 2000 ABCA 116). In its cross-appeal, his company, Sylvan, seeks restoration of that award.

5 Because of the punitive damages issues, this appeal was heard concurrently with *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.), judgment, which is being released concurrently with this judgment.

6 In my view, for reasons which differ somewhat from the memorandum of judgment handed down by the Alberta Court of Appeal, the appeal should be dismissed with costs and the cross-appeal should be dismissed without costs.

I. Facts

7 Sylvan had operated a 171.53 acre, 18-hole golf course since 1979 under a lease which gave it a right of first refusal in the event the owner decided to sell the land. On November 3, 1989, a purchaser unrelated to O'Connor or Performance offered to purchase the golf course property for $1.3 million. Sylvan then had until December 31, 1989, to make the purchase on the same terms and conditions. The outside offer triggered the chain of events that led to this action.

8 O'Connor was familiar with the Sylvan Lake Golf Course, having played it frequently and having hosted his corporate tournament at that site for some years.

9 O'Connor, unbeknownst to Bell, had approached the landowner with a view to purchasing the leased golf course property, without result. He had obtained a financing commitment as early as March 31, 1989, from the Federal Business Development Bank ("FBDB"). On learning that Sylvan had exercised its right of first refusal, O'Connor approached Bell with an offer of financial assistance, which was declined. However, when Bell's former partner dropped out, and Sylvan's efforts to finance the purchase of the golf course through other means proved unsuccessful, Bell went back to O'Connor. Bell testified that at that meeting he discussed with O'Connor how Bell wanted to secure another five years of operation of the golf course with a chance at the end of that time to secure his retirement by the development of the 18th hole for residential development. Negotiations for a joint venture ensued near the end of November or early December 1989.

10 After a number of preliminary meetings, O'Connor spent about two and a half hours at Bell's home during the December 16-17 weekend. The two men met at length in O'Connor's truck a day or two later. The trial judge found that Bell and O'Connor came to a verbal agreement on the terms of their joint venture. They would pool their resources plus a $700,000 mortgage from the FBDB to purchase the property. Sylvan (Bell) would thereafter operate the facilities for five years for its own account without any day-to-day involvement of O'Connor. In brief, at the conclusion of five years, Sylvan would be bought out by Performance (O'Connor) for an agreed sum less any money then outstanding on the FBDB mortgage.

11 For present purposes, the only contentious issue was the option for a residential development to be undertaken by Bell (or a third party) "along the 18th fairway." O'Connor and Bell did not discuss a metes and bounds description of the optioned land, but Bell testified, and the trial judge accepted, that he showed O'Connor photographs and plans of the sort of development he had in mind, namely, a *double* row of houses (i.e., on both sides of a street) clustered around a *cul-de-sac* along the length of the 18th fairway (480 yards). A photograph of a comparable golf course development where Bell had lived in the Bayview area of Toronto formed part of the negotiations (and was marked at trial as Exhibit 1, Tab 67). O'Connor agreed to option the land to permit such a development; otherwise (as the trial judge found), Bell would not have agreed to the five-year joint venture. The parties agreed that the purchase price of the optioned land would be $400,000 by a third party (or $200,000 if the existing owner Sylvan (Bell) chose to develop the parcel).

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12 As part of the agreement, O'Connor undertook to have his lawyer reduce the verbal terms to writing. In due course, a document was produced. Clause 18, the option, accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 *yards*), clause 18 allowed only enough land for a single row of houses (110 *feet*). This misstatement of the oral agreement was thus pleaded in para. 9 of the Statement of Claim:

> Paragraph 18 of the December 21st, 1989 written Agreement did not accurately reflect the terms of the oral agreement made between Performance and Sylvan in that it misdescribed the width of the lands subject to the Agreement as "One Hundred and Ten (110 ft.) feet in width east to west", when the width of the lands comprising the 18th hole was approximately 110 *yards* in width east to west. [emphasis in original]

Bell had in mind a development of about 58 homes on about 11 acres. O'Connor's draft allowed 3.6 acres. Bell testified, and the trial judge accepted, that he had specifically told O'Connor during the negotiations that a single row housing development (which is all that clause 18 would permit) would "be a waste of land and an uneconomic use of the 18th hole" (para. 42).

13 Clause 18 of the Joint Venture Agreement, as drawn up by O'Connor's lawyer, provided as follows:

> 18. The parties agree that sale of a portion of the lands for development of residential housing is contemplated by both of them within the term of Sylvan's tenancy. *Such portion of the lands is: one hundred ten (110 ft) feet in width east to west and approximately four hundred eighty (480 yds) yards in length north to south*, and abutted by the eastern border of the lands along its entire length. The parties agree that, if they are presented with an appropriate offer, those lands will be sold to a third party developer. It is agreed that such appropriate offer will offer the sum of at least four hundred thousand ($400,000) dollars cash for those lands and provide for the continued, uninterrupted existence of the golf course consisting of no less than six thousand two hundred fifty (6250 yds) yards in length with all eighteen fairways well divided, defined and reasonably wide (for reference sake the parties agree that the fairways of the golf course are, at the date of this agreement, for the most part well divided, defined and reasonably wide). [Emphasis added.]

14 On December 21, 1989, O'Connor and Bell signed the Joint Venture Agreement, as well as the documentation to finance the purchase of all of the land. The documents were then delivered to the solicitor for Sylvan, who reviewed it, and suggested revisions, which led to the signing of an amended Joint Venture Agreement on December 27, 1989. Sylvan's solicitor testified at trial that he did not discuss the optioned property dimensions with Bell, and Bell said he never read the option clause. All copies of the documents had been left with his lawyer. O'Connor's solicitor was not called to testify, an omission that caused the trial judge to draw the adverse inference that if the lawyer had testified, it would not have assisted O'Connor.

15 O'Connor knew from Bell's comment during the negotiations that he would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing. Anything less would be "a waste." O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 *feet* for 110 *yards*.

16 In 1990, Bell experienced some "cash flow difficulties" that led to a modification to the financial terms of the agreement, but pressed ahead with plans for the potential development. For a time in 1992, he worked with UMA Engineering Ltd. He subsequently retained Norman Trouth, a development consultant, who produced alternative plans and sketches for developments of 50 and 58 houses along the 18th fairway. Trouth estimated the 58-house project on or about 10.9 acres would net $820,100. In some respects, Bell was looking for more land than O'Connor had verbally agreed to. The proposals would, as contemplated from the outset, involve a measure of realignment of the 18th fairway. Bell therefore left these development proposals with O'Connor, who said he would review them. In the meantime, the lands in the golf course had been annexed to the Town of Sylvan Lake and there was potential for development of the entire 171.5 acres, much to O'Connor's benefit.

17 Time went by. In May 1993, Bell again contacted O'Connor, who promised to review the proposal, but did not respond either then or even after a later meeting arranged by Bell's wife. The clock was running because the option required

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the development to be completed by December 31, 1994. Finally, by letter dated June 8, 1993, O'Connor's lawyer advised Bell that "[i]t is very unlikely that Performance Industries Ltd. will approve of any development plan which is not strictly in line with the Agreement."

18 Bell testified that at that point, for the first time, he read clause 18 and realized that it did not conform to the oral agreement. O'Connor, he concluded, had slipped in a change of dimensions that turned a viable project into "a waste of land." Bell says he was incensed. He attended at O'Connor's office for what he described as a heated meeting.

19 Attempts were made to resolve the dispute, but O'Connor continued to insist that Bell's right to develop the property was limited under clause 18 of the Agreement to a strip of land 110 feet wide on the easterly boundary of the golf course adjacent to the 18th hole. Bell continued to insist that O'Connor live up to the verbal agreement, which would require 110 feet being read as 110 yards.

20 In December 1994, the 5-year duration of the joint venture coming up for expiry, O'Connor tendered the funds required to buy out Sylvan's interest. Bell refused to allow Sylvan to relinquish possession of the land, and O'Connor commenced an action for specific performance. The Alberta Court of Queen's Bench granted an order for specific performance and O'Connor assumed possession of the property and built a clubhouse at the 18th hole. Also in late 1994, Sylvan commenced the present action against Performance and O'Connor for rectification of the Agreement or damages in lieu thereof, punitive damages and solicitor-client costs.

II. Judicial History

A. Alberta Court of Queen's Bench (1999), 246 A.R. 272

21 Wilkins J. noted that the onus was on the plaintiff "to establish both that Bell was mistaken as to the description of the development property when he signed the Agreement and that O'Connor knew of his mistake" (para. 66).

22 In the view of Wilkins J., "O'Connor's conduct in attempting to take advantage of the mistake he knew Bell to have made in signing the Agreement is equivalent to a fraud or a misrepresentation amounting [to] fraud or sharp practice" (para. 87). He concluded that "[i]t would be unjust, inequitable and unconscionable for this court not to offer redress to Bell in the face of that conduct" (para. 87). Accordingly, it was "clear from the evidence" that Bell is entitled to rectification of clause 18 of the Agreement. Sylvan was awarded damages in lieu of specific performance of the rectified Joint Venture Agreement.

23 The compensatory damages were assessed on the basis of "the amount of money that Bell would have been entitled to [receive] had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified clause 18" (para. 92). Wilkins J. was satisfied that a development of 58 houses could have "been constructed and substantially marketed prior to December 31, 1994" (para. 93). In the result, he assessed damages on the basis of the 58-lot development on the 480-yard 18th fairway in the amount of $820,100. From this he subtracted $200,000 (being the amount Sylvan (Bell) would have had to pay Performance (O'Connor) to exercise the $400,000 option), for a net of $620,100.

24 With respect to punitive damages, Wilkins J. reiterated that he found "the actions of O'Connor to be tantamount to fraud, equivalent to a misrepresentation in the nature of fraud, and sharp practice" (para. 109). O'Connor's "actions demand an award which will stand as an example to others and at the same time assure that [he] does not unduly profit from his conduct" (para. 109). Wilkins J. stated that "[this] latter statement is the only proper basis for an award of punitive damages" (para. 109) in this case. Accordingly, O'Connor's punitive damages should be awarded "at least to the extent of disgorging the base profit he has realized by his improper conduct" (para. 110). Punitive damages were assessed at $200,000. For their misbehaviour in the conduct of the action, the defendants (now appellants) were required to pay solicitor-client costs.

25 O'Connor argued that he should not be personally liable for any judgment against Performance in favour of the plaintiff, but Wilkins J. rejected this argument "in its entirety" (para. 119). He said that every step taken in furtherance of this joint venture was directed by O'Connor, as was every attempt to defeat Bell's legitimate interests in the protracted litigation. "Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute" (para. 119) liability personally to O'Connor. And so he did.

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B. Alberta Court of Appeal (2000), 255 A.R. 329, 2000 ABCA 116

26 In a *per curiam* decision, the Court of Appeal upheld Wilkins J.'s rulings that the Agreement could be rectified and that the corporate veil could be lifted. It also upheld the damages award, with the exception of the award for punitive damages, which it set aside. The order for solicitor-client costs was similarly upheld.

27 With respect to compensatory damages, the Court of Appeal was "not prepared to interfere with the award of damages in this case" (para. 27). It did, however, describe the trial judge's award as "generous" (para. 27).

28 The Court of Appeal agreed with the trial judge that "the misconduct of the defendants was so outrageous that punishment and deterrence [were] required" (para. 28), but that punitive damages "should be awarded only if they achieve some rational purpose" (para. 28). In the Court of Appeal's view, the "substantial and generous compensatory damages awarded" (para. 29) by the trial judge satisfy both the punishment and deterrence objectives in this case. The Court of Appeal was also of the view that this was not a case where it was necessary to award punitive damages to ensure that the defendant does not profit from his misconduct. O'Connor would have profited under the Agreement even if he had not misbehaved. Accordingly, the Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

III. Analysis

29 When reasonably sophisticated business people reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. Nor does a falling out between business partners usually attract an award of punitive damages. This case is unusual because of the findings of fraud and deceit made against the appellant O'Connor by the trial judge. The appellants are therefore obliged to try to make their case, if at all, out of the mouth of Bell, with such help as they can find in the law books for their position.

30 Counsel for the appellants (who was not counsel at trial) seeks to raise three issues, which he describes as follows: (1) the relationship between the plea of unilateral mistake and the remedy of rectification (particularly where the mistake is the product of the plaintiff's own negligence), (2) the kind of pleading and proof that a plaintiff who seeks rectification must offer, as well as the proper standard of proof to apply in rectification cases, and (3) the proper method of quantifying damages ordered in lieu of rectification in cases where the subject matter of the rectified contract is an option for the sale of land. The respondent, as stated, cross-appeals against the quashing of the award of punitive damages.

A. Rectification of the Contract

31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud." The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud." The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 630, *"M. F. Whalen" (The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109 (S.C.C.), at pp. 126-127, *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558, Gerald Henry Louis Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999), at p. 867, Stephen M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999), para. 336. In *Hart, supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution." Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

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B. Preliminary Objection

32 The respondent says the appellants ought not to be allowed to argue various objections to rectification that were not raised at trial. The alleged uncertainty about the terms of the prior oral agreement, for example, is an issue that did not come into bloom until after the appellants had lost in the Alberta Court of Appeal. There is some merit in this objection. Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at p. 539:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

33 In my view, the appellants' contentions on the rectification issues are fact-based, but are manageable on the evidentiary record and raise important issues of law and equity. The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice.

34 Here the respondents sought and obtained an equitable remedy to rectify a situation which need never have arisen had Bell properly read the draft document in December 1989. He who seeks equity must do equity. If equitable relief had been wrongfully granted, we should not close our eyes to a fatal objection because of counsel's oversight at trial. The facts vital to the appellants' new legal position are readily ascertainable in the evidence and the necessary findings are implicit, if not always explicit, in the trial judge's reasons.

C. The Conditions Precedent to Rectification

35 As stated, high hurdles are placed in the way of a business person who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

36 I referred earlier to the four conditions precedent, or "hurdles," that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court *may* exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

37 The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

38 The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630, *"M. F. Whalen" (The)*, *supra*, at pp. 126-127.

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39 What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C. S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it," but " 'all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken' ": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A., *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.), *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-363, and Waddams, *supra*, at para. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (*Hart, supra, per* Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that - and only that - which the parties had already orally agreed to.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*"M. F. Whalen" (The), supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt' " (*Hart, supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray* (1974), [1975] 2 S.C.R. 354 (S.C.C.), at pp. 371-372). The modern approach, I think, is captured by the expression "convincing proof," i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.

42 Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e.g., Waddams, *supra*, at para. 343), but, again, the objective is to promote the utility of written agreements by closing the "floodgate" against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification.

43 It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *"M. F. Whalen" (The), supra*, Duff J. (as he then was) said, at p. 127, "[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties." Modern practice has moved away from insistence on documentary corroboration (Waddams, *supra*, at para. 337, Fridman, *supra*, at p. 879). In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the Court, be available.

44 It is convenient at this point to deal with the trial judge's findings in relation to these traditional requirements. I will then turn to the appellants' proposed fifth precondition - due diligence on the part of the plaintiff.

(1) The Existence and Content of the Prior Oral Agreement

45 The appellants' principal argument against rectification is that the alleged prior oral agreement is void for uncertainty. Reliance is placed on *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72 (B.C. C.A.), where rectification of an agreement to purchase a recreational vehicle park was refused because, *per* Finch J.A. (now C.J.B.C.), at para. 7, the parties never agreed on "the precise location of the eastern boundary," and *Gordeyko v. Edmonton (City)* (1986), 45 Alta. L.R. (2d) 201 (Alta. Q.B.), where Stratton J. (as he then was) found the evidence uncertain about a notice period envisaged by the prior oral agreement. See also *Kerr v. Cunard* (1914), 16 D.L.R. 662 (N.B. S.C.). Appellants' counsel quotes Lord Denning's "pithy" observation that: "[a] mistake made by one party to the knowledge of the other is a ground for avoiding a contract, but not for making one" (*Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253 (Eng. C.A.), at p. 265).

46 I agree with the appellants that on this point the trial judge's reasons are somewhat unsatisfactory, but this appears to be because the "uncertainty" argument now made against rectification was not before him. The issue of uncertainty of subject matter was raised neither in the pleadings nor at trial. The trial judge directed his reasons to the points that he believed were

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in controversy. As to the appellants' new arguments, one may echo the words of James V.C. in *Rumble v. Heygate* (1870), 18 W.R. 749 (Eng. Ch.), who said, at p. 750, that the objections to the agreement in that case on the basis of uncertainty of quantity of land and of its site "are mere shadows which vanish when examined by the light of common sense."

47 The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof. Here the trial judge predicated his award of compensatory damages on the finding that the optioned land could accommodate 58 single family houses located along the 480 yard length of the 18th fairway. There is no argument about the 480 yards. O'Connor himself plucked the 480 figure from the length of play listed on the Sylvan Lake Golf Club score card. O'Connor's number for the width of the development (110) may also be accepted. The issue is whether the number was intended to express yards or feet. The trial judge appears to have concluded that the dispute about the depth of the residential development (which is all that divided the parties) came down to a simple choice between Bell's version (Plan A) and O'Connor's version (Plan B). Both plans were predicated on the length of the 18th fairway, namely, 480 yards. Plan B, which O'Connor had described in the document, contemplated a single row of houses on a development plan 110 *feet* deep. Bell's Plan A was based on two rows of housing separated by a road allowance, in a configuration similar to that shown in the aerial photo of the Bayview development discussed by Bell and O'Connor at their December 16-17 meeting. Plan A called for a depth of about 110 *yards*. If Plan B's 110-*foot* depth is tripled to 110 *yards*, the acreage under option would be roughly tripled from about 3.6 acres (Plan B) to about 10.8 acres (Plan A), which accommodates the 58 lots plus the standard municipal road allowance. The problem in *I.C.R.V. Holdings Ltd.*, *supra*, was that the parties never agreed on the boundary. Here the trial judge concluded that there *was* agreement even though the parties did not express themselves to each other in lawyerly language. This not infrequently happens: *Bloom v. Averbach*, [1927] S.C.R. 615 (S.C.C.), per Lamont J., at p. 621:

> It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. *The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds* ad idem *as to these expressions*? [Emphasis added.]

48 The trial judge thus found that the parties had made a verbal agreement with reference to a residential development along the 18th hole. It was more than an agreement to agree. He concluded that there was a definite project in a definite location to which O'Connor and Bell had given their definite assent.

49 Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O'Connor cannot complain if the numbers he inserted in clause 18 (110 x 480) are accepted and confirmed. The issue, then, is the error created by his apparently duplicitous substitution of feet for yards in one dimension. We know the 480 must be yards because it measures the 18th fairway. If the 110 is converted from feet to yards, symmetry is achieved, certainty is preserved and Bell's position is vindicated.

(2) Fraud or Conduct Equivalent to Fraud

50 The notion of "*equivalent* to fraud," as distinguished from fraud itself, is often utilized where "the court is unwilling to go so far as to find actual knowledge on the side of the party seeking enforcement" (Waddams, *supra*, at para. 342). The trial judge had no such hesitation in this case. He characterized O'Connor's actions as "fraudulent, dishonest and deceitful" (para. 114).

51 The trial judge was persuaded not only of the terms of the prior oral agreement and of Bell's mistake but "beyond any reasonable doubt" of O'Connor's knowledge of that mistake. He states (at para. 79):

> This court is satisfied beyond any reasonable doubt that O'Connor knew of Bell's mistake and he chose to permit Bell to sign it in the mistaken belief that it represented the verbal agreement. He did so with the full intention that he would in the future rely on the terms of the Agreement to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development.

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52 O'Connor thus fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that Bell would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing as specified in the prior oral contract. O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards. O'Connor knowingly snapped at Bell's mistake "to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development." Bell's loss would be O'Connor's gain, as O'Connor (Performance) would come into sole ownership of the optioned land as of December 31, 1994.

53 Although on occasion the trial judge describes O'Connor's conduct as "equivalent to fraud," and elsewhere he describes it as actual fraud, his reasons taken as a whole can only be characterized as a finding of actual fraud.

(3) Precise Terms of Rectification

54 It follows from the foregoing that "the precise form" in which the written document can be made to conform to the oral agreement would be simply to change the word "feet" in the phrase "one hundred and ten (110) *feet* in width" to "yards."

(4) Existence of "Convincing Proof"

55 The trial judge made his key findings in respect of the prior oral agreement, Bell's unilateral mistake and O'Connor's knowledge of that mistake to a standard of "beyond any reasonable doubt."

56 He also found that Bell's version of the verbal agreement was sufficiently corroborated on significant points by other witnesses (including his wife, his former partner, his lawyer and, subsequently, the development consultants), and documents (including his lawyer's notes and the plan of the Bayview Golf Course development discussed in mid-December 1989).

D. Bell's Lack of Due Diligence

57 The appellants seek, in effect, to add a fifth hurdle (or condition precedent) to the availability of rectification. A plaintiff, they say, should be denied such a remedy unless the error in the written document could not have been discovered with due diligence.

58 O'Connor says that Bell's failure to read clause 18 and note the mixture of yards and feet should be fatal to his claim because the Court ought not to assist businesspersons who are negligent in protecting their own interests. Alternatively, the effective cause of Bell's loss is not the fraudulent document but Bell's failure to detect the fraud when he had an opportunity to do so.

59 I agree that Bell, an experienced businessman, ought to have examined the text of clause 18 before signing the document. The terms of clause 18 were clear on their face (even though many readers might have misread a description of land that mixed units of measurement as clause 18 did here). He had time to review the document with his lawyer. He did so. Changes were requested. He did not catch the substitution of 110 feet for 110 yards; indeed, he says he did not read clause 18 at all.

60 The trial judge, at para. 76, accepted the evidence of Bell's lawyer, who admitted that he had not directed his mind to the limitations of the size of the development parcel found in clause 18, nor had he made any note of bringing those to Bell's attention, which would have been his normal practice.

> He could offer no explanation for why he had not done so other than the fact that his focus on receipt of the Agreement signed by Bell was to ensure the completion and registration of documentation to facilitate the closing of [the purchase] on or before December 31, 1989. This court accepts the evidence offered by Mr. Hancock and that of Bell that they at no time discussed the description of property contained in clause 18.

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61 It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence.

62 On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. A diligent reading of the written document would generally have disclosed the error that the plaintiff, after the fact, seeks to have corrected. The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word. As the American *Restatement of the Law, Second: Contracts (2d)* (St. Paul, Minn.: American Law Institute Publishers, 1981), points out in its commentary under s. 157 ("Effect of Fault of Party Seeking Relief"), "since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence." Comment B discusses "failure to read writing." "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." But this proposition is qualified by that Comment's further statement that the "exceptional rule" in s. 157 (which permits rectification or "reformation" of the contract) applies only where there has been an agreement that preceded the writing. "In such a case, a party's negligence in failing to read the writing does not preclude reformation if the writing does not correctly express the prior agreement."

63 One reason why the defence of contributory negligence or want of due diligence is not persuasive in a rectification case is because the plaintiff seeks no more than enforcement of the prior oral agreement to which the defendant has already bound itself.

64 The commentary in the American *Restatement* is consistent with the Canadian case law. For example, in *Beverley Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (B.C. S.C.), the vendor signed documents, already signed by the purchaser, in the office of the purchaser's solicitor that conveyed two lots, the single lot (with a motel) that the vendor had offered for sale and the adjacent residentially zoned vacant lot. Of that group of individuals, only the purchaser noted the error (on the day of signing) and he was "pleased and surprised" another lot had been included. He snapped at the offer but he had played no role in inducing the mistake. Gould J. conceded (at pp. 758-759), "[i]t is quite true that if they [the three shareholders of the vendor] had read the legal description in the documents with any care, they would have caught the error. Obviously they did not so read the legal description, and that is understandable, although careless, because they were with their own solicitor, present in the purchaser's solicitor's office, and both solicitors were obviously giving the impression that the final documents were in order and ready for signature." Gould J. ordered that the second lot be conveyed back to the original vendor because it was "unfair, unjust or unconscionable" (p. 760) for the purchaser "to hold the legal advantage he ha[d] gained" (p. 759). Gould J. acknowledged that the presence of a solicitor can help explain why a party might not himself read the written document. In the present case, Bell left the documentation up to the lawyers without appreciating that he had given his lawyer insufficient information to check O'Connor's figures. He had, at that time, no reason to question O'Connor's integrity.

65 If want of due diligence had been a good defence to rectification, relief would likely have been refused in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan Inc.* (2001), 203 Sask. R. 298, 2001 SKCA 31 (Sask. C.A.), *Stepps Investments Ltd., supra, per* Grange J., at p. 362, *Prince Albert Credit Union Ltd. v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.), *Montreal Trust Co., supra*, at p. 262, *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C. S.C.).

E. Discretionary Relief

66 I conclude, therefore, that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

F. Fraud

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67 There is, on the facts of this case, a more fundamental reason why the appellants' complaint about Bell's lack of due diligence provides no defence. O'Connor did more than "snap" at a business partner's mistake. O'Connor undertook as part of the verbal agreement to have a document prepared that set out its terms. According to the trial judge, he not only breached that term, it became part of his fraudulent scheme to have the document wrongly state the terms of the option, to fraudulently misrepresent to Bell that it did accurately set out their verbal agreement, to allow Bell to sign it when O'Connor knew Bell was mistaken in doing so, then to delay any response to Bell's development proposals (and thus bring the error to Bell's attention) until it was almost too late for the development to proceed. O'Connor admitted providing his lawyer with the erroneous metes and bounds description in clause 18. It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

68 "[F]raud 'unravels everything' ": *Farah v. Barki*, [1955] S.C.R. 107 (S.C.C.), at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch. 616 (Eng. Ch. Div.), at p. 623).

69 The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C., who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty' ": *Central Railway Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99 (U.K. H.L.), at pp. 120-121.

70 Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (B.C. S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).

> Once the plaintiff knows of the fraud he must mitigate his loss but until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.
>
> And, in my opinion, a good thing, too. There may be greater damages to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault I fool you." Such a defence should not be countenanced from a rogue. (p. 336)

See also *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (B.C. S.C.). To the same effect is George Spencer Bower and Alexander Kingcome Turner, *The Law of Actionable Misrepresentation*, 3rd ed. (London: Butterworths, 1974), at p. 218:

> A man who has told even an innocent untruth, by which he has induced another to alter his position, - much more one who has fraudulently lied with that object and result, - has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

71 The appellants having failed to establish that due diligence on the part of the plaintiff is a precondition to rectification, or to shake the trial judge's findings with respect to the traditional preconditions discussed above, their appeal on the rectification issues must be rejected.

G. Damages in Lieu of Rectification

72 The trial judge awarded $620,100 in compensatory damages representing the loss of profit on a fully built residential development on the 18th fairway. The appellants argue that damages should be limited to the difference between the market value of the land and the option price of $400,000. They say compensatory damages should not include the "reasonably

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expected profit" from a 58-lot housing development.

73 The finding of fact is, however, that the parties specifically contemplated (even on O'Connor's evidence) that the optioned land would be put to the use of residential housing. Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract: *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642 (S.C.C.), at p. 648, *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670 (S.C.C.), *Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307 (S.C.C.), *Corbin v. Thompson* (1907), 39 S.C.R. 575 (S.C.C.), *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at p. 655. In *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (B.C. S.C.), Nemetz C.J.B.C. observed, at pp. 272-273:

> [T]he plaintiff's damages should be assessed by reference to the profits which both parties contemplated the plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a " . . . contemplation of circumstances which embrace the head or type of damage in question".

74 The appellants then contend that even if the trial judge selected the correct measure of damages, he ought to have applied a higher discount for contingencies, particularly the contingencies that (1) Sylvan (Bell) lacked the financial resources to exercise the option and fund the project, and (2) the project could not, in any event, have been completed by the end of 1994, as required. In essence, they argue that in assessing damages, the Court must discount the value of the chance of profit by the improbability of its occurrence, and call in aid the observation of Crocket J. in *Hyman v. Kinkel*, [1939] S.C.R. 364 (S.C.C.), at p. 383:

> For my part, I can find no authority . . . justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.

75 It is at this point, I think, that the appellants' argument runs afoul of the rule against raising new fact-based issues on appeal. The trial judge has found as a fact that the respondent contracted for the opportunity to build a residential development on about 10.9 acres of prime land. It was wrongfully deprived of that opportunity. The trial judge set out to assess the value of that lost opportunity (which was, of course, potentially worth considerably less than a certainty). The appellants' trial counsel took little issue with the damages claim as advanced by Sylvan, and did not adduce much of an evidentiary record to the contrary, whether by calling his own witnesses, or through cross-examination of the respondent's witnesses, to challenge significantly the expert evidence of Trouth and others. Trouth may have been overly optimistic and his figures generous, but his evidence was uncontradicted.

76 The Alberta Court of Appeal characterized the compensatory award as "substantial and generous" (para. 29) but concluded that: "Despite our reservations, we are not prepared to interfere with the award of damages in this case" (para. 27). In the absence of an error of principle, or a factual record that supports the appellants' criticisms, this Court ought not to interfere with the concurrent findings in the Alberta courts on the amount of compensatory damages.

H. Should the award of punitive damages be restored?

77 The respondent in its cross-appeal seeks restoration of the $200,000 award of punitive damages disallowed by the Alberta Court of Appeal. Principles concerning the award and assessment of punitive damages were canvassed at the hearing of this appeal, heard the same day as *Whiten*, *supra*, reasons in which are released concurrently.

78 It is sufficient to apply the principles developed in *Whiten* without repeating the underlying analysis.

79 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency." The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, *supra*, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 196.

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80 The misconduct found against O'Connor was his contemptuous disregard for Bell's rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.

81 Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour," yet not all fraud cases lead to an award of punitive damages.

82 O'Connor's fraud was a condition precedent to Bell's successful claim to rectification, for which his company will now receive compensatory damages of $620,100. Payment of $620,100 hurts. The question is whether *more* punishment is rationally required by way of retribution, deterrence or denunciation (*Whiten, supra*, at para. 43).

83 *Whiten* emphasizes that defendants should have "advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it" (*Whiten, supra*, at para. 86). Here, punitive damages in the sum of $1,020,100 were expressly sought in the Amended Amended Statement of Claim and the basis for the claim was "disgorgement of the profits the Defendants will enjoy as a result of the [Plaintiff's] unilateral mistake." The trial judge, as stated, awarded $200,000 in punitive damages.

84 The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill, supra*, at para. 197:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

85 *Whiten* affirms that "[t]he 'rationality' test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum" (para. 101).

86 I agree with the Alberta Court of Appeal that the award of punitive damages in this case does not serve a rational purpose.

87 O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct." These are both legitimate objectives for the award of punitive damages (*Whiten, supra*, at paras. 43, 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

88 This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but, in the end, the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful." His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

89 The trial judge's second reason for punitive damages was to ensure that O'Connor "[did] not unduly profit from his conduct" (para. 109). But in fact O'Connor did not profit at all from his misconduct. The source of his development profits

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was the prior oral contract. Whatever Performance (O'Connor) made after paying $620,100 compensatory damages to the respondent rightfully belonged to them under the terms of the (rectified) agreement. As discussed earlier, the verbal agreement of December 1989 contemplated that after five years, O'Connor's company, Performance, would acquire the golf club lands (minus the optioned lands if the option had been exercised) to develop as it wished for its own account. While on the whole O'Connor's conduct in this matter was found to be reprehensible, his behaviour also had some redeeming qualities. Early on in the project, for example, O'Connor picked up Bell's share of mortgage interest when Bell was not able to afford to contribute the amount that he had agreed to pay. The conflict between Bell and O'Connor should not be caricatured as a battle between good and evil.

90 It may be true, as the trial judge found, that O'Connor's profits on the balance of lands *not* subject to the option will "recover all or more of the amount of damage for loss of profit awarded against him in favour of Bell" (para. 109), but, with respect, that is not a rational reason to punish O'Connor further. Those profits are not the fruit of misconduct directed at Bell.

91 Finally, the assessment of $200,000 coincides with the payment that Sylvan (Bell) was obliged to pay in order to exercise the option, and which the trial judge properly took into account in his assessment of compensatory damages. This figure has no rational relationship to the appellants' potential development profits on the balance of the golf course land, on which there was no evidence. Moreover, it is a payment that the appellants, under the rectified agreement, were entitled to keep.

92 As pointed out in *Whiten*, *supra*, at paras. 98 and 100, and *Hill*, *supra*, at para. 197, punitive damages are not "at large," and both the award and the assessment of quantum must meet the test of rationality. In this case, with respect, neither the punitive damages award nor the $200,000 assessment survives that test.

IV. Conclusion

93 I would therefore dismiss the appeal and cross-appeal both with costs on a party and party basis.

***LeBel J.*:**

94 Subject to my comments on punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.), I agree with Binnie J.'s reasons. I would dispose of the appeal and cross-appeal as he suggests. Rectification of the contract was properly ordered, but punitive damages would fulfil no rational purpose in this case.

Appeal dismissed; cross-appeal dismissed.
Pourvoi rejeté; pourvoi incident rejeté.

Footnotes

* Corrigendum to para. 70: the D.L.R. cite was replaced with the B.C.L.R. cite, with the consequent changes to page references being made in the quotation.

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Applicant

-and-

BESCO INTERNATIONAL INVESTMENT CO., LTD.
Respondent

Court File No.: CV-18-605366-00CL

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