



SUPERIOR COURT OF JUSTICE

ENDORSEMENT/COUNSEL SLIP

COURT FILE NO.: CV-21-00673521-00CL DATE: October 6, 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: Ontario Securities Commission v. Go-To Developments Holdings Inc., et al.

BEFORE JUSTICE: Justice Steele

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Nemers	KSV Restructuring (Court-appointed Receiver & Manager)	jnemers@airdberlis.com
Ian Aversa		iaversa@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Gregory Azeff	Respondents	gazeff@millerthomson.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
N / A		

ENDORSEMENT OF JUSTICE STEELE:

Overview

1. KSV Restructuring, the Court-appointed Receiver of the 23 Receivership Respondents (as defined in the Receivership Order), brings a motion to compel Oscar Furtado, the Receivership Respondents' principal, to release approximately 11,271 identified emails to the Receiver.

2. Furtado claims solicitor-client privilege or common interest privilege in respect of the emails requested by the Receiver.
3. Furtado is the only party opposing the Receiver's motion.
4. For the reasons set out below, Oscar Furtado shall release the approximately 11,271 identified emails to the Receiver forthwith.

Background

5. KSV was appointed pursuant to an application made by the Ontario Securities Commission under ss. 126 and 129 of the *Securities Act*, R.S.O. 1990, c. S.5 as Receiver of certain enumerated pieces of real property and all the other assets, undertakings and properties of each of the Receivership Respondents. The Commission had issued two freeze directions under the *Securities Act* requiring Furtado to maintain assets derived from investor monies and requiring RBC Direct Investing to maintain the assets in Furtado's account.
6. Further background on the Receiver's appointment can be found in Patillo J.'s endorsement, *Ontario Securities Commission v. Go-To Developments Holdings Inc.*, 2021 ONSC 8133.
7. The Receiver was not appointed over Furtado in his personal capacity.
8. The Receivership Respondents were developers of certain real property projects in Ontario. The entities raised significant funds from investors in Ontario for certain of the real estate projects by selling limited partnership units. The projects are not complete.
9. One of the projects, Go-To Spadina Adelaide Square LP ("Adelaide LP"), involves the development of two properties, located at 355 Adelaide St. W. and 46 Charlotte Street in Toronto. Furtado raised capital for Adelaide LP by selling partnership units to investors.
10. The emails sought by the Receiver are from Furtado to Mr. Alfredo Malanca, a.k.a. Palmeri, or from Malanca/Palmeri to Furtado, or copying Malanca/Palmeri. The emails were sent/received while Furtado was working with the Receivership Respondents from his work email.
11. Malanca/Palmeri is the president or representative of certain entities that did business with the Receivership Respondents. Malanca/Palmeri was president of Goldmount Financial Corporation ("Goldmount") and represented Adelaide Square Developments Inc. ("ASD"). As noted at paras. 12, 14, and 16 of Patillo J.'s endorsement, certain fees were paid to Goldmount and ASD from Adelaide LP, including a \$20.95 million assignment fee which Adelaide LP paid to ASD from investor monies.
12. ASD has filed a claim pursuant to the Claims Procedure for approximately \$11.1 million against Adelaide LP and its general partner Go-To Adelaide Spadina Inc. (the "ASD Claim"). The Receiver has disallowed the ASD Claim, which has been disputed by ASD.
13. The Receivership Order contains the following provisions:

4. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property¹ and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) To take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

[...]

- (c) to manage, operate and carry on the business of any of the Receivership Respondents, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business or cease to perform any contracts of any of the Receivership Respondents;

- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

[...]

- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

[...]

- (r) to examine under oath any person the Receiver reasonably considers to have knowledge of the affairs of the Receivership Respondents, including, without limitation, any present or former director, officer, employee or any other person registered or previously registered with the OSC or subject to or formerly subject to the jurisdiction of the OSC or any other regulatory body respecting or having jurisdiction over any of the Property and the affairs of any of the Receivership Respondents; and

- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons [broadly defined to include the Receivership Respondents, their current and former directors, officers, employees, legal counsel, etc. and all other individuals, firms,

¹ "Property is defined as the Real Property and all the other assets, undertakings and properties of each of the Receivership Respondents, including all of the assets held in trust or required to be held in trust by or for any of the Receivership Respondents, or by their lawyers, agents and/or any other Person (as defined below), and all proceeds thereof.

corporations, governmental bodies or agencies or other entities], including the Receivership Respondents, and without interference from any other Person.

7. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of any of the Receivership Respondents, or the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 7 and 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

14. A Privilege Protocol was entered into between Furtado and KSV. Further to that Privilege Protocol, the Receiver retained a third party to host the Receivership Respondents' data in a repository. Furtado's counsel, Miller Thomson, reviewed the data and advised that it had objections to approximately 78,000 records being provided to the Receiver on the basis of them being "privileged." At this motion, the Receiver is seeking access to approximately 11,271 of those.

Analysis

Is the Receiver entitled to review the emails for the purpose of exercising its powers under the Receivership Order?

15. I am satisfied that the Receiver is entitled to review the emails for the purpose of exercising its powers under the Receivership Order.
16. As noted above, Furtado claims that the Identified Emails are subject to solicitor-client privilege. Furtado has refused to deliver the Identified Emails to the Receiver despite paragraph 7 of the Receivership Order.
17. The Identified Emails were sent by and to Furtado when he was employed with Go-To from and to his corporate email address (oscarfurtado@gotodevelopments.com). In some cases, no lawyer was copied. Where a solicitor was copied on the correspondence, it was either a lawyer for the Receivership Respondents or for ASD.
18. Furtado did not retain his own personal lawyer to provide him with separate director and officer advice.
19. The Receiver submits that the Receiver steps into the shoes of the Receivership Respondents and is entitled to access the Receivership Respondents' emails for the purposes for which the Receiver was

appointed, which includes the investigation of the alleged improper dealings between Furtado and ASD. The Receiver argues that the appointment was made by Patillo J. to protect the public.

20. Furtado submits that the Receiver cannot look at the legal advice that the Receivership Respondents obtained prior to the Receiver's appointment.
21. The jurisprudence is clear that a receiver's ability to waive privilege derives from the powers granted to the receiver by the order under which they were appointed. In *Ontario (Securities Commission) v. Greymac Credit Corp (1983)*, 41 O.R. (2d) 328 (Div. Ct.), a receiver was appointed by Cabinet under the *Loan and Trust Corporations Act*. The appointing order granted the receiver all the powers of the board of directors to manage the affairs of the corporation: at paras. 17 and 60. Southey J. found that the receiver had the power to waive Greymac's solicitor-client privilege subject to one limitation. The receiver was appointed for the purpose of conducting Greymac's business and taking steps towards its continued operation. The receiver could waive privilege for the purpose of obtaining information about the assets and affairs of the company from the company's solicitor or former solicitor. However, the receiver could not waive privilege to allow Greymac's solicitors to disclose confidential information to the Morrison Commission as part of its inquiry: at para. 18. A waiver of this nature would not be in furtherance of the purpose for which the receiver was appointed: see also *Russel & Dumoulin, Re (1986)*, 9 B.C.L.R. (2d) 265 (S.C.), at para. 8.
22. In *Russell*, at para. 13, the Supreme Court of British Columbia noted:

[...] The receiver-manager is vested with the power to manage the affairs of the company and conduct its business: *Moss S.S. Co. v. Whinney*, [1912] A.C. 254 (H.L.), *Ont. Securities Comm. v. Greymac Credit Corp.*; *Ont. Securities Comm. V. Prousky (1983)*, 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73 (Div. Ct.). The taxation of solicitors' accounts is one of the company's powers exercisable in the conduct of its business affairs. The receiver-manager must have the right to obtain and make use of those records which would be available for use by the company on taxation to enable him to exercise that power in the place and stead of the company officers. Furthermore, in order to enable him to prosecute the taxation, he must have the right to waive whatever solicitor-client privilege there is in respect of those records, at least to the extent necessary for taxation purposes. [...]
23. Furtado argues that the cases cited by the Receiver pre-date the recognition of the importance of solicitor-client privilege as a "principle of fundamental justice" under section 7 of the Canadian Charter of Rights and Freedoms: *Canada (National Revenue) v. Thompson*, 2016 SCC 21, at para. 17. The Supreme Court of Canada has held that solicitor-client privilege must be "jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction": *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 17.
24. As noted in Furtado's factum, privilege is a personal right and a protection which must be zealously protected.
25. While the instant case is subsequent to these important solicitor-client privilege cases and subsequent to *Greymac* and *Russel*, the Court here is not being asked to pierce or set aside solicitor-client privilege. Instead, the Receiver seeks confirmation, in line with *Greymac* and *Russel*, that a receiver's powers are

granted under the applicable appointing order and may include the power to assert and/or waive solicitor-client privilege as part of the receiver's inquiry or mandate in carrying out the business.

26. In granting the Receivership Order in the instant case, Patillo J. noted, at para. 22, that "it is in the best interests of the investors in the Go-To projects that a receiver be appointed to ensure that the Go-To projects are managed in a proper fashion to protect the investors' investments." He stated, at para. 27, that the appointment of a receiver will ensure "that the Go-To entities are properly administered" and he contemplated, at para. 28, that the various Go-To projects could continue under the Receiver's control. Patillo J. further noted, at paras. 23 and 24:

The Commission's investigation has revealed evidence of undisclosed payments to Furtado arising from Adelaide LP's purchase of the Properties, resulting in misappropriation and improper use of Adelaide LP funds through his dealings with ASD.

The Commission's evidence establishes Furtado:

- a) Arranged to personally profit from Adelaide LP's purchase of the Properties;
- b) Misused other Go-To LP assets to secure Adelaide LP's acquisition of the Properties; and
- c) Gave false and/or misleading evidence to Staff about his dealings with ASD and Furtado Holdings' receipt of shares and money from ASD.

27. The receivership appointment in the instant case was not an insolvency appointment. The appointment was made under the *Securities Act* following an application made by the Commission. The Commission requested the appointment of a receiver because it was concerned about certain business dealings including those between ASD and Furtado, involving Adelaide LP investor funds. Patillo J. stated, at para. 31, that there is "at least a serious issue to be tried as to potential breaches of the act by Furtado and Furtado Holdings, including fraud".

28. As set out above, the Receiver was granted broad powers under the Receivership Order over all of the Property and businesses of the Receivership Respondents: nothing was carved out. In addition to the general broad powers in the Commercial List model receivership order, in paragraph 4(r) of the Receivership Order, the Receiver was empowered and authorized to:

examine under oath any person the Receiver reasonably considers to have knowledge of the affairs of the Receivership Respondents, including, without limitation, any present or former director, officer, employee or any other person registered or previously registered with the OSC or subject to or formerly subject to the jurisdiction of the OSC or any other regulatory body respecting or having jurisdiction over any of the Property and the affairs of any of the Receivership Respondents;

29. The addition of paragraph 4(r) to the Receivership Order gives the Receiver fact-finding powers regarding the "affairs of the Receivership Respondents." The Receiver's mandate was broadened in scope beyond dealing with the Receivership Respondents' Property and businesses to include an examination of the affairs of the Receivership Respondents.

30. Under paragraph 4(s) of the Receivership Order, the Receiver is authorized and empowered to “take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.”
31. Further, paragraph 4 of the Receivership Order includes the customary language in respect of the powers granted to the Receiver that “in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons ... including the Receivership Respondents, and without interference from any other Person.”
32. I am satisfied that the language in the Receivership Order contemplates the Receiver investigating the affairs of the Receivership Respondents and taking any steps reasonably necessary to do so, including reviewing the Identified Emails sent while Furtado was working with the Receivership Respondents.
33. I also note that Patillo J.’s endorsement states that the appointment of the Receiver is “to ensure that the Go-To projects are managed in a proper fashion to protect the investors’ investments”.
34. The Receiver has indicated that the adjudication of the ASD Claim is a gating issue to adjudicating the other claims against Go-To Adelaide. In the Receiver’s Seventh Report, the Receiver noted that Go-To Adelaide’s receivership bank account had a balance of about \$14.7 million. Accordingly, the determination of the ASD Claim will significantly impact distributions to other stakeholders. The Receiver thinks that its review of the Identified Emails will greatly assist in resolving the ASD Claim and thereby allowing the other claims to be addressed.
35. Furtado points to the privilege carve out language in paragraph 7 of the Order as applying to protect the Identified Emails. As noted above, paragraph 7 concludes with the following proviso:
provided however that nothing in this paragraph 7 and 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.
36. The protection in paragraph 7 of the Order does not apply where, as here, the solicitor-client privilege, if any, in respect of the Identified Emails is a right of the Receivership Respondents, not Furtado. Furtado cannot use paragraph 7 of the Receivership Order to prevent the Receiver from accessing the Identified Emails, which were sent to/from the Receivership Respondents.
37. I agree with the Receiver’s submission that for Furtado to be successful in preventing the Receiver from accessing the Identified Emails, Furtado would need to show that such emails are subject to his personal solicitor-client privilege, which he has not done. As noted above, Furtado did not retain his own personal lawyer to obtain director/officer advice as he could have done.
38. The Identified Emails are the Receivership Respondents’ emails and any solicitor-client privilege rights in respect of them lie with the Receivership Respondents. Given Patillo’s J.’s endorsement, and the language of the Receivership Order, discussed above, the Receiver is authorized and empowered to investigate the affairs of the Receivership Respondents, which includes reviewing the Identified Emails.

Disposition and Costs

39. Oscar Furtado shall release the approximately 11,271 identified emails to the Receiver forthwith. Order attached.
40. At the motion, the parties were asked to upload their costs outlines to CaseLines. The parties confirmed that the Court could decide the issue of costs. Furtado shall pay the Receiver's costs fixed in the amount of \$18,000 (inclusive of taxes and disbursements).

A handwritten signature in blue ink, appearing to be "J. Furtado", is located in the lower right quadrant of the page. The signature is fluid and cursive, with a horizontal line extending from the end.