

**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**

FACTUM OF THE APPLICANT

February 4, 2019

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PART I - OVERVIEW¹

1. The applicant, Weichang Yang (“**Mr. Yang**”) seeks an Order appointing KSV Kofman Inc. (“**KSV**”) as receiver (in such capacity, the “**Receiver**”) over the property of the respondent, Besco International Investment Co., Ltd. (“**Besco**”), municipally known as 414 Croft Street, Port Hope, Ontario (the “**Property**”), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended (the “**CJA**”), among other things.

2. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavit of Weichang Yang, sworn on September 17, 2018 (the “**Yang Affidavit**”); Application Record, Tab 2.

3. The principal of Besco, Hui Gang Sun (“**Mr. Sun**”), admits that he received the equivalent of \$5 million from Mr. Yang and that, as at July 20, 2017, there was \$3.711 million that he has not repaid (exclusive of costs accrued by Mr. Yang).

Affidavit of Huang Gang Sun sworn October 2, 2018 (“Sun Affidavit”) at paras 8 and 13; Responding Application Record, Tab 1.

4. Mr. Sun does not dispute that Besco guaranteed the repayment of the indebtedness of Mr. Sun to Mr. Yang pursuant to the Guarantee, and that Besco granted security to Mr. Yang in the form of the GSA, the Initial Mortgage and the Replacement Mortgage (among other security) as security for its guarantee obligation.

Sun Affidavit at paras 20, 21 and 30; Responding Application Record, Tab 1.

5. Mr. Sun also admits that, on behalf of Besco, he executed a consent to the appointment of a receiver in favour of Mr. Yang.

Sun Affidavit at para 32; Responding Application Record, Tab 1.

6. Besco is in default of its obligations to Mr. Yang. Mr. Yang made demand upon Besco on June 13, 2018 and delivered a notice of sale in respect of the Property (the “**Notice of Sale**”) on July 17, 2018.

Yang Affidavit at paras 57–61, see also Exhibits “U” and “V”; Application Record, Tab , 2U and 2V.

7. In response to the Notice of Sale, Besco brought an injunction application to prevent Mr. Yang from selling the Property under the Notice of Sale.

Yang Affidavit at para 62; Application Record, Tab 2.

8. Besco’s injunction application challenged, among other things: (i) the validity and enforceability of the Guarantee, and (ii) the validity of the registration of both the Initial

Mortgage and the Replacement Mortgage. Justice McEwen dismissed Besco's injunction application by reasons released January 2, 2019.

Affidavit of Irene Artuso sworn February 4, 2019 ("Artuso Affidavit") at para 13 and Exhibit "L"; Supplemental Application Record, Tab 1 and 1L.

9. Given the opposition from Besco to the Notice of Sale, the most expedient and appropriate mechanism for dealing with the enforcement of the Applicant's security is through the appointment of the Receiver.

10. In response to this receivership application, and despite having executed a consent to the appointment of a receiver, Besco opposes the appointment of the Receiver and seeks once again to challenge the validity and enforceability of the Guarantee, the Initial Mortgage and the Replacement Mortgage.

11. Besco's opposition is without merit and should be dismissed, with costs payable to Mr. Yang.

PART II - THE FACTS

A. Initial Promissory Note

12. Mr. Sun took the equivalent of \$5 million in Chinese currency from Mr. Yang and, contrary to his agreement, failed or refused to provide Mr. Yang with the equivalent of \$5 million in Canadian currency.

Yang Affidavit at para 20; Application Record, Tab 2.

13. Following Mr. Yang's attempts to recover the amounts owing from Mr. Sun, the parties agreed to a repayment arrangement on terms memorialized in a promissory note (written

in Chinese) dated June 14, 2017 issued by Mr. Sun to Mr. Yang in the amount of \$5 million (the “**Initial Promissory Note**”). Under the terms of the Initial Promissory Note, *Mr. Sun agreed to repay the loan in full by July 20, 2017*, with an interest rate of 0.1% per day commencing June 1, 2017.

Yang Affidavit at paras 21–22, see also Exhibit “C”; Application Record, Tab 2 and 2C.

14. When the remaining balance owing under the Initial Promissory Note became due on July 20, 2017, Mr. Sun did not have the funds to repay the amount owing to Mr. Yang. Mr. Sun requested, and Mr. Yang agreed, to extend the maturity date of the loan.

Yang Affidavit at para 25; Application Record, Tab 2.

B. The Loan Agreement, Guarantee & Initial Mortgage

15. As consideration for the agreed extension of the maturity date of the loan, Mr. Sun and Mr. Yang entered into an English language loan agreement, made as of July 20, 2017, amending and restating the terms and conditions of the Initial Promissory Note (the “**Loan Agreement**”).

Yang Affidavit at para 26, see also Exhibit “D”; Application Record, Tab 2 and 2D.

16. During the negotiation and execution of the Loan Agreement (and the ancillary documents contemplated therein), Mr. Yang was represented by Fasken Martineau DuMoulin LLP (“**Fasken**”), and Mr. Sun was represented by Dentons Canada LLP (“**Dentons**”).

Yang Affidavit at para 27; Application Record, Tab 2.

17. The material provisions of the Loan Agreement include, among other terms, the following:

- (a) Mr. Sun and Besco, among others, acknowledged and confirmed that Mr. Sun owed \$3,711,300 to Mr. Yang as of July 20, 2017;
- (b) Mr. Sun agreed to repay the balance owing to Mr. Yang, together with accrued and unpaid interest, on or before October 20, 2017 (the “**Maturity Date**”), such amount to bear interest at the rate of 15% per year;
- (c) Besco (and certain other guarantors) unconditionally and irrevocably guaranteed to Mr. Yang payment in full of the Indebtedness (as defined in the Loan Agreement) as it became due; and
- (d) Besco, among other guarantors, acknowledged that: (i) Mr. Sun and Besco (and the other guarantors) were mutually dependent on each other in the conduct of their respective businesses; (ii) the extension of the loan by Mr. Yang to Mr. Sun, and the grant of the guarantee and indemnity contemplated in the Loan Agreement (and other loan documents) are in the interests of and to the advantage of Besco (and the other guarantors); and (iii) Besco (and the other guarantors) will derive significant commercial benefit from those arrangements.

Yang Affidavit at para 28; Application Record, Tab 2.

18. As part of the negotiation of the Loan Agreement (and in consideration for the extension of the Maturity Date), Besco executed a guarantee agreement dated July 20, 2017 (the “**Guarantee**”). Pursuant to the Guarantee, Besco guaranteed the repayment of any and all indebtedness of Mr. Sun to Mr. Yang. Among other terms, the Guarantee provides that Mr. Yang is not bound to exhaust his recourse against Mr. Sun or others or any security or other guarantees before being entitled to payment from Besco of the indebtedness owing.

Yang Affidavit at paras 29–30, see also Exhibit “E”; Application Record, Tab 2 and 2E.

19. The obligations of Besco to Mr. Yang are secured by, among other agreements, a collateral mortgage granted by Besco in favour of Mr. Yang in respect of the Property (the “**Initial Mortgage**”).

Yang Affidavit at para 35, see also Exhibit “H”; Application Record, Tab 2 and 2H.

20. The Borrower and Besco executed an acknowledgement and direction from Besco authorizing Fasken to, among other things, register the Initial Mortgage on title to the Property.

Yang Affidavit at para 38, see also Exhibit “L”; Application Record, Tab 2 and 2L.

21. Fasken registered the Initial Mortgage on title to the Property on July 24, 2017 as Instrument No. ND153386.

Yang Affidavit at para 36, see also Exhibit “I”; Application Record, Tab 2 and 2I.

C. Forbearance Agreement

22. On the Maturity Date, the Loan Agreement matured and the remaining indebtedness under the Loan Agreement became immediately due and owing. Mr. Sun failed or refused to repay the indebtedness on the Maturity Date.

Yang Affidavit at para 45; Application Record, Tab 2.

23. On or about March 14, 2018, Fasken (on behalf of Mr. Yang) made demand upon Mr. Sun and the Guarantors for payment of the indebtedness under the Loan Agreement and Guarantees, as applicable.

Yang Affidavit at para 47, see also Exhibit “N” and “O”; Application Record, Tab 2, 2N and 2O.

24. Following delivery of the demands, Mr. Sun and the Guarantors requested, and Mr. Yang agreed, to forbear from enforcing his rights and remedies against Mr. Sun and the Guarantors. The terms of such forbearance were set out in a forbearance agreement dated on or about May 17, 2018 (the “**Forbearance Agreement**”).

Yang Affidavit at para 48, see also Exhibit “P”; Application Record, Tab 2 and 2P.

25. Mr. Sun and the Guarantors were represented by Dentons during the negotiation and execution of the Forbearance Agreement.

Yang Affidavit at para 49; Application Record, Tab 2.

26. Pursuant to the Forbearance Agreement, Mr. Yang agreed to, among other things, forebear from enforcing his rights and remedies against Mr. Sun and the Guarantors until the earlier of August 20, 2018, or the occurrence of an Event of Default (as defined in the Forbearance Agreement) (the “**Forbearance Period**”).

Yang Affidavit at para 50; Application Record, Tab 2.

27. In the Forbearance Agreement Mr. Sun and the Guarantors each acknowledged, among other things, that:

- (a) as of April 26, 2018, Mr. Sun was indebted to Mr. Yang in the amount of \$3,211,300, plus accrued interest in the amount of \$8,028, and expenses, pursuant to the Loan Agreement;
- (b) the indebtedness is due and owing;
- (c) the Loan Agreement, the Guarantee, the indebtedness, and the Initial Mortgage constitute valid, binding and enforceable obligations of Besco (among others) to Mr. Yang and that Besco has no defence to any obligation or liability thereunder or in respect thereof; and
- (d) Mr. Sun and Besco (among others) are in default of their obligations to Mr. Yang.

Yang Affidavit at para 51; Application Record, Tab 2.

D. The Replacement Mortgage

28. As a condition to Mr. Yang entering into the Forbearance Agreement, Mr. Sun and Besco also agreed to, among other things, grant to Mr. Yang a replacement mortgage in respect of the Property (the “**Replacement Mortgage**”).

Yang Affidavit at para 52, see also Exhibit “Q”; Application Record, Tab 2 and 2Q.

29. Besco also executed a consent to appointment of receiver.

Yang Affidavit at para 53, see also Exhibit “R”; Application Record, Tab 2 and 2R.

30. Besco executed an acknowledgement and direction authorizing Fasken to, among other things, register the Replacement Mortgage on title to the Property.

Yang Affidavit at para 54, see also Exhibit “S”; Application Record, Tab 2 and 2S.

31. Fasken registered the Replacement Mortgage on title to the Property on or about May 28, 2018 as Instrument No. ND166861.

Yang Affidavit at para 55, see also Exhibit “I”; Application Record, Tab 2 and 2I.

32. Among other provisions, the Replacement Mortgage contains the following material terms:

- (a) the principal amount owing is \$5,000,000, bearing interest at the rate of 36.5%;
- (b) it incorporates Standard Charge Terms No. 200033 (the “**Standard Charge Terms**”);
- (c) it is given as collateral security for the payment and performance of all indebtedness, obligations and liabilities of Besco to Mr. Yang, including, without limitation, amounts owing pursuant to the Loan Agreement, the Guarantee, and the Replacement Mortgage;
- (d) upon Mr. Yang’s rights and remedies under the Replacement Mortgage becoming enforceable, Mr. Yang may, among other remedies: (i) appoint a receiver over the Property; and (ii) take possession of the Property and lease, sell or otherwise dispose of the Property; and
- (e) the Replacement Mortgage is governed by the laws of the province of Ontario.

Yang Affidavit at para 56; Application Record, Tab 2.

E. Default Under the Forbearance Agreement & Notice of Sale Under the *Mortgages Act* (Ontario)

33. On or about June 1, 2018, Mr. Yang was served with a petition to the Supreme Court of British Columbia commenced by the Bank of Montreal (“**BMO**”) naming Mr. Sun, Mr. Yang, and others as respondents (the “**BMO Petition**”). The BMO Petition sought, among other relief, enforcement of a mortgage held by BMO against certain lands in Vancouver, British Columbia, and the appointment of a receiver.

Yang Affidavit at para 57, see also Exhibit “T”; Application Record, Tab 2 and 2T.

34. Mr. Yang also holds a mortgage in respect of the lands in Vancouver that were the subject of the BMO Petition, which Mr. Sun granted to Mr. Yang as security for his obligations under the Loan Agreement.

Yang Affidavit at para 58; Application Record, Tab 2.

35. It is an event of default under the Forbearance Agreement if legal proceedings are commenced against Mr. Sun or any of the Guarantors, which, in Mr. Yang’s view would materially impair either (i) the realizable value of the property, assets and undertakings of Mr. Sun or the Guarantors; or (ii) the ability of Mr. Sun or the Guarantors to repay the indebtedness.

Yang Affidavit at para 59; Application Record, Tab 2.

36. On June 13, 2018, Fasken wrote to Dentons to advise that: (i) the commencement of the BMO Petition constituted an event of default under the Forbearance Agreement, (ii) the Forbearance Period had terminated, (iii) the indebtedness owing under the Loan Agreement was immediately due and payable, (iv) Mr. Yang’s security is enforceable immediately, and (v) Mr. Yang had given instructions to enforce his security under the Replacement Mortgage.

Yang Affidavit at para 60, see also Exhibit “U”; Application Record, Tab 2 and 2U.

37. On July 17, 2018, Fasken wrote to Dentons, among others, enclosing a notice of sale in respect of the Property (the “**Notice of Sale**”).

Yang Affidavit at para 61, see also Exhibit “V”; Application Record, Tab 2 and 2V.

F. August 2018 Application and January 2019 Endorsement

38. In response to the Notice of Sale, Besco brought an application for an injunction to prevent Mr. Yang from selling the Property. The application was commenced by notice of application dated August 17, 2018, and amended on August 31, 2018.

39. The injunction application was heard on October 19, 2019 by Justice McEwen. On January 2, 2019 Justice McEwen released reasons dismissing Besco’s application (the “**January 2019 Endorsement**”). The January 2019 Endorsement made a number of findings that are relevant to this proceeding, including the following:

- (a) Besco guaranteed Mr. Sun’s obligations to Mr. Yang and was represented by counsel;²
- (b) the registration of the Initial Mortgage was approved and authorized by Besco;³
- (c) Besco confirmed its guarantee obligations in the Forbearance Agreement;⁴
- (d) in the Forbearance Agreement, Besco confirmed the validity and enforceability of the Guarantee and that it has no defences;⁵
- (e) Besco authorized Mr. Yang to register the Replacement Mortgage, the result being that there are two mortgages registered on the Property both in the amount of \$5 million;⁶
- (f) Besco was still represented by counsel when it authorized the registration of the Replacement Mortgage;⁷

² Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 2.

³ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 3.

⁴ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 3–4.

⁵ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 8–9.

⁶ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 4–5.

- (g) Mr. Yang has advised counsel to Besco that he is prepared to discharge the Initial Mortgage if Besco can confirm that no intervening claims were filed prior to the registration of the Replacement Mortgage – **no response has been provided by Mr. Sun or Besco;**⁸
- (h) the registration of both the Initial Mortgage and the Replacement Mortgage does not contravene Ontario law;⁹ and
- (i) Mr. Yang has indicated his willingness to work with any refinancier.¹⁰

Artuso Affidavit at para 13 and Exhibit “L”, Supplemental Application Record, Tab 1 and 1L.

40. Justice McEwen also held as follows with respect to the registration of both the Initial Mortgage and the Replacement Mortgage:

Overall, it bears noting that Besco takes greatest issue with the fact that two mortgages have been registered on title. The fact remains however that Mr. Yang has not been repaid despite several extensions; the two mortgages were registered with the consent of Besco, and Mr. Yang has demonstrated a legitimate willingness to work with Mr. Sun and Besco (and any financier) to discharge the mortgage in exchange for payment of the amount owing.

Artuso Affidavit at para 13 and Exhibit “L”; Supplemental Application Record, Tab 1 and 1L at 13–14.

F. Besco Has Not Been Able to Obtain Financing Despite Mr. Yang’s Cooperation

41. Despite various assertions in the Sun Affidavit that Besco is on the verge of securing financing to repay its indebtedness to Mr. Yang, Mr. Yang has not been repaid. It has now been approximately four months since the date Mr. Sun swore the Sun Affidavit.

Sun Affidavit at paras 25, 35–38, 42, and 49; Responding Motion Record, Tab 1.

⁷ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 5.

⁸ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 4–5.

⁹ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 7.

¹⁰ Artuso Affidavit, Exhibit “L”, Supplemental Application Record, Tab 1L at 5.

42. Besco has been working on obtaining financing from Livesolar Capital Corp. (“Livesolar”) since October, 2018. Despite repeated assurances that the funding was imminent, Besco has not yet been able to secure the funds.

Artuso Affidavit at paras 3 and 6 and Exhibits “B” and “F”; Supplemental Application Record, Tab 1, 1B and 1F.

43. Mr. Yang has cooperated with Besco’s attempts to secure the Livesolar financing from the outset, including by providing multiple drafts of an undertaking to discharge the mortgages and a payout statement of amounts owing to Mr. Yang. Despite Mr. Yang’s cooperation, Besco has been unable to secure financing to repay amounts owing to Mr. Yang.

Artuso Affidavit at paras 5 and 11 and Exhibits “D” and “J”; Supplemental Application Record, Tab 1, 1D, and 1J.

PART III - ISSUES

44. This Application raises a single issue: whether KSV should be appointed as Receiver. The Receiver should be appointed for the following reasons:

- (a) it is just and convenient in the circumstances of this case;
- (b) Justice McEwen has already found that there is no issue with the registration of both the Initial Mortgage and the Replacement Mortgage on title to the Property;
and
- (c) Mr. Sun’s claim that he did not understand the documents that he executed is without merit.

45. Besco also delivered a notice of motion seeking, *inter alia*, to discharge the Initial Mortgage or, in the alternative, discharging the Replacement Mortgage and amending the Initial

Mortgage. Besco's motion is, in essence, a motion for rectification of title to the Property. This factum will also address this issue.

PART IV - THE LAW

A. IT IS JUST AND CONVENIENT TO APPOINT THE RECEIVER

46. Section 243(1) of the BIA and section 101(1) of the CJA each provide a court the authority to appoint a receiver if the court finds such an appointment to be just and convenient.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended, s 243(1); **Factum of the Respondent, Schedule B.**

Courts of Justice Act, RSO 1990, c C.43, as amended, s 101(1); **Factum of the Respondent, Schedule B.**

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

Degroote v DC Entertainment Corp et al, 2013 ONSC 7101, at para 53; **Book of Authorities of the Applicant, Tab 1.**

48. Factors to consider in the determination of whether it is appropriate to appoint a receiver include, among others, the following factors which are relevant to the present matter:

- (a) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
- (a) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
- (b) the conduct of the parties; and
- (c) the likelihood of maximizing return to the parties.

Textron Financial Canada Ltd v Chetwynd Motels Ltd (2010), 67 CBR (5th) 97 (BC SC) at para 50; **Book of Authorities of the Applicant, Tab 2.**

- (a) ***Mr. Yang has the right to appoint a receiver***

49. In determining what is just or convenient under s. 243(1) of the BIA or s. 101 of the CJA, the court must have regard to all 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. 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, because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

RMB Australia Holdings Ltd v Seafield Resources Ltd, 2014 ONSC 5205 at paras 28 & 29; Book of Authorities of the Applicant, Tab 3.

50. In this case, the GSA, the Initial Mortgage and the Replacement Mortgage each provide Mr. Yang with the right to appoint a receiver upon default by Besco.

Yang Affidavit, Exhibits “F”, “H”, and “Q”; Application Record, Tab 2F, 2H, and 2Q.

(b) *Receivership will preclude the prospect of further litigation*

51. Besco has challenged, delayed, and otherwise hindered Mr. Yang’s efforts to enforce his security, including by bringing an application for injunctive relief and a motion for rectification of title. The history of this dispute suggests that Besco’s pattern of behaviour will continue.

52. The prospect of more litigation related to a debtor’s default is a consideration that weighs in favour of appointing a receiver.

Bank of Montreal v Carnival National Leasing Ltd, 2011 ONSC 1007 at para 36; Book of Authorities of the Applicant, Tab 4.

53. A receivership proceeding will provide a single forum in which issues arising from the enforcement of the Replacement Mortgage can be adjudicated.

(c) *Mr. Yang has conducted himself according to his legal rights*

54. Mr. Yang is seeking to have a receiver appointed with clean hands. In registering the Initial Mortgage and Replacement Mortgage, and in commencing power of sale proceedings to enforce the Replacement Mortgage, Mr. Yang has continually acted in accordance with the legal rights he bargained for in the Guarantee, the Forbearance Agreement and the Replacement Mortgage.

55. As described above, Mr. Yang has cooperated with Besco's efforts to refinance the property. Notwithstanding these efforts, Besco has been unable to secure the financing necessary to repay its debt to Mr. Yang.

56. It has been approximately eight months since Mr. Yang first sought to enforce his security through the Notice of Sale. Mr. Yang is entitled to be repaid amounts owing to him. The appointment of the Receiver will allow for the sale of the Property and the repayment of Besco's debt to Mr. Yang.

(d) *Receivership will maximize value for both Mr. Yang and Besco*

57. A receiver owes duties and obligations to the court and to all the debtor company's stakeholders. A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all.

Business Development Bank of Canada v Pine Tree Resorts Inc, 2013 ONSC 1911 at paras 52 & 57; Book of Authorities of the Applicant, Tab 5.

58. The appointment of the Receiver will not only benefit Mr. Yang. The Receiver will owe duties to Besco and the Court, which will ensure that Besco's interests will be protected.

B. BESCO RAISES ISSUES PREVIOUSLY DETERMINED BY JUSTICE MCEWEN

59. The Court is entitled to, and should, recognize the determinations made by Justice McEwen in the January 2019 Endorsement, particularly (i) that the registration of both the Initial Mortgage and the Replacement Mortgage does not contravene Ontario law, and (ii) that Besco confirmed the validity and enforceability of its guarantee and that it had no defences with respect thereto.

60. Writing for the Supreme Court of Canada in *British Columbia (Attorney General) v. Malik*, Binnie J thoroughly sets out the admissibility of prior court judgments and the use that can be made thereof.

***British Columbia (Attorney General) v. Malik*, 2011 SCC 18 [*Malik*] at paras 37–48; Book of Authorities of the Applicant, Tab 6.**

61. With respect to the admissibility of prior civil or criminal judgments in subsequent civil proceedings, Binnie J stated that a judge is “entitled to take judicial notice of prior decisions of the court” and referred to the public documents (or official written statement) exception to the hearsay rule.

Malik, supra para 38; Book of Authorities of the Applicant, Tab 6.

62. With respect to the weight that a court is to give to prior judgments, Binnie J stated:

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.

Malik, supra para 42; Book of Authorities of the Applicant, Tab 6.

63. To illustrate the use that can be made of a prior judicial determination, Binnie J referred to the Ontario Court of Appeal's decision in *Del Core v. College of Pharmacists (Ontario)*. 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.

Malik, supra para 43; Book of Authorities of the Applicant, Tab 6.

Del Core v College of Pharmacists (Ontario) (1985), 51 OR (2d) 1, 19 DLR (4th) 68 (Ont CA), aff'g 21 ACWS (2d) 389 (Ont Sup Ct J (Div Ct)); Book of Authorities of the Applicant, Tab 7.

64. Similarly, it would be an abuse of process for Besco to once again criticize Mr. Yang for having registered both the Initial Mortgage and the Replacement Mortgage, and to use this as a basis to oppose the appointment of the Receiver, despite Justice McEwen having found that Mr. Yang was well within his rights in having done so.

65. It is equally an abuse of process for Besco to deny the validity or enforceability of the Guarantee given that Justice McEwen found that Besco had confirmed that the Guarantee was both valid and enforceable and that it had no defences in respect thereof.

C. THE MORTGAGES ARE VALID

66. Mr. Sun's assertion that he did not understand what he was committing Besco to when he signed the various loan, guarantee, and security documents amounts to a plea of *non est factum*. Essentially, Mr. Sun is seeking to disown his signature to those documents. The involvement of Dentons in the preparation and execution of those documents preclude Mr. Sun's plea of *non est factum*. He entered into each of those agreements with the benefit of Dentons'

counsel. Mr. Sun's subsequent execution of the Forbearance Agreement also precludes his plea of *non est factum* as he affirmed the Guarantee and the Initial Mortgage to be valid, binding, and enforceable. The Forbearance Agreement was also entered into with the benefit of Dentons' counsel.

67. It may be inferred that a party understood a document when that person signed the document after discussing it with his or her lawyer.

Trez Capital Limited Partnership v Ontario International College Inc, 2018 ONSC 4978 at 43–46; Book of Authorities of the Applicant, Tab 8.

68. Independent legal advice is not a prerequisite for a lender to make a claim against a guarantor; however, the presence of independent legal advice is useful to a lender, because it provides a means to negate any pleas of *non est factum*, misrepresentation, undue influence, duress, fraud, or unconscionability.

Royal Bank of Canada v 2240094 Ontario Inc, 2013 ONSC 2947 at para 16; Book of Authorities of the Applicant, Tab 9.

69. *Non est factum* will be denied if the party pleading it has by conduct elected to affirm the contract, which may have been voidable otherwise.

Pepper v Prudential Trust Co (1963), 41 DLR (2d) 583, 45 WWR 275 (Sask CA) at para 19; aff'd [1965] SCR 417, 50 DLR (2d) 420; Book of Authorities of the Applicant, Tab 10.

70. Where a guarantor affirms in a forbearance agreement, with the benefit of legal counsel, that the guarantee that they gave is good and valid and shall remain good and valid, binding and enforceable, the affirmation renders the guarantee in respect to which it was made valid and enforceable, even if that guarantee would have otherwise been voidable (which is expressly denied in any event).

Royal Bank v 131864 Ontario Ltd, 2003 CarswellOnt 3290 (Ont Sup Ct J) at para 19, aff'd 2003 CarswellOnt 3239 (Ont CA); Book of Authorities of the Applicant, Tab 11.

71. The heavy onus of proving *non est factum* lies upon the party seeking to disown his or her signature.

Westerlund v Ayer, [1971] SCR 131 at 133; Book of Authorities of the Applicant, Tab 12.

See also *Prentice v Barrie Community Credit Union Ltd* (1988), 8 ACWS (3d) 262 (Ont DC) at para 13; Book of Authorities of the Applicant, Tab 13.

72. Besco has failed to meet the heavy onus required to prove *non est factum*.

D. RECTIFICATION OF TITLE UNAVAILABLE

73. Besco seeks an order discharging the Initial Mortgage, and, in the alternative, an order discharging the Replacement Mortgage and an order amending the Initial Mortgage.

74. In support of its motion, Besco asserts that Mr. Yang had no legal right or authority to maintain the Initial Mortgage after the registration of the Replacement Mortgage.

75. Besco raised this issue previously at the injunction application. Justice McEwen found that Besco authorized the registration of both the Initial Mortgage and the Replacement Mortgage.

76. In any event, contrary to Besco's assertion, legal authority for the registration of the Initial Mortgage is drawn from the Guarantee and legal authority for the Replacement Mortgage is drawn from the Forbearance Agreement. Both the Initial Mortgage and the Replacement Mortgage were registered in accordance with Mr. Yang's rights under the Guarantee and the Forbearance Agreement.

77. Significantly, Besco specifically authorized the registration of both the Initial Mortgage and the Replacement Mortgage pursuant to the acknowledgements and directions that it executed in both cases (with the benefit of Dentons' legal counsel).

Yang Affidavit at paras 38 and 54, see also Exhibits "L" and S"; Application Record, Tab 2, 2L and 2S.

78. Rectification of title is not a remedy available to Besco with respect to either the Initial Mortgage or the Replacement Mortgage.

79. Justice Brown, writing for a majority of the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, enunciated the purpose and availability of rectification of title as follows:

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

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 (*Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 CarswellBC 79, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 CarswellAlta 186, 2002 SCC 19, [2002] 1 S.C.R. 678, 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 s.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, 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* (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."**

...

In *Performance Industries* (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* 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* (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). [Emphasis added.]**

Canada (Attorney General) v Fairmont Hotels Inc, 2016 SCC 56 at para 12, 13 & 15; Book of Authorities of the Applicant, Tab 14.

80. As stated by Justice Brown, the Supreme Court of Canada's decision in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* set out "certain demanding preconditions" that must be satisfied before the discretionary remedy of rectification of title is available to a party. These preconditions are:

- 1 rectification should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement,
- 2 there must be an inconsistent prior oral agreement,
- 3 the advantaged defendant resisting rectification either knew or ought to have known of the mistake, such that permitting the advantaged defendant to take advantage of the error would amount to fraud of the equivalent of fraud,
- 4 the party seeking rectification must show the precise form in which the written instrument can be made to express the prior intention and the fifth test is that,

5 the plaintiff's evidentiary burden is to demonstrate the first four hurdles by "convincing proof."

Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd, 2002 SCC 19 [*Performance Industries*] at paras 36–41; Book of Authorities of the Applicant, Tab 15.

81. Besco has not provided evidence that would satisfy any of the foregoing preconditions.

82. With respect to precondition 5, Besco has failed to provide any evidence that meets a standard of “convincing proof”, which Justice Brown describes 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”.

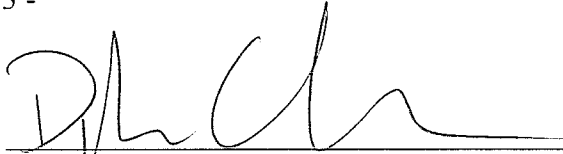
Performance Industries, supra at para 41; Book of Authorities of the Applicant, Tab 15.

PART V - ORDER REQUESTED

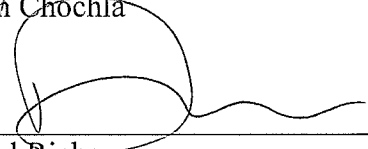
83. The Applicant respectfully requests that this Honourable Court grant the following relief:

- (d) an Order appointing KSV as Receiver of the Property;
- (e) an Order dismissing Besco’s motion to discharge or amend the Mortgages;
- (f) costs of this proceeding, on a substantial indemnity basis, including HST charged thereon; and
- (g) such further and other relief as counsel may advise and this Honourable Court may deem just.

RESPECTFULLY SUBMITTED THIS 4th DAY OF FEBRUARY, 2019



Dylan Chochla



Daniel Rieher

Lawyers for the Applicant

TAB A

SCHEDULE “A”

1. *Degroote v DC Entertainment Corp et al*, 2013 ONSC 7101;
2. *Textron Financial Canada Ltd v Chetwynd Motels Ltd* (2010), 67 CBR (5th) 97 (BC SC);
3. *RMB Australia Holdings Ltd v Seafield Resources Ltd*, 2014 ONSC 5205;
4. *Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007;
5. *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONSC 1911;
6. *British Columbia (Attorney General) v. Malik*, 2011 SCC 18;
7. *Del Core v College of Pharmacists (Ontario)* (1985), 51 OR (2d) 1, 19 DLR (4th) 68 (Ont CA) , aff’g 21 ACWS (2d) 389 (Ont Sup Ct J (Div Ct));
8. *Trez Capital Limited Partnership v Ontario International College Inc*, 2018 ONSC 4978;
9. *Royal Bank of Canada v 2240094 Ontario Inc*, 2013 ONSC 2947;
10. *Pepper v Prudential Trust Co* (1963), 41 DLR (2d) 583, 45 WWR 275 (Sask CA); aff’d [1965] SCR 417, 50 DLR (2d) 420;
11. *Royal Bank v 131864 Ontario Ltd*, 2003 CarswellOnt 3290 (Ont Sup Ct J), aff’d 2003 CarswellOnt 3239 (Ont CA);
12. *Westerlund v Ayer*, [1971] SCR 131;
13. *Prentice v Barrie Community Credit Union Ltd* (1988), 8 ACWS (3d) 262 (Ont DC);
14. *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56;
15. *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19.

TAB B

SCHEDULE “B”

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

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

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

Restriction on appointment of receiver

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

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

Courts of Justice Act, RSO 1990, c C.43

Injunctions and receivers

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

WEICHANG YANG
Applicant

-and-

BESCO INTERNATIONAL INVESTMENT CO., LTD.
Respondent

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

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