SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV- 21-00673521-00CL **DATE: October 31, 2023**

NO. ON LIST: 1

TITLE OF PROCEEDING: OSC V GO-TO DEVELOPMENTS HOLDINGS INC

BEFORE: JUSTICE JANA STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Nemers	KSV Restructuring Inc.	jnemers@airdberlis.com
Ian Aversa	KSV Restructuring Inc.	iaversa@airdberlis.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Greg Azeff	Oscar Furtado	gazeff@millerthomson.com
Monica Faheim	Oscar Furtado	mfaheim@millerthomson.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE STEELE:

Overview

[1] The Receiver brings this motion asking the Court to uphold the disallowance of Oscar Furtado's claim against Go-To Stoney Creek Elfrida LP ("Stoney Creek LP") and Go-To Stoney Creek Elfrida Inc. ("Stoney Creek GP", and together with Stoney Creek LP, "Stoney Creek").

[2] Mr. Furtado was the principal of the 23 Receivership Respondents, including Stoney Creek LP and Stoney Creek GP.

[3] Mr. Furtado was the president and sole director of Stoney Creek GP. Stoney Creek GP was the general partner of Stoney Creek LP.

[4] Further background on this proceeding can be found in my decision in *Ontario Securities Commission v. Go-To Development Holdings Inc., et al*, 2023 ONSC 5921 and in Patillo J.'s endorsemen, *Ontario Securities Commission v. Go-To Developments Holdings Inc.*, 2021 ONSC 8133. As noted in my decision, at para. 28, the receivership appointment in this case was made under the *Securities Act* following an application made by the Commission.

[5] Further to the claims procedure set out in the Claims Procedure Order, dated April 7, 2022, Mr. Furtado submitted a proof of claim against Stoney Creek in the amount of $867,769, which was disallowed by the Receiver on or about March 28, 2023. Mr. Furtado's claim arose from guarantee fees, pursuant to Guarantee Fee Agreements between Stoney Creek LP, by its general partner, Stoney Creek GP, and Mr. Furtado, as guarantor (dated Feb. 27, 2018, Nov. 19, 2019, and Dec. 18, 2020).

[6] On or about April 11, 2023, Mr. Furtado delivered a notice of dispute in respect of the Receiver's disallowance of his claim.

[7] On or about June 6, 2023, the Receiver advised Mr. Furtado and the other stakeholders that "[i]f the Stoney Creek [disputed claim] is not withdrawn in the following weeks, the Receiver intends to bring a motion to Court to have the Receiver's disallowance of the claim upheld." Mr. Furtado subsequently confirmed that he would not withdraw the disputed claim.

Analysis

Was the Receiver correct in having disallowed Mr. Furtado's claim against Stoney Creek?

[8] The Receiver was correct in disallowing Mr. Furtado's claim against Stoney Creek.

[9] The Receiver reviewed the three Guarantee Fee Agreements. The Receiver noted that the Guarantee Fee Agreements were only signed by Mr. Furtado (in his personal capacity as the guarantor, and as the corporate signing officer for Stoney Creek). The Guarantee Fee Agreements provide that Go-To Stoney Creek LP "agrees to pay to the Guarantor [Furtado] an annual guarantee fee equal to 5% of the total principal amount guaranteed by the Guarantor from time-to-time under the Guarantees." The Receiver submits that this is another example of self-dealing by Mr. Furtado, which was not disclosed to the investors.

[10] The Receiver does not dispute the existence of the Guarantee Fee Agreements or that they provide for a guarantee fee payable to Mr. Furtado from Stoney Creek. The Receiver disallowed Mr. Furtado's claim against Stoney Creek for the following reasons, set out in the Notice of Disallowance of Claim:

> a. It constitutes undisclosed, related-party agreements made by a fiduciary in breach of the fiduciary's contractual and/or common law duties. Without limiting the generality of the foregoing, neither Go-To Stoney Creek LP's Limited Partnership Agreement dated October 20, 2017 (the "LP Agreement") nor Go-To Stoney Creek LP's "Investment Opportunity" brochure to investors dated March 2019 (the "IO Brochure") discloses your entitlement to any guarantee fees. The IO Brochure goes even further, in that it specifically references that "*The General Partner and the Builder will sign for all third party financing and provide the Banks with all personal guarantees when required*," and your name is not specifically referenced. Additionally, the IO Brochure does not reference that any guarantor would be entitled to a fee for providing a guarantee. If the intention was that you personally would be entitled to a guarantee fee, such entitlement should have been explicitly disclosed in the IO Brochure and the LP Agreement. ...;
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> b. In the alternative, if disclosure of the related-party fees can somehow be inferred from the LP Agreement (which the Receiver does not believe to be the case), the fees would still breach section 5.12 of the LP Agreement, which requires such fees to be "*reasonable and competitive with the cost of similar goods or services provided by an independent third party*." You have provided no evidence to the Receiver that the purported guarantee fees are reasonable and competitive with what could have been obtained from an independent third party. In fact, the purported guarantee fees are five times higher than a similar purported guarantee fee between yourself and Go-To Niagara Chippawa LP (which is an Affiliate, as defined in the LP Agreement, of Go-To Stoney Creek LP); and
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> c. In the further alternative, you have not provided any evidence to the Receiver that you had the financial wherewithal to pay the subject guarantees if called upon (in other words, that Go-To Stoney Creek LP received anything in exchange for purportedly agreeing to the guarantee fees). This is particularly noteworthy, as the subject guarantees increased from $2.4 million as of February 27, 2018, to $6 million as of November 19, 2019 to $10.65 million as of December 18, 2020.

[11] In Mr. Furtado's notice of dispute, he disagreed with the Receiver's position regarding the obligation to disclose the guarantee fees. He stated: "Mr. Furtado disagrees entirely with the assertion that there was any requirement or obligation on his part to disclose the entitlement to guarantee fees." Mr. Furtado now argues that the guarantee fee obligation was disclosed in any event in Stoney Creek LP's 2019 financial statements.

[12] Mr. Furtado, as a fiduciary of both Stoney Creek GP and Stoney Creek LP, was obliged to disclose his personal contractual entitlement to guarantee fees tied to bank loans to Stoney Creek LP. The Guarantee Fee Agreement is between Stoney Creek LP and Oscar Furtado. It is executed by Mr. Furtado personally and by Mr. Furtado, as the President & CEO of Stoney Creek GP. In making this agreement, Mr. Furtado was contracting that Stoney Creek LP would pay him an annual guarantee fee equal to 5% of the total principal amount from time to time guaranteed by him under the guarantees.

[13] As noted above, Mr. Furtado was the sole director and president of Stoney Creek GP. As such, he owed fiduciary duties to Stoney Creek GP: s. 134 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (Ontario). Mr. Furtado, as the sole director of the general partner, also owes a fiduciary duty at the limited partnership level: *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853, at para. 96, where the Court of Appeal stated:

> [I]t would be an anomalous result if the law offered no remedy for the breach of a directors' fiduciary duty in circumstances where the limited partnership suffered the resulting loss. If that were the case, directors could act with impunity to damage the interests of the limited partnership, including by engaging in self-dealing, and there would be no remedy for such a breach of fiduciary duty. The law of fiduciary duties, which is based in equity, should not brook such a lacuna in its remedies.

[14] Stoney Creek's limited partnership agreement provides that: "The General Partner shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the Partnership."

[15] Mr. Furtado, in executing the Guarantee Fee Agreements as an officer of Stoney Creek GP, was doing so as an agent of the corporation. Directors and officers of a corporation act as agents of the corporation, particularly when developing company business: *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, at para. 133.

[16] Fiduciaries are subject to certain duties, including the duty of full disclosure. As noted by the Court of Appeal in *Advanced Funding Corp. v. Bannick* (1979), 27 O.R. (2d) 193, at 196:

> One of the prime fiduciary duties of an agent is that of full disclosure. Wherever it appears that the agent is going to profit from the agency over and above the remuneration agreed to be paid by the principal, the duty of disclosure must be rigorously enforced by the Court, and it must be shown that after full disclosure, the principal has expressly or by necessary implication consented to the agent making a profit. The principle has been stated in many cases [citations omitted].

[17] Mr. Furtado argues that if he was required to disclose the guarantee fees, he did so because they were referenced in the 2019 financial statements. The 2019 financial statements have been withdrawn by the auditor.

[18] The notes to Stoney Creek LP's 2019 financial statements include the following statements:

- The Partnership has an agreement with Oscar Furtado (Guarantor), ultimate beneficial owner of the Class B unitholders, to guarantee the repayment of the indebtedness amounts outstanding. The Guarantor is entitled to an annual guarantee fee equal to 5% of the total principal amount guaranteed by the Guarantor. During the year ended December 31, 2019, $nil (2018 - $60,143) in guarantee fees was paid and is included in land inventory.

- During the year ended December 31, 2019, $34,521 (2018 - $nil) in guarantee fees was payable to the Guarantor and is included in accounts payable and accrued liabilities and land inventory.

[19] In determining whether there was disclosure of the guarantee fee agreement with Mr. Furtado, the Receiver relied upon the Limited Partnership Agreement and the investment marketing brochure for the Stoney Creek project. Mr. Furtado pointed to the fact that the Receiver had not relied upon the 2019 financial statements in suggesting that the Receiver had not fully investigated his claim. The 2019 audit opinions were withdrawn by PwC, the auditor. In a letter from PwC to the Receiver, copy to Mr. Furtado, dated March 7, 2022, the auditor stated:

> PwC has determined that the auditor's reports to the Shareholder of GTDH and Partners of the Go-To Group for financial year 2019 as well as the auditor's report to the Partners of Go-To Spadina for financial year 2020 should not be relied upon by any party and as such, we are withdrawing these opinions.
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> This letter is to notify management, and those charged with governance – in this case Mr. Furtado and the Receiver – that PwC, as previous auditors of the Go-To Group and GTDH, seeks to prevent any reliance on the Auditor's Reports for the periods in question. Please take the necessary steps to ensure that anyone in receipt of the Audited Financial Statements, including that our Auditor's Reports thereon, are informed of this situation and advised not to rely on same.

[20] The Receiver notes that section 5.12 of the Limited Partnership Agreement (between Stoney Creek GP, Go-To Development Holdings Inc. and each party who executes the agreement and agrees to be bound as a limited partner) could potentially be an applicable provision if there was evidence that the guarantee fees were reasonable and competitive with what would be provided to a third party. However, that provision would not obviate the need for disclosure. Section 5.12 of the Limited Partnership Agreement provides:

> The General Partner may employ or retain an Affiliate of the General Partner (which for greater certainty includes Go-To Holdings) on behalf of the partnership to provide goods or services to the Partnership, provided that the cost of such goods or services are reasonable and competitive with the cost of similar goods or services provided by an independent third party.

[21] There was no evidence that the guarantee fee claimed by Mr. Furtado is "reasonable and competitive with the cost of similar goods or services provided by an independent third party" such that it could fall within section 5.12. I note that Mr. Furtado did not swear an affidavit on this motion.

[22] The Go-To marketing brochure for the Stoney Creek project, entitled "Investment Opportunity", does not disclose that limited partner investor funds will be used to pay guarantee fees to the related party, Mr. Furtado. The "Summary of Key Considerations" in the brochure discloses the following with regard to the structure of the deal and the bank financing:

> Deal Structure/Liability
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> - The Limited Partners have limited liability on their investment.

- The General Partner, Go-To Developments, has unlimited liability. The General Partner and Builder will sign for all third party financing and provide the Banks with all personal guarantees when required.

- The Limited Partners only fund the original purchase of the land, related closing costs and initial soft costs. The Investor will not be required to provide any additional funding to complete the project.

Bank Financing

- Financing for development and construction is obtained from the Bank.

- The Banks will not provide construction financing until the following is achieved:

    a. The land is properly zoned.

    b. The City has approved the plans for development.

    c. The project has pre-sold a minimum of 70% of the homes in a given phase.

- When the Bank does provide financing, this is done using the appraised value of the land. The appraised value of the land continues to increase at each stage of the development process. As an example, upon completion of zoning the appraised value of the land increases. There is a further increase in the appraised value when City approvals are obtained and again when pre-sales occur.

[Emphasis added.]

[23] The marketing brochure distributed to potential investors in the Stoney Creek project describes which costs investors are responsible for and does not mention guarantee fees. The brochure mentions that the General Partner and Builder will sign for third party financing and provide personal guarantees where required, but does not state that Mr. Furtado may provide personal guarantees, nor does it specify that any guarantee fees will be paid if a personal guarantee is provided.

[24] Mr. Furtado points to section 5.13 of the Limited Partnership Agreement, which provides:

> The validity of a transaction, agreement or payment involving the Partnership and an Affiliate of the General Partner is not affected by reason of the relationship between the General Partner and such Affiliate or by reason of the approval or lack thereof of the transaction, agreement or payment by the directors of the General Partner, all of whom may be officers or directors of or otherwise interested in or related to such Affiliate.

> The parties hereto acknowledge that: (i) the General Partner and Go-To Holdings may have the same directors, officers, direct or indirect shareholders, employees and affiliates; and (ii) that Go-To Holdings and the directors, officers, shareholders, employees and affiliates of each of Go-To Holdings and the General Partner are engaged in a wide range of investing and other business activities, which may include, direct and/or indirect, ownership and development of real property. Consequently, the directors, officers or employees of the General Partner will only devote as much time as is necessary (but not all of his or her full time) to supervise the management of the business and affairs of the Partnership.

[25] Mr. Furtado submits that any disclosure obligation is eliminated by the inclusion of section 5.13 in the LPA. The Receiver agrees that section 5.13 permits the entering into of an agreement such as the Guarantee Fee Agreements. However, the Receiver submits that section 5.13 does not obviate the need to disclose the fee agreements and fees. I agree.

[26] The only disclosure of the guarantee fees is in the notes to the financial statements, which have been withdrawn. The notes do not disclose the total quantum of guarantee fees potentially payable to Mr. Furtado (over $860,000), nor do they disclose the means of calculating them. While the 2019 balance sheet discloses loans payable by Stoney Creek LP in the amount of $6,350,000, the notes do not specify the quantum of guarantee fees. The guarantee fee amount payable to the guarantor (Mr. Furtado) in 2019 ($34,521) would not suggest to someone reading the statements that the fees potentially payable to Mr. Furtado would be of the magnitude claimed. Mr. Furtado points to the guarantee fee agreement, which contemplated additional guarantees being provided. The 2020 iteration of the guarantee fee agreement contained the total indebtedness that was guaranteed in the amount of $10,650,000. However, as noted, the guarantee fee agreement, signed by Mr. Furtado for Stoney Creek and Mr. Furtado personally, was not disclosed. In any event, considering that this was a lucrative related party transaction, one would expect full disclosure, including to investors in the limited partnership. As noted by this Court in *Klana v. Jones* (2003), 35 B.L.R. (3d) 236 (Ont. S.C.J.), at para. 44:

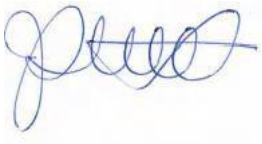
> The duty owed by an agent to its principal requires the agent to make full disclosure of material facts which place or may place the agent in a conflict of interest. The duty of full disclosure extends to every material fact regarding the subject matter of the agency, which clearly would contemplate financial disclosure. The onus of providing that there was adequate disclosure lies with the agent. It is not sufficient for the agent merely to disclose that he or she has an interest or to make a statement that would signal the principal should inquire. "Material information means information that a reasonable person would consider likely to operate on the principal's judgment." The test for whether information is material is objective. [Citations omitted.]

[27] I am satisfied that Mr. Furtado had a duty to provide full disclosure of the guarantee fee arrangement, which he failed to do.

Disposition and Costs

[28] The Receiver's request for the Court to uphold the Disallowance Order is granted.

[29] Mr. Furtado shall pay the Receiver's costs fixed in the amount of $14,500 (including taxes and disbursements) forthwith.



Date: November 9, 2023