Court of Appeal File No. COA-23-OM-0314
Court File No. CV-18-608978-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO LIMITED

Applicant
(Respondent on Appeal)

\- and -

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents
(Appellants on Appeal)

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

RESPONDING PARTIES' FACTUM

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Jeremy Opolsky (LSO #: 60813N)
Tel: 416.865.8117
jopolsky@torys.com

Jake Babad (LSO #: 79256F)
Tel: 416.865.8181
jbabad@torys.com

Alex Bogach (LSO #: 72138L)
Tel: 416.865.7379
abogach@torys.com

Lawyers for the Responding Party

TO: **Miller Thomson LLP**
100 New Park Place
Suite 700
Vaughan, ON L4K 0H9

Michael Farace (LSO #: 29852S)
Tel: 905.532.6618
Fax: 905.660.0139
mfarace@millerthomson.com

Lawyer for the Moving Party

Court of Appeal File No. COA-23-OM-0314
Court File No. CV-18-608978-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO LIMITED

Applicant
(Respondent on Appeal)

- and -

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents
(Appellants on Appeal)

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

TABLE OF CONTENTS

Page No.

PART I - OVERVIEW AND FACTS 1
Facts 3
The Massey Contract 3
The Lien and Delay Action 5
PART II - POSITION ON ISSUES 7
The Test for Leave to Appeal 7
The Proposed Appeal is Not Meritorious 8
The Receiver sought rectification well within the limitation period 9
Rectification claim was pleaded properly 11
No error on estoppel 12
MOD needs to win on multiple grounds of appeal 14
No Significance to Bankruptcy Practice 15
Significance to the proceedings is not a relevant factor in this case 16
The proceeding will unduly hinder payment of Forma-Con’s creditors 16

PART I - OVERVIEW AND FACTS

1. The moving party, MOD, asks this Court for leave to appeal about a typo. The name of a numbered company, as a party to a contract, had a single mistaken digit. It said **'2'** instead of **'8'**. Everyone—including MOD—agrees this was an error. The motions judge found that it was clearly a mistake. But MOD seeks to use the typo to prevent the respondent—the receiver of Forma-Con—from recovering more than $2 million for work Forma-Con performed and returning that money to Forma-Con's creditors. There are no issues that warrant this Court hearing this appeal.

2. MOD entered into a contract for work on a Toronto condominium tower, completed in 2019. The work was performed by numbered companies doing business as Forma-Con Construction. The contract permits MOD to retain a 10% holdback until completion of the project. The holdback is approximately $2 million. The contract was performed without incident for years. Forma-Con went into receivership in 2018 and the Receiver completed the work.

3. After completion of the work, the Receiver sought payment of the holdback. MOD refused. MOD alleged that the Receiver did not have authority to seek payment because the contract was between MOD and "142850**2**" not "142850**8**." The 508 company carried on business as Forma-Con and was the corporate predecessor to the debtor, 1033803. The 502 company had no connection at all to the debtor or its wider family of companies. MOD concedes that this was a clerical error.

4. Notwithstanding this concession, MOD continues to contest the Receiver's authority. Why? Because, if the Receiver cannot pursue the holdback, no one will. More than $2 million

will go to MOD instead of Forma-Con's creditors. On cross-examination, MOD conceded that it is using this litigation to get 100% of the contract work but only pay 90% of the agreed price.

5. MOD seeks to keep its litigation afloat by raising three grounds of appeal. Each has no prospect of success:

(a) ***The rectification claim is not time-barred.*** MOD ignores that the factual basis of the rectification claim was pleaded in the underlying action, well within the statute of limitations. It likewise ignores that these pleadings were relied upon by the motion judge to reject this argument.

(b) ***The rectification claim was properly pled***. In a new issue raised for the first time in its leave to appeal materials, MOD advances a formalistic argument that the Receiver needed to expressly put its rectification argument in its statement of claim, rather than its reply pleading—even though the motion judge concluded MOD had notice of the rectification claim based on the pleadings as a whole.

(c) ***The motion judge correctly applied estoppel principles to the facts***. After reviewing the various documentation exchanged between the parties that repeatedly referred to 803, the motion judge concluded that MOD could not resile from the parties' shared understanding that 803 was the correct counterparty. MOD demonstrates no error in this analysis.

6. Finally, there is no broader interest to bankruptcy practice raised here to justify leave; the grounds of appeal are idiosyncratic and fact-specific. They have no application outside this case.

7. In short, MOD's appeal faces a tall mountain to scale. It asks Forma-Con's creditors to wait at the bottom while it makes its unlikely ascent. The leave to appeal mechanism in the *BIA* was designed precisely to guard against these sorts of appeals.

Facts

The Massey Contract

8. KSV Restructuring Inc. (the "**Receiver**") is the court-appointed receiver and manager of 1033803 Ontario Inc. ("**803**") and 1087507 Ontario Limited. 803 operated a concrete forming business under the name Forma-Con Construction ("**Forma-Con**").[1] Prior to 2016, Forma-Con was operating as 1428508 Ontario Limited ("**508**").[2] Forma-Con operated within the Bondfield Group, a broader group of companies that provided construction services in the Greater Toronto Area.[3]

9. On December 19, 2014, an agreement was entered into between MOD and "Forma-Con Construction (a division of 142850**2** Ontario Limited)" with respect to a construction project at 197 Yonge St., Toronto, known as Massey Tower ("**Massey Contract**").[4]

10. However, there was a mistake in the naming of the parties to the Massey Contract. It described Forma-Con Construction as a division of 142850**2** ("**502**") rather than the proper and intended party, 50**8**.

---

[1] Motion Judge Reasons, Moving Party's Motion Record ("**MR**"), Tab 4 at paras. 1, 4.
[2] Motion Judge's Reasons, MR, Tab 4 at para. 23.
[3] Motion Judge's Reasons, MR, Tab 4 at para. 4.
[4] Motion Judge's Reasons, MR, Tab 4 at para. 7.

11. The parties all agree that this was a mistake.[5] 502 carried on a business known as Second Floor Ltd. and the corporation was cancelled in 2007, seven years before the Massey Contract was executed. There is no link or relationship whatsoever between 502 and Forma-Con or any other entity within the Bondfield Group.[6]

12. For years, no one noticed or cared about the error in the Massey Contract. As the motion judge found, between December 2014 and December 2016, "the [Massey Contract] was performed by both parties for approximately two years without incident or complication – 508 provided the concrete forming services, and MOD paid 508 for those services."[7]

13. As noted above, after 2016, Forma-Con began operating as 803. MOD's construction manager, Tucker HiRise Construction Inc. ("**Tucker**"), was aware that 803 began providing the concrete forming services under the Massey Contract. 803 also performed under the Massey Contract without incident or objection from MOD or Tucker, with numerous documents exchanged between the parties referencing 803, not 502 or 508.[8]

14. Under the Massey Contract, MOD was entitled to holdback 10% of the value of the contract. The holdback amount is $2,038,704.26 (the "**Holdback**"). The Holdback is owed to Forma-Con upon completion of the project.[9]

---

[5] Motion Judge's Reasons at para. 46, MR, Tab 4.
[6] Motion Judge's Reasons at paras. 10-13, MR, Tab 4.
[7] Motion Judge's Reasons at para. 20, MR, Tab 4.
[8] Motion Judge's Reasons at paras. 24-27, MR, Tab 4.
[9] Motion Judge's Reasons at paras. 20, 28, MR, Tab 4.

The Lien and Delay Action

15. On November 19, 2018, KSV was appointed as the receiver over 803. The Massey Tower project was not completed at the time. The Receiver had Forma-Con complete the project in order to recover the Holdback for the benefit of Forma-Con's creditors. Following the completion of the project, the Receiver requested payment of the Holdback. MOD refused.[10]

16. The Receiver registered a lien in respect of the project and commenced a lien action (the "**Lien Action**"). The Receiver also commenced an action against MOD for amounts owing to 803 for work done in connection with the Project (the "**Delay Action**").[11]

17. MOD defended the Lien Action on the basis that the party to the Massey Contract was 502, not 508, and that it never entered into any contract with 803.[12] MOD asserted that the Receiver therefore had no authority to bring the Lien Action.[13]

18. In its reply pleading in the Lien Action, the Receiver expressly pleaded that the misnaming of the counterparty was a clerical error.[14]

19. If MOD is correct that the Receiver cannot seek payment of the $2 million, nobody will. While MOD acknowledges that it owes Forma-Con the Holdback,[15] its position in this application is, as the motion judge noted, that "some other party" is entitled to the funds even though "no other party asserts any such interest."[16] MOD's representative candidly admitted on

---

[10] Motion Judge's Reasons at paras. 28-32, MR, Tab 4.
[11] Motion Judge's Reasons at para. 33, MR, Tab 4.
[12] Motion Judge's Reasons at para. 59., MR, Tab 4.
[13] Motion Judge's Reasons at para. 34, MR, Tab 4.
[14] Motion Judge's Reasons at para. 61, MR, Tab 4.
[15] Statement of Defence and Counterclaim at para. 6, MR, Tab 6, Ex. 6, p. 1090.
[16] Motion Judge's Reasons at para. 100, MR, Tab 4.

cross-examination that the purpose of this litigation is to pay 90% of the contract price for 100% of the contract work.[17]

20. Given MOD's position in the Lien Action that the Receiver lacked the authority to seek payment of the Holdback on behalf of 803, the Receiver moved to seek the advice and direction of the commercial court on whether it had the authority to bring the Lien Action and the Delay Action. The motion judge concluded that:[18]

(a) ***The Massey Contract should be rectified to reflect that 508, not 502, was the party to the contract.*** The motion judge concluded that it was "beyond any serious dispute that both parties intended from the outset that 508 was to be the named party, the naming of 502 was the result of a simple clerical mistake."[19] With respect to whether the rectification claim was statute-barred, the motion judge explained that the claim was advanced in the Lien Action, well-within the statutory limitation period.

(b) ***803 was a party to the Massey Contract by successorship.*** The motion judge explained that, pursuant to the enurement clause in the Massey Contract, 803 was the corporate successor to 508.[20]

(c) ***MOD is estopped from taking the position that 803 is not a party to the Massey Contract.*** The motion judge found: (i) MOD's evidence "was clear that it intended to contract with Forma-Con" and that the "numbered company behind

[17] Ball Cross, MR, Tab 12, p. 2000 (q. 350).
[18] Motion Judge's Reasons at para. 104, MR, Tab 4.
[19] Motion Judge's Reasons at para. 45, MR, Tab 4.
[20] Motion Judge's Reasons at paras. 83-84, MR, Tab 4.

Forma-Con was not relevant"; (ii) that both parties acted in reliance on the shared assumption that 803 was the counterparty; and (iii) it would be "unjust and unfair to allow MOD to resile or depart from the common assumption" and that it would be "difficult to come to a different conclusion."[21]

PART II - POSITION ON ISSUES

The Test for Leave to Appeal

21. MOD seeks leave to appeal under section 193(e) of the *Bankruptcy and Insolvency Act* ("***BIA***"). Courts consider four factors in deciding whether to grant leave:

(a) Whether the proposed appeal is *prima facie* meritorious.

(b) Whether the point of appeal is of significance to the bankruptcy practice.

(c) Whether the point raised is of significance to the action itself.

(d) Whether the appeal will unduly hinder the progress of the action.[22]

22. This Court has explained that the third factor—whether the point of appeal is of significance to the action itself—is "likely to be of lesser assistance" because "most proposed appeals…raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case."[23] Indeed, in recent cases, the Court has left this factor out of its analysis entirely.[24]

---

[21] Motion Judge's Reasons at para. 99, MR, Tab 4.

[22] *Ontario (Superintendent of Bankruptcy) v. 407 ETR Concession Co*., 2012 ONCA 569 at para. 47, Responding Party's Book of Authorities ("**RBOA**"), Tab 1.

[23] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para. 30, RBOA Tab 2.

[24] *See e.g. KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2023 ONCA 219 at para. 41 RBOA Tab 3; *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 at para. 32, RBOA, Tab 4.

The Proposed Appeal is Not Meritorious

23. MOD must show that its appeal is *prima facie* meritorious. This element is determinative: where the appeal has no possible chance of success, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."[25]

24. MOD's proposed appeal can be summarized in three issues:

(a) The Receiver's claim for rectification is statute-barred.

(b) The Receiver's claim for rectification should have been pleaded in its statement of claim in the Lien Action.

(c) MOD should not be estopped from taking the position that 803 is not party to the contract.[26]

25. In assessing whether a proposed appeal is meritorious, this Court's "inquiry is informed by the principle of deference owed to a commercial court judge."[27] The issues raised by MOD—the interpretation of contracts, assessments of the parties' conduct under a commercial agreement, and analysis of the parties' pleadings—all engage a commercial court judge's specialized expertise.[28] Absent demonstratable error, an appeal court will not interfere.[29] Indeed,

---

[25] *Re Ravelston Corp.*, 2005 CanLII 63802 at para. 28 (ONCA), RBOA, Tab 5.

[26] MOD's notice of appeal also raises one other issue: whether the judge errored in finding that 803 was a corporate successor to 508 and, therefore, a party to the Massey Contract. However, MOD offers no arguments in its leave to appeal factum as to why the motion judge erred or the matter otherwise deserves leave to appeal. There is no basis on which to assert that this appeal ground is *prima facie* meritorious.

[27] *Re Kaiser*, 2011 ONCA 713 at para. 18, RBOA Tab 6; *Re Ravelston Corp.*, 2007 ONCA 268 at para. 14, RBOA Tab 7.

[28] *Re Mundo Media Ltd.*, 2022 ONCA 607 at para. 30 RBOA Tab 8; *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 ONCA 779 at para. 39, RBOA Tab 9.

[29] *Re Kaiser*, 2011 ONCA 713 at para. 18, RBOA Tab 6.

on leave to appeal motions, the deference owed to the first instance judge "can take an argument that is tenable in theory and make it hopeless in reality."[30]

26. Here, MOD's proposed grounds illustrate no real demonstrable error below—the grounds variously ignore the evidence below, the motion judge's findings of fact and the clear application of settled law. The proposed issues are canvassed below.

The Receiver sought rectification well within the limitation period

27. MOD argues that rectification is time-barred. It claims that the limitation period for claiming rectification was January 15, 2022 and that the Receiver first sought rectification on August 15, 2022 in its notice of motion for advice and directions.

28. MOD seeks to re-litigate the motion judge's fact-specific conclusion that the Receiver's claim was sufficiently pleaded in the Lien Action.

29. In the Lien Action, the Receiver's statement of claim, dated March 13, 2019, sought to collect the Holdback and pleaded that it was entitled to advance the claim on behalf of 803.[31] MOD's statement of defence responded that 502, not 508, was the party to the Massey Contract.[32]

30. In its reply pleading, dated October 5, 2020, the Receiver expressly pleaded that "the misnaming was a clerical error" and that the "parties agreed and understood that the entity

---

[30] *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at para. 16, RBOA Tab 10.

[31] Motion Judge's Reasons at para. 58, MR, Tab 4; Statement of Claim, MR, Tab 6, Ex. 4, pp. 1062-1087.

[32] Motion Judge's Reasons, MR, Tab 4 at para. 59; Statement of Defence and Counterclaim, MR, Tab 6, Ex. 5, pp. 1089-1094.

mutually understood as Forma-Con would perform the work specified in the contract."[33] MOD does not even allude to the Receiver's reply pleading in its leave to appeal materials.

31. The motion judge relied on these pleadings to conclude that the Receiver's motion for directions was not asserting any new cause of action.[34] The factual matrix underpinning the cause of action—that there had been an obvious clerical mistake at odds with the substance of the parties' actual agreement—was pleaded in the Lien Action.

32. The motion judge correctly relied on *Klassen v. Beausoliel*.[35] In *Klassen*, this Court confirmed that courts should take a "factually oriented" approach to the concept of a cause of action:

> An amendment does not assert a new cause of action – and therefore is not impermissibly statute-barred – if the "original pleading … contains all the facts necessary to support the amendments … [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded": [citations omitted].[36]

33. Keeping in mind the need to read pleadings generously, the motion judge correctly concluded that the Receiver's pleadings in the Lien Action contained all the facts necessary to support the rectification claim.[37] The pleading need not be labelled "rectification".[38] In addition, pursuant to Rule 25.01, the "pleadings" include a reply pleading. The motion judge's conclusion arises from his assessment of the pleadings in the Lien Action, including the Receiver's reply,

---

[33] Reply and Defence to Counterclaim at para. 1., MR, Tab 6, Ex. 6, p. 1096.
[34] Motion Judge's Reasons at para. 60, MR, Tab 4.
[35] *Klassen v. Beausoliel*, 2019 ONCA 407, RBOA Tab 11.
[36] *Klassen v. Beausoliel*, 2019 ONCA 407 at para. 28, RBOA Tab 11.
[37] Motion Judge's Reasons at paras. 57, 62-64, MR, Tab 4.
[38] *Reddy v. Freightliner Canada Inc.*, 2015 ONSC 1811 at para. 25 aff'd 2015 ONCA 797, RBOA Tabs 12, 13.

and will be owed deference on appeal. MOD has demonstrated no *prima facie* error in the motion judge's holding.

Rectification claim was pleaded properly

34. In an argument not advanced before the motion judge, MOD now says that the Receiver should have amended its statement of claim in the Lien Action to seek rectification. In the ordinary course, courts do not normally allow parties to raise new arguments on appeal,[39] let alone grant leave to hear those arguments.[40] This is an argument that could and should have been advanced before the motion judge.

35. Even if this Court allows MOD to raise this argument for the first time on appeal, MOD's arguments are formalistic and divorced from the law of pleadings. Moreover, this ground leads to no material relief.

36. Pleadings "must be considered in a functional way" with the primary question being whether the recipient of the pleading "would reasonably have understood" that the claim was being advanced.[41] What matters is that MOD was alerted to the facts underlying the Receiver's rectification claim.

37. MOD's position is also inconsistent with the *Rules of Civil Procedure*. Rule 25.08 requires plaintiffs to deliver a reply pleading when they "intend to reply in response to a defence

---

[39] *Kaiman v. Graham*, 2009 ONCA 77 at para. 18, RBOA Tab 14.
[40] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at paras. 35-36, RBOA Tab 15; *Re Tasci*, 2020 BCCA 317 at paras. 49, 52, RBOA Tab 16.
[41] *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818 at para. 38, RBOA Tab 17.

on any matter that might, if not specifically pleaded […] raise an issue that has not been raised by a previous pleading." The Receiver did precisely that.

38. Moreover, this issue is inconsequential. Courts will allow a plaintiff to shift a cause of action from its reply pleading to its statement of claim so long as there is no non-compensable prejudice.[42] The motion judge already concluded that "there is no prejudice to MOD, let alone non-compensable prejudice" in allowing the Receiver to seek rectification.[43] This finding is owed deference. The Receiver could simply amend its statement of claim in the Lien Action and make this entire ground of appeal moot. This Court's time is not well spent considering whether the Receiver should have to copy a paragraph from its reply pleading and paste it into its statement of claim.

No error on estoppel

39. The parties agree that estoppel by convention has three requirements: (i) the parties' dealings were based on a shared assumption of fact or law, even if mistaken; (ii) a party must have acted in reliance on the shared assumption; and (iii) it would be unjust and unfair to allow one of the parties to resile or depart from the common assumption.[44] The motion judge applied these three requirements.[45]

40. This is settled law. But MOD now seeks to re-litigate the motion judge's application of these principles to the facts. MOD asserts that the motion judge erred in concluding that MOD

---

[42] *McComb v. American Canada Inc.*, 1986 CarswellOnt 500 (Ont. HCJ), RBOA Tab 18.
[43] Motion Judge's Reasons at para. 63, MR, Tab 4.
[44] *Ryan v. Moore*, 2005 SCC 38 at para. 59, RBOA Tab 19; *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, 2021 ONCA 201 at para. 144, RBOA Tab 20.
[45] Motion Judge's Reasons at paras. 95-103, MR, Tab 4.

and Forma-Con's dealings were based on "a shared assumption of fact" that 803 was the counterparty. The motion judge considered the evidence and rejected this:

> The evidence of MOD was clear that it intended to contract with Forma-Con and in fact thought it was doing so; the numbered company behind Forma-Con was not relevant. The shared assumption, although mistaken, was that 803 was the counterparty.[46]

41. MOD does not detail any palpable and overriding error and its arguments lack an air of reality. For two years, MOD received progress billings, insurance and WSIB clearance certificates from 803. It paid 803.[47] Its own witness said that MOD "believed Forma-Con was the trade contractor."[48]

42. MOD's position reveals the tactical nature of its litigation. It objected to 803 as a counterparty only after the Receiver was appointed. Its reason for doing so was admitted in cross-examination: MOD's position is that it should only pay 90 percent of the contract value for 100 percent of the contract work.[49] MOD never cared about the digits of the numbered company until it would justify keeping the Holdback.

43. Based on this evidence, the motion judge concluded that the parties shared an assumption that 803 was the correct counterparty. That conclusion is rooted in the evidence and owed deference.

44. MOD also says that the motion judge erred in stating that MOD did not assert any beneficial interest in the Holdback.[50] The motion judge made this comment in the context of

---

[46] Motion Judge's Reasons at para. 97, MR, Tab 4.
[47] Motion Judge's Reasons at paras. 25-27, 98, MR, Tab 4.
[48] Motion Judge's Reasons at para. 81, MR, Tab 4.
[49] Ball Cross, MR, Tab 12, p. 2000 (q. 350).
[50] Motion Judge's Reasons at para. 101, MR, Tab 4.

determining whether it would be unjust and unfair for MOD to resile from the parties' shared assumption. MOD says that it does have a beneficial interest in the Holdback because, in the Lien Action, it wishes to use the Holdback to set off other amounts it says it is owed from Forma-Con.

45. MOD cites no authority for the questionable proposition that a party holds a beneficial interest to funds that it seeks to use in an unproven set-off claim. Outside of its set-off claim, MOD asserts no interest in the Holdback and agrees that it is owed to the Receiver.[51]

46. In any event, the motion judge did not rest his estoppel analysis on the fact that MOD did not assert a beneficial interest in the Holdback. Instead, the motion judge considered the entirety of the evidence and determined that there was "no basis upon which to conclude that it is any sense fair or equitable for MOD to be allowed to keep that 10% Holdback". He added that it would be "difficult to come to a different conclusion in the equity."[52] This was not a close case. MOD's alleged error is neither palpable nor overriding.

MOD needs to win on multiple grounds of appeal

47. Not only do MOD's individual grounds of appeal stand little to no chance of success, but its overall success also requires it to win on both the rectification and estoppel issues. This compounds its appeal's lack of merit:

(a) If MOD only wins on rectification, MOD will still be estopped "from taking the position…that the Receiver is not entitled to the Holdback."[53]

---

[51] Statement of Defence and Counterclaim at para. 6, MR, Tab 6, Ex. 6, p. 1090.
[52] Motion Judge's Reasons at para. 99, MR, Tab 4.
[53] Motion Judge's Reasons at para. 103, MR, Tab 4.

(b) If MOD only wins on corporate successorship—an issue that it has not challenged in its leave to appeal materials—the Receiver's position will prevail on the strength of the rectification and estoppel findings.

(c) If MOD only wins on estoppel, the Receiver will prevail because the estoppel finding was made only in the event that the motion judge erred in his corporate successor finding.[54]

48. Even if MOD could show that one of its grounds has *prima facie* merit—and they do not—this would not be enough. The appeal would have no realistic prospect of success.

No Significance to Bankruptcy Practice

49. MOD's grounds of appeal have no connection to bankruptcy practice.

50. To meet the s. 193 test, MOD describes its grounds of appeal in the specific factual context of this case, for example: "The application of limitation periods to actions <u>taken by court officers</u>" and "the appropriate use of rectification <u>in the receivership context.</u>"[55]

51. However, none of the grounds raised—and certainly none of the grounds argued in MOD's factum—have any specific ties to bankruptcy. MOD's arguments about rectification, pleadings and estoppel do not turn on any of the bankruptcy or receivership-specific facts. The *Bankruptcy and Insolvency Act* is not pled; indeed, the word "bankruptcy" does not appear in the body of MOD's factum.

---

[54] Motion Judge's Reasons at para. 91, MR, Tab 4.
[55] Moving Party's Factum at paras. 44(a)-(b) [underlining added].

52. Moreover, MOD's grounds of appeal, whether bankruptcy-related or not, do not transcend the interests of the parties. It attacks the motion judge's reading of the pleadings and his application of the estoppel by convention doctrine on the particular facts of the case. These issues turn on the specific pleadings and the evidence. Leave to appeal is routinely refused when appellate courts are asked to weigh in on these kinds of case-specific skirmishes.[56]

Significance to the proceedings is not a relevant factor in this case

53. As noted earlier, Ontario courts are increasingly skeptical about the utility of this factor. This case is a good example of why. MOD is leveraging a typo to refuse to return $2 million. Keeping $2 million is, of course, valuable to MOD. It would be important to most litigants. This alone cannot justify keeping MOD's tactical litigation afloat, particularly when the appeal does not disclose any legal issues, let alone any issues with a reasonable likelihood of success.

The proceeding will unduly hinder payment of Forma-Con's creditors

54. MOD says that there is no concern about delay because the Lien Action is being case managed. That case, says MOD, will proceed on a schedule set by the case management judge once the appeal is resolved.[57] This is the point. This appeal will inherently delay the Lien Action and will therefore delay return of Forma-Con's money to Forma-Con's creditors. They have been waiting long enough already.

---

[56] *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2023 ONCA 219 at para. 42, RBOA Tab 3; *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 at para. 46, RBOA Tab 4; *Re Tasci*, 2020 BCCA 317 at para. 48 RBOA Tab 16.

[57] Moving Party's Factum at para. 47.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May, 2023.

____

Jeremy Opolsky

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Jeremy Opolsky (LSO #: 60813N)
Tel: 416.865.8117
jopolsky@torys.com

Jake Babad (LSO #: 79256F)
Tel: 416.865.8181
jbabad@torys.com

Alex Bogach (LSO #: 72138L)
Tel: 416.865.7379
abogach@torys.com

Lawyers for the Respondents

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Ontario (Superintendent of Bankruptcy) v. 407 ETR Concession Co.*, 2012 ONCA 569
2. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282
3. *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 219
4. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581
5. *Re Ravelston Corp.*, 2005 CanLII 63802 (ONCA)
6. *Re Kaiser*, 2011 ONCA 713
7. *Re Ravelston Corp.*, 2007 ONCA 268
8. *Re Mundo Media Ltd.*, 2022 ONCA 607
9. *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 ONCA 779
10. *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224
11. *Klassen v. Beausoliel*, 2019 ONCA 407
12. *Reddy v. Freightliner Canada Inc.*, 2015 ONSC 1811
13. *Reddy v. Freightliner Canada Inc.*, 2015 ONCA 797
14. *Kaiman v. Graham*, 2009 ONCA 77
15. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225
16. *Re Tasci*, 2020 BCCA 317
17. *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818
18. *McComb v. American Canada Inc.*, 1986 CarswellOnt 500 (Ont. HCJ)
19. *Ryan v. Moore*, 2005 SCC 38
20. *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, 2021 ONCA 201

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Appeals
Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

> **(a)** if the point at issue involves future rights;
>
> **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
>
> **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> **(e)** in any other case by leave of a judge of the Court of Appeal.

Rules of Civil Procedure, R.R.O. 1990, Reg 194

Pleadings Required or Permitted
Action Commenced by Statement of Claim or Notice of Action

25.01 (1) In an action commenced by statement of claim or notice of action, pleadings shall consist of the statement of claim (Form 14A, 14B or 14D), statement of defence (Form 18A) and reply (Form 25A), if any. R.R.O. 1990, Reg. 194, r. 25.01 (1).

Where a Reply Is Necessary
Different Version of Facts

25.08 (1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim. R.R.O. 1990, Reg. 194, r. 25.08 (1).

Affirmative Reply

(2) A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06 (5) (inconsistent claims or new claims). R.R.O. 1990, Reg. 194, r. 25.08 (2).

Reply Only Where Required

(3) A party shall not deliver a reply except where required to do so by subrule (1) or (2). R.R.O. 1990, Reg. 194, r. 25.08 (3).

Deemed Denial of Allegations Where No Reply

(4) A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party. R.R.O. 1990, Reg. 194, r. 25.08 (4).

Court of Appeal File No. COA-23-OM-0314

BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO LIMITED v. 1033803 ONTARIO INC. et al.

COURT OF APPEAL FOR ONTARIO

RESPONDING PARTIES' FACTUM

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Jeremy Opolsky (LSO #: 60813N)
Tel: 416.865.8117
jopolsky@torys.com

Jake Babad (LSO #: 79256F)
Tel: 416.865.8181
jbabad@torys.com

Alex Bogach (LSO #: 72138L)
Tel: 416.865.7379
abogach@torys.com

Lawyers for the Respondents