

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED

Respondents

**APPLICATION UNDER
SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED
FACTUM OF THE RECEIVER – RETURNABLE OCTOBER 6, 2023
(PRODUCTION MOTION)**

September 27, 2023

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PART I – OVERVIEW

1. This factum is filed by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of the 23 Receivership Respondents (as defined in the Receivership Order, as defined below), in support of the Receiver’s motion for an Order compelling the Receivership Respondents’ principal, Oscar Furtado (“**Mr. Furtado**”), to release to the Receiver approximately 11,271 identified emails (including any attachments thereto, the “**Identified Emails**”) (collectively, the “**Production Order**”).

2. Mr. Furtado and another individual named Alfredo Malanca a.k.a. Alfredo Palmeri (“**Mr. Malanca/Palmeri**”) are parties on all the Identified Emails.

3. Mr. Malanca/Palmeri was president of Goldmount Financial Corporation (“**Goldmount**”) and represented Adelaide Square Developments Inc. (“**ASD**”). He was later given an email address with the Receivership Respondents under the purported title of “*business development manager*,” while retaining his roles at ASD and Goldmount. ASD and Goldmount (and others) received significant payments from the Receivership Respondents, which payments and related dealings were amongst the main issues giving rise to this receivership proceeding.

4. Following a lengthy (and delayed) review for privilege by Mr. Furtado and his counsel, Mr. Furtado refused to provide the Identified Emails to the Receiver on the sole purported basis of solicitor-client privilege. This position is without merit, as, amongst other things: (i) the Identified Emails are not protected by a solicitor-client relationship; and (ii) in any event, the Receiver is entitled to review the Identified Emails even if the Receivership Respondents could claim privilege over them.

5. Mr. Furtado’s improper withholding of the Identified Emails has essentially brought this receivership proceeding to a halt, blocking adjudication/resolution of almost \$50 million of claims, to the detriment of stakeholders. The Production Order is both appropriate and necessary to move this proceeding forward.

PART II – FACTS

A. Background

6. Pursuant to an application by the Ontario Securities Commission (the “**Commission**”) under ss. 126 and 129 of the *Securities Act*, RSO 1990, c. S.5, as amended (the “**Securities Act**”), the Court made an Order on December 10, 2021 (the “**Receivership Order**”) appointing KSV as the Receiver of the 17 pieces of real property listed on Schedule “A” of the Receivership Order (the “**Real Property**”) and all the other assets, undertakings and properties of each of the Receivership Respondents, including all 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, and all proceeds thereof (together with the Real Property, the “**Property**”).¹

7. Prior to the receivership, the Receivership Respondents’ primary counsel was Torkin Manes LLP (“**Torkin Manes**”), which jointly represented the Receivership Respondents and Mr. Furtado in respect of matters concerning the Receivership Respondents’ business.² RAR Litigation Lawyers (“**RAR**”) was also pre-receivership litigation counsel on behalf of some of the Receivership Respondents,³ and Goodmans LLP (“**Goodmans**”) provided a development planning opinion in respect of one of the Receivership Respondents’ Projects (as defined below).⁴

¹ [Receivership Order](#), at recitals and para. 3.

² See, for example: (i) page 18 of [Exhibit 56 to the Affidavit of Stephanie Collins](#), Senior Forensic Accountant in the Enforcement Branch of the OSC, sworn December 6, 2021 (the “**Collins Affidavit**”); (ii) page 6 of the [First Report](#) of the Receiver dated December 20, 2021 (the “**First Report**”); (iii) page 16 (item m) of the [Third Report](#) of the Receiver dated March 29, 2022 (the “**Third Report**”); (iv) pages 3-6 of Appendix C to the [Fifth Report](#) of the Receiver dated August 11, 2022 (the “**Fifth Report**”); (v) Appendix C to the [Sixth Report](#) of the Receiver dated November 14, 2022 (the “**Sixth Report**”); (vi) page 3 of Appendix H to the Sixth Report, *supra*; (vii) Appendix G to the [Supplement to the Sixth Report](#) of the Receiver dated January 11, 2023 (the “**Sixth Report Supplement**”); (viii) page 5 (items g and m) of Appendix M to the Sixth Report Supplement; (viii) pages 3-4 (items vii and xvi) of Appendix H to the [Seventh Report](#) of the Receiver dated June 6, 2023 (the “**Seventh Report**”).

³ See, for example, page 13 of the Seventh Report, *supra*, and court file no. CV-21-006635470000 (Jain v. Go-To Spadina Adelaide Square LP, et al.).

⁴ Found at pages 25-26 of Exhibit 56 to the Collins Affidavit, *supra*.

8. The Receivership Respondents were developers of nine, early-stage residential real estate projects in Ontario (the “**Projects**”).⁵ Between 2016 and 2020, Mr. Furtado and the Receivership Respondents raised almost \$80 million from Ontario investors for the Projects. The vast majority of investors’ funds remain outstanding.⁶

9. The flagship development involved Go-To Adelaide Square LP (“**Adelaide LP**”). Its business was described as purchasing, holding an interest in, conducting pre-development planning with respect to development and construction of two properties in downtown Toronto (the “**Adelaide Properties**”).⁷ This Project was, by far, the most advanced and significant of the nine Projects in which the Receivership Respondents were involved.⁸

10. Adelaide LP obtained the purchase rights to the Adelaide Properties through ASD, a company owned, in part, by AKM Holdings Corp. (“**AKM**”), which was in turn owned by Mr. Malanca/Palmeri’s wife.⁹

11. Mr. Furtado negotiated Adelaide LP’s acquisitions of the Adelaide Properties with Mr. Malanca/Palmeri as a representative of ASD.¹⁰

⁵ Fifth Report, *supra*, section 2.0.

⁶ [Endorsement of The Honourable Mr. Justice Pattillo](#) dated December 10, 2021 (the “**Receivership Endorsement**”) at para. 8.

⁷ Receivership Endorsement, *supra*, at para. 9.

⁸ The Property associated with each of the Projects has been sold by the Receiver with approval by the Court. As set out in the Sixth Report, *supra*, the Receiver sold the Adelaide Properties for \$90 million (plus a potential density bonus of up to \$3 million). In comparison, the next highest sale by the Receiver was for the so-called “Stoney Creek” Property, which sold for \$15.4 million.

⁹ Receivership Endorsement, *supra*, at para. 11.

¹⁰ Receivership Endorsement, *supra*, at para. 11.

12. ASD was represented by the law firms of Concorde Law Professional Corporation (“**Concorde Law**”)¹¹ and Schneider Ruggiero LLP (“**Schneider Ruggiero**”).¹²

13. In granting the Commission’s application for the Receivership Order, this Court was “*satisfied based on the Commission’s evidence of [Mr.] Furtado’s dealings in respect of Adelaide LP that it is in the best interest 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.*”¹³

14. Specifically, this Court noted that “*The Commission’s investigation has revealed evidence of undisclosed payments to [Mr.] Furtado arising from Adelaide LP’s purchase of the [Adelaide] Properties, resulting in misappropriation and improper use of Adelaide LP funds through his dealings with ASD.*”¹⁴ Mr. Furtado’s dealings with ASD in connection with Adelaide LP’s purchase of the Adelaide Properties also included payments being made to Goldmount and AKM (amongst others).¹⁵

15. Mr. Furtado unsuccessfully attempted to appeal (and stay) the Receivership Order as follows:

- (a) on December 29, 2021, the Court of Appeal for Ontario (the “**Court of Appeal**”) dismissed Mr. Furtado’s motion to stay the Receivership Order pending an appeal of the granting of the Receivership Order (the “**Appeal**”);
- (b) on April 28, 2022, the Court of Appeal dismissed the Appeal; and

¹¹ See, for example: (i) pages 4-5 (items xvi, xix and xx) of Appendix H to the Seventh Report, *supra*.

¹² See, for example: (i) page 6 (item xxv) of Appendix H to the Seventh Report, *supra*; and (ii) para. 74 of Appendix I to the Seventh Report, *supra*. Schneider Ruggiero was also the escrow agent for condominium unit purchasers in two other Projects (see, for example, footnotes 3 and 5 in the Second Report, *supra*), counsel for certain mortgagees in connection with one of these Projects (see, for example, Appendix F to the Fifth Report, *supra*) and dealt with certain land transfer tax-related matters in connection with a fourth Project (see, for example, page 16 (item n) of the Third Report, *supra*).

¹³ Receivership Endorsement, *supra*, at para. 22.

¹⁴ Receivership Endorsement, *supra*, at para. 23.

¹⁵ Appendix H to the Sixth Report Supplement, *supra*.

- (c) on June 27, 2022, Mr. Furtado filed a Notice of Application seeking leave to appeal the Court of Appeal’s dismissal of the Appeal to the Supreme Court of Canada, which leave application the Supreme Court of Canada dismissed on February 16, 2023.¹⁶

16. The Receivership Order grants the Receiver all the usual powers under the model receivership order of this Court (plus additional investigatory powers), and includes, without limitation, the customary language 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.*”¹⁷

B. The Claims Process and the ASD Claim

17. On April 7, 2022, this Court approved a claims procedure (the “**Claims Procedure**”), which the Receiver is authorized, directed and empowered to administer for the purpose of calling for, assessing and determining claims against the Receivership Respondents.¹⁸

18. Notwithstanding the evidence of “*misappropriation and improper use of Adelaide LP funds through [Mr. Furtado’s] dealings with ASD,*” ASD has filed a claim pursuant to the Claims Procedure on a secured basis for approximately \$11.1 million against Adelaide LP and its general partner Go-To Adelaide Spadina Inc. (together with Adelaide LP, “**Go-To Adelaide**”) (collectively, the “**ASD Claim**”).¹⁹ The Receiver has disallowed the ASD Claim in its totality, and ASD has disputed the Receiver’s disallowance.²⁰

¹⁶ Seventh Report, *supra*, s. 1.0.

¹⁷ Receivership Order, *supra*, at para. 4.

¹⁸ [Claims Procedure Order](#) of The Honourable Madam Justice Conway dated April 7, 2022.

¹⁹ The approximate quantum of \$11.1 million is as of May 4, 2022. Interest and costs continue to accrue on this claim.

²⁰ Appendices H and I to the Seventh Report, *supra*.

19. As summarized below, obtaining access to the Identified Emails is a gating issue to adjudicating or resolving the ASD Claim. In turn, adjudicating or resolving the ASD Claim is a gating issue to adjudicating or resolving the remaining unresolved claims against Go-To Adelaide, which consist of: (i) a subsequent secured claim by another stakeholder for approximately \$5.2 million (which has also been disallowed by the Receiver, which disallowance is disputed by the stakeholder); and (ii) additional unsecured, intercompany and investor claims of approximately \$32.9 million.²¹ As at the date of the Seventh Report, Go-To Adelaide's receivership bank account had a balance of approximately \$14.7 million, so the determination of the ASD Claim will significantly impact distributions to subsequent-ranking stakeholders.²²

C. The Identified Emails and their Importance to this Receivership Proceeding

20. Upon its appointment, the Receiver made copies of the Receivership Respondents' data (the "**Data**"), including the:

- (a) Receivership Respondents' Google Drive, including email accounts of the Receivership Respondents' former employees;
- (b) Receivership Respondents' server;
- (c) laptops of seven former employees of the Receivership Respondents, including Mr. Furtado (who, for greater certainty, was the president and sole director of all the corporate Receivership Respondents, which, in turn, were the general partners of the corresponding limited partnership Receivership Respondents); and
- (d) cellphones of Mr. Furtado and the Receivership Respondents' former head of accounting.²³

²¹ [Aide-mémoire](#) of the Receiver for Case Conference of August 14, 2023 ("**Aide-mémoire**") at para. 9.

²² Seventh Report, *supra*, at page 12 (para. 29).

²³ Seventh Report, *supra*, at page 18 (para. 1); [Affidavit of Oscar Furtado](#) sworn December 14, 2021 at paras. 6-7.

21. The Receiver and Mr. Furtado also agreed that the Receiver could immediately access any source documents relating to the development of the Projects, including, without limitation, financial and planning information stored on the server, but that the Receiver would otherwise refrain – on a temporary and without prejudice basis – from accessing the Data.²⁴

22. The Receiver and Mr. Furtado’s current counsel, Miller Thomson LLP (“**Miller Thomson**”), then negotiated a privilege protocol, which was acknowledged and agreed by Mr. Furtado on November 9, 2022 (the “**Privilege Protocol**”). The Privilege Protocol sets out the process:

- (a) for the Receiver to review the Data (and therefore assist the Receiver with its determination of claims pursuant to the Claims Procedure, including without limitation, the ASD Claim); and
- (b) to segregate, to the extent possible, potentially privileged communications.²⁵

23. In accordance with the Privilege Protocol:

- (a) the Receiver retained Epiq Global to host the Receivership Respondents’ Data in a repository;
- (b) Miller Thomson reviewed the Data in the repository to determine whether to assert any “**Objections**” to the Receiver receiving any “**Potentially Privileged Data**” (as both terms are defined in the Privilege Protocol); and
- (c) on May 19, 2023, after several delays and indulgences, Miller Thomson advised that it had Objections to approximately 78,000 records being released to the Receiver.²⁶

²⁴ Seventh Report, *supra*, at page 19 (para. 2).

²⁵ Seventh Report, *supra*, at page 19 (para. 3).

²⁶ Seventh Report, *supra*, at page 20 (paras. 4-6).

24. The Receiver does not agree that a large portion of the 78,000 records classified as privileged by Miller Thomson are in fact privileged, and, in any event, does not believe that these records are properly withheld from the Receiver.²⁷

25. At this juncture, and without prejudice to the Receiver's rights to receive additional productions from the Privilege Protocol, the Receiver is specifically interested in the Identified Emails. Messrs. Furtado and Malanca/Palmeri are parties on all the Identified Emails, all of which were conducted through: (i) Mr. Furtado's email account with the Receivership Respondents; and (ii) Mr. Malanca/Palmeri's email accounts with Goldmount and the Receivership Respondents.²⁸

26. Mr. Furtado, through Miller Thomson, has Objected to the release of the Identified Emails on the sole purported basis of solicitor-client privilege.²⁹

27. The Receiver considers the continued withholding of the Identified Emails to be frivolous and without merit under the Privilege Protocol, given that, amongst other things:

- (a) Mr. Furtado was not in a solicitor-client relationship with Mr. Malanca/Palmeri (neither of whom is a lawyer), and non-privileged communications cannot be cloaked with privilege by also sending them to a lawyer (and lawyers were not even copied on many of these emails); and
- (b) regardless, the case law is clear that the Receiver steps into the shoes of the Receivership Respondents and is entitled to access their purportedly privileged emails for the purposes for which the Receiver was appointed, which includes investigating the alleged improper dealings between Messrs. Furtado and Malanca/Palmeri.³⁰

²⁷ Seventh Report, *supra*, at page 20 (para. 7).

²⁸ Schedules to the Receiver's [notice of motion](#).

²⁹ Aide-mémoire, *supra*, at para. 7.

³⁰ Aide-mémoire, *supra*, at para. 8; Receivership Order, *supra*, at para. 4(r); Receivership Endorsement, *supra*.

28. The Receiver has provided multiple opportunities for Mr. Furtado to release the Identified Emails to the Receiver, and has repeatedly explained the Receiver's rationale for why the continued withholding of the Identified Emails is frivolous and without merit.³¹

29. Mr. Furtado has refused to release the Identified Emails to the Receiver. He has also not explained, as of the date of this factum, why the Receiver's reasoning is incorrect, despite being asked to do so four months ago.³² To the extent any response has been provided, it has been limited to a vague assertion of common-interest privilege (which is not a stand-alone privilege) and that Mr. Furtado's confidential health situation now precludes him from identifying privileged records (notwithstanding that the privilege review was already completed months ago).³³

30. Subsequent to Miller Thomson advising the Receiver that Mr. Furtado was suffering from health issues that prevented him from providing instructions, Mr. Furtado both provided instructions to Miller Thomson and personally authored a detailed explanation document to the Receiver regarding the Receiver's treatment of certain intercompany claims under the Claims Procedure.³⁴

31. At a recent case conference, the Court scheduled the Production Order motion for October 6, 2023, and highlighted its time sensitivity given its bearing on the ASD Claim and other matters.³⁵

32. The Receiver believes its review of the Identified Emails will greatly assist in resolving the ASD Claim (thereby allowing the other claims against Go-To Adelaide to be addressed), as the Identified Emails are reasonably expected to provide details about the "*misappropriation and improper use of Adelaide LP funds through [Mr. Furtado's] dealings with ASD.*"³⁶

³¹ [Document Brief](#) of the Receiver for Case Conference of August 14, 2023 ("**Document Brief**"), s. 1.

³² Document Brief, *supra*, s. 1.

³³ Document Brief, *supra*, s. 1.

³⁴ Document Brief, *supra*, s. 1.

³⁵ [Endorsement of The Honourable Madam Justice Conway](#) dated August 14, 2023.

³⁶ Receivership Endorsement, *supra*, at para. 23.

33. In addition, the Identified Emails are also expected to assist in determining the authenticity or inauthenticity of the very transactional documents upon which the entire ASD Claim relies. As previously reported to this Court and the stakeholders, Go-To Adelaide’s former auditor has provided the Receiver with a signed version of a loan agreement between Go-To Adelaide and ASD dated April 4, 2019 that differs significantly from the loan agreement of the same date attached to ASD’s proof of claim (and previously provided to the Commission).³⁷

PART III – ISSUE

34. The sole issue on this motion is whether the Receiver is entitled to access the Identified Emails. The Identified Emails are listed, one-by-one, with their parties, dates and subject matter, on the lengthy schedules attached to the Receiver’s notice of motion.

PART IV – LAW AND ARGUMENT

35. It is trite law that solicitor-client privilege attaches only to those communications which: (i) are between a solicitor and its client; (ii) entail the seeking or giving of legal advice; and (iii) are intended to be confidential.³⁸

36. Where two or more parties jointly consult a solicitor for legal advice, solicitor-client privilege may still apply (i.e., traditional common-interest privilege), but “*each party is expected to share in and be privy to all communications passing between each of them and their solicitor,*” such that, for greater certainty, “*should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication.*”³⁹

³⁷ Seventh Report, *supra*, at page 12 (para. 27). Amongst other things, the version provided by the former auditor does not include the granting of security or certain other material terms relied upon by ASD in the ASD Claim.

³⁸ *Pritchard v. Ontario (H.R.C.)*, [2004] 1 S.C.R. 809 (<https://canlii.ca/t/1h2c4>) [*Pritchard*] at para. 15; *Dente et al. v Delta Plus Group et al.*, 2023 ONSC 3376 (<https://canlii.ca/t/jxpbb>) [*Dente*] at para. 80.

³⁹ *Pritchard*, *supra*, at para. 23.

37. This is consistent with the Rules of Professional Conduct, which require a lawyer engaged by multiple clients to advise each of them that “*no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned.*”⁴⁰

38. Common interest privilege has also been “*narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest*” (including, without limitation, the fiduciary duties imposed upon directors of corporations).⁴¹ This is consistent with a fiduciary’s “*strict standard of conduct, encompassing duties of loyalty, utmost good faith and avoidance of conflict of duty and self-interest.*”⁴²

39. At its broadest, common-interest privilege may be established “*where a lawyer’s communication or advice is shared, on a confidential basis, with a non-client or other ‘with a sufficient common interest in the same transactions’.*”⁴³ But even at its broadest, common-interest privilege is not a stand-alone privilege: “*Communications that are otherwise non-privileged cannot be cloaked in privilege simply because they are exchanged between parties sharing a common interest.*”⁴⁴

40. The party asserting the privilege must prove it, and may, where appropriate, submit the materials to court for inspection.⁴⁵ However, as cautioned by The Honourable Mr. Justice Myers:

I am certainly not to be taken as finding that a court is obliged to conduct a document-by-document inspection of every document over which a far-fetched claim of privilege is made. Far from it. In most cases, knowing the parties to the document, the date, the subject matter, and the nature of the privilege asserted will likely be sufficient.⁴⁶

⁴⁰ Rules of Professional Conduct, Law Society of Ontario (<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3>) [*Rules of Professional Conduct*], r. 3.4-5.

⁴¹ *Pritchard*, *supra*, at para. 24; *Business Corporations Act* (Ontario), s. 134.

⁴² *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.) (CanLII: <https://canlii.ca/t/1db42>) at para. 36.

⁴³ *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576 (<https://canlii.ca/t/jr9v5>) [*Wintercorn*] at para. 160(i).

⁴⁴ *Wintercorn*, *supra*, at para. 160(v).

⁴⁵ *Bie Health Products v. The Attorney General of Canada et al.*, 2015 ONSC 3418 (<https://canlii.ca/t/gj67t>) [*Bie Health*] at para. 16.

⁴⁶ *Bie Health*, *supra*, at para. 16.

41. Finally (and of particular importance in this case), where a receiver is appointed with general powers to manage the affairs of a corporation, included in those powers “*is the power to waive any solicitor-and-client privilege of the corporation,*” and, by necessary implication, the power to review any communications subject to the privilege.⁴⁷ This is consistent with the non-receivership context “*where a director resigns and becomes adverse in interest to the company,*” in that the privilege “*belongs to the current management and directors of the company and not to the former director.*”⁴⁸

42. Applying the above principles to the facts of the current case:

- (a) with respect to the Identified Emails on which no lawyer is present, the Court does not need to conduct a document-by-document inspection of these communications to decide conclusively that Mr. Furtado’s “*far-fetched claim*” of solicitor-client privilege is frivolous, without merit and must fail, such that the Receiver is entitled to access these Identified Emails;
- (b) with respect to the Identified Emails on which any of the Receivership Respondents’ lawyers from Torkin Manes, RAR or Goodmans is present (which constitute the majority of the remaining Identified Emails), the Court similarly does not need to conduct a document-by-document inspection of these communications to decide conclusively that, even if solicitor-client privilege applies, the Receivership Respondents would be part of any such privilege, and, therefore, the Receiver is also entitled to access these Identified Emails; and

⁴⁷ *Re Ont. Securities Com’n and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.) (<https://canlii.ca/t/g168p>) at 346; *Russell & DuMoulin, Re* (1986), 9 B.C.L.R. (2d) 265 (S.C.) (<https://canlii.ca/t/210r6>) at para. 13 [*Russell*].

⁴⁸ *Dente, supra*, at para. 59.

- (c) with respect to the remaining Identified Emails on which any of ASD’s lawyers from Concorde Law or Schneider Ruggiero is present, the Court similarly does not need to conduct a document-by-document inspection of these emails to decide conclusively that, even if solicitor-client privilege applies because of a common-interest between ASD and the Receivership Respondents, the Receivership Respondents would be part of any such privilege, and, therefore, the Receiver is also entitled to access these Identified Emails.

43. In order for Mr. Furtado to be successful in blocking the Receiver from accessing an Identified Email (including, without limitation, any residual Identified Emails not captured by the above subparagraphs), he would, at a minimum,⁴⁹ need to show that such emails are subject to his personal solicitor-client privilege to the exclusion of the very Receivership Respondents in respect of which Mr. Furtado was a fiduciary.

44. In other words, given that Mr. Malanca/Palmeri was on all the Identified Emails, Mr. Furtado would need to admit (and then prove) that Mr. Furtado put his personal, self-dealing interests with Mr. Malanca/Palmeri ahead of the fiduciary duties that Mr. Furtado owed to the Receivership Respondents – to such an extent that Mr. Furtado had a common-interest and privileged relationship with Mr. Malanca/Palmeri, but not with any of the Receivership Respondents.

PART V – CONCLUSION

45. Regardless of whether any of the Identified Emails are privileged, the Receiver is entitled to review them because any such privilege now belongs to the Receiver.

⁴⁹ As set out in the schedules to the Receiver’s notice of motion, these remaining Identified Emails also include stakeholders (and their lawyers) who were adverse in interest to Mr. Furtado and the Receivership Respondents, including, without limitation, mortgagees, lien claimants, Trisura Guarantee Insurance Company, etc., thereby representing a further example of Mr. Furtado’s “*far-fetched claim*” of solicitor-client privilege.

46. Given that Mr. Furtado and Mr. Malanca/Palmeri are on all the Identified Emails, and given that these two individuals are at the centre of the “*misappropriation and improper use of Adelaide LP funds through [Mr. Furtado’s] dealings with ASD*”⁵⁰ that gave rise to the receivership in the first place, it is reasonably foreseeable that the release of the Identified Emails to the Receiver will assist in narrowing the remaining issues and facilitating the determination of the remaining claims in this receivership proceeding, including the ASD Claim.

PART VI – RELIEF REQUESTED

47. It is respectfully submitted that the Receiver’s request for the Production Order in respect of the Identified Emails be granted in its totality.

ALL OF WHICH IS RESPECTFULLY SUBMITTED as of the date first written above.



AIRD & BERLIS LLP, lawyers for the Receiver

⁵⁰ Receivership Endorsement, *supra*, at para. 23.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Pritchard v. Ontario (H.R.C.)*, [2004] 1 S.C.R. 809.
2. *Dente et al. v Delta Plus Group et al.*, 2023 ONSC 3376.
3. *Rochweg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.).
4. *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576.
5. *Bie Health Products v. The Attorney General of Canada et al.*, 2015 ONSC 3418.
6. *Re Ont. Securities Com’n and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.).
7. *Russell & DuMoulin, Re* (1986), 9 B.C.L.R. (2d) 265 (S.C.).

**SCHEDULE “B”
RELEVANT STATUTES**

Securities Act (Ontario), ss. 126 and 129

Freeze direction

126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

- (a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;
- (b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or
- (c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise.

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.

Grounds for continuance or other order

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,

- (a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or
- (b) the regulation of capital markets in Ontario or another jurisdiction.

Notice

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction.

Clarification or revocation

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked.

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

- (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or
- (b) it is appropriate for the due administration of Ontario securities law.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. .

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 194, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion.

Rules of Professional Conduct, r. 3.4-5

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Business Corporations Act (Ontario), s. 134

Standards of care, etc., of directors, etc.

134 (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. R.S.O. 1990, c. B.16, s. 134 (1); 2006, c. 34, Sched. B, s. 24.

Duty to comply with Act, etc.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement. R.S.O. 1990, c. B.16, s. 134 (2).

Cannot contract out of liability

(3) Subject to subsection 108 (5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof. R.S.O. 1990, c. B.16, s. 134 (3).

ONTARIO SECURITIES COMMISSION

Applicant

and

GO-TO DEVELOPMENTS

HOLDINGS INC. et al

Respondents

Court File No: CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER
(RETURNABLE OCTOBER 6, 2023)

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