Court File No.: CV-24-00716425-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

and

10503452 CANADA INC. and ASIF KARIMOV

Respondents

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

FACTUM OF DUCA FINANCIAL SERVICES CREDIT UNION LTD.
(Re: Appointment of Receiver, Returnable April 11, 2024)

April 5, 2024

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Timothy R. Dunn (LSO #34249I)
Tel: (416) 597-4880
Email: tdunn@blaney.com

Alexandra Teodorescu (LSO #63889D)
Tel: (416) 596-4279
Email: ateodorescu@blaney.com

Lawyers for the Applicant

TO: SERVICE LIST

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FACTUM OF DUCA FINANCIAL SERVICES CREDIT UNION LTD.

PART I – OVERVIEW

1. This factum is filed in support of an application by DUCA Financial Services Credit Union Ltd. ("**DUCA**") to appoint msi Spergel Inc. as receiver (in such capacity, the "**Receiver**"), without security, over the assets, property and undertaking of 10503452 Canada Inc. (the "**Debtor**").

2. The proposed Appointment Order is authorized under s. 243 of the *Bankruptcy and Insolvency Act* ("**BIA**") and s. 101 of the *Courts of Justice Act* (the "**CJA**"). The Debtor has incurred indebtedness of approximately $4.3 million owed to DUCA. The indebtedness has now matured, is due and payable in full and has not been repaid. The Debtor does not have any demonstrable ability to repay the indebtedness, despite demands being made by DUCA, which have been outstanding since January 16, 2024. The appointment of the proposed Receiver is just and convenient in the circumstances.

PART II – FACTS

A. The Parties

3. DUCA is a credit union and an Ontario corporation with a head office located at 5255 Yonge Street, 4th Floor, Toronto, Ontario.[1]

4. The Debtor is a federal company incorporated under the *Canada Business Corporations Act*. Asif Karimov (the "**Guarantor**") and Orkhan Karimov ("**Orkhan**") are directors of the Debtor.[2]

B. Business of the Debtor and Credit Agreement

5. The Debtor is a real estate holding company operating out of the Toronto, Ontario region. It is the registered owner of the lands and premises municipally known as 740-748 Sheppard Avenue West, Toronto, Ontario (the "**Property**").[3]

6. The Property is a parcel of land having an area of approximately 0.46 acres near the intersection of Sheppard Avenue West and Bathurst Street in North York.[4]

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[1] Affidavit of Ivan Bogdanovich, sworn on April 5, 2024 ("**Bogdanovich Affidavit**"), at para 4, Application Record, dated April 5, 2024, Tab 2, pg.16.

[2] Bogdanovich Affidavit, at para 5, Application Record, dated April 5, 2024, Tab 2, pg. 16.

[3] Bogdanovich Affidavit, at para 6, Application Record, dated April 5, 2024, Tab 2, pg. 17.

[4] Bogdanovich Affidavit, at para 7, Application Record, dated April 5, Tab 2, pg. 17.

7. The Debtor acquired the Property with a view to developing it into a 9-storey mixed use building with more than 70 residential units and approximately 200 square meters of commercial retail space (the "**Project**").[5]

8. Pursuant to a commitment letter dated February 1, 2021, between DUCA, as lender, and the Debtor, as borrower (the "**Credit Agreement**"), DUCA agreed to provide a demand loan in the principal amount of four million two hundred and forty-two thousand dollars ($4,242,000) to the Debtor (the "**Loan**").[6]

9. The purpose of the Loan was to assist the Debtor in refinancing existing debt with respect to the Project, to provide working capital for pre-development costs associated with the Project and to provide an equity take-out.[7]

10. The Debtor submitted a Site Plan Control application in respect of the Project in November 2022, but no further information about the status of the Project has been provided to DUCA.[8]

11. The Credit Agreement provides that all principal and accrued interest owing under the Loan is repayable on demand.[9] The Credit Agreement provides for the following process on maturity:

> Upon the expiry date of the Term at a time (1) when an amount remains owing under the Loan for principal, (2) the Borrower is not in default under this Commitment, and (3) the Borrower has not agreed to a renewal or extension on terms satisfactory to the Lender, the Loan shall automatically renew for a period of 30 days from the expiry date of the Term at an interest rate equal to the existing Interest Rate on the expiry

[5] Bogdanovich Affidavit, at para 8, Application Record, dated April 5, 2024, Tab 2, pg. 17.

[6] Bogdanovich Affidavit, at para 9, Application Record, dated April 5, 2024, Tab 2, pg. 17.

[7] Bogdanovich Affidavit, at para 10, Application Record, dated April 5, 2024, Tab 2, pg. 17.

[8] Bogdanovich Affidavit, at para 11, Application Record, dated April 5, 2024, Tab 2, pg. 18.

[9] Bogdanovich Affidavit, at para 12, Application Record, dated April 5, 2024, Tab 2, pg. 18.

> date of the Term plus 3.0% per annum, and the monthly payment for principal and interest shall be adjusted accordingly. The Loan shall automatically renew for additional third day periods unless the Lender provides at least 15 days' notice to the Borrower of the Lender's intent not to renew prior to the end of any renewal period [emphasis added].[10]

12. By letters dated November 1, 2023 and December 1, 2023, DUCA informed the Debtor that it would not be renewing the Loan. Accordingly, the Loan matured on January 1, 2024 (the "**Maturity Date**").[11]

C. The Security

13. As security for the Loan pursuant to the Credit Agreement, the Debtor provided DUCA with broad security, including, but not limited to, the following:

a. A first-ranking charge/mortgage registered against title to the Property on March 1, 2021, as instrument AT5664920 in the principal amount of $4,670,000 ("**Mortgage**");[12]

b. A notice of a general assignment of rents dated February 23, 2021, registered against title to the Property on March 1, 2021, as instrument AT5664963 ("**GAR**");[13]

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[10] Bogdanovich Affidavit, Exhibit "B," pg. 13, Application Record, dated April 5, 2024, Tab 2B, pg. 52.

[11] Bogdanovich Affidavit, at para 13 and Exhibit "C," Application Record, dated April 5, 2024, Tab 2 and Tab 2C, pgs. 18, 63-64.

[12] Bogdanovich Affidavit, Exhibit "D," Application Record, dated April 5, 2024, Tab 2D, pgs. 66-74.

[13] Bogdanovich Affidavit, Exhibit "E," Application Record, dated April 5, 2024, Tab 2E, pgs. 75-80.

c. A general security agreement in respect of all present and future undertaking and property of the Debtor dated as of February 23, 2021 (the "**GSA**");[14]

d. A cash collateral agreement dated February 23, 2021 ("**Cash Agreement**");[15] and

e. An assignment of insurance agreement dated February 23, 2021 ("**Insurance Agreement**," and collectively, the "**Security**").[16]

14. DUCA is currently holding $30,810.40 as cash collateral under the Cash Agreement.[17]

15. As a condition of the Loan, DUCA required the Guarantor to provide DUCA with an unlimited, absolute guarantee dated February 23, 2021, respecting all indebtedness owing by the Debtor to DUCA (the "**Guarantee**").[18]

D. Secured Creditors

16. DUCA registered a Financing Statement in respect of the Debtor giving notice of its GSA and other security on February 22, 2021.[19]

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[14] Bogdanovich Affidavit, Exhibit "F," Application Record, dated April 5, 2024, Tab 2F, pgs. 81-92.

[15] Bogdanovich Affidavit, Exhibit "G," Application Record, dated April 5, 2024, Tab 2G, pgs. 93-94.

[16] Bogdanovich Affidavit, Exhibit "H," Application Record, dated April 5, 2024, Tab 2H, pgs. 95-97.

[17] Bogdanovich Affidavit, at para 15, Application Record, dated April 5, 2024, Tab 2, pg. 19.

[18] Bogdanovich Affidavit, at para 16, Application Record, dated April 5, 2024, Tab 2, pg. 19.

[19] Bogdanovich Affidavit, at para 17, Application Record, dated April 5, 2024, Tab 2, pg. 19.

17. Royal Bank of Canada (“**RBC**”) registered a security interest in respect of the Debtor on May 2, 2019, relating to an Assignment of Rents regarding 940 Danforth Avenue, Toronto (“**940 Danforth**”), which is another real property owned by the Debtor.[20]

18. The parcel register for the Property indicates that: (i) the Debtor remains the owner of the Property since November 1, 2019; (ii) DUCA is the first and only mortgagee registered on title to the Property; and (iii) a construction lien in favour of Tregebov Cogan Architecture Ltd. in the amount of $67,869 was registered on February 15, 2024 (“**Construction Lien**”).[21]

19. The registration of the Construction Lien was done without the prior written consent of DUCA and represents a default under the Mortgage.[22]

20. A realty tax certificate for the Property, effective March 11, 2024, indicates arrears owing, including penalties in the amount of $7,097.63.[23] The Debtor’s failure to pay the outstanding realty taxes represents a default under the Mortgage.[24]

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[20] Bogdanovich Affidavit, at para 18 and Exhibit “K,” Application Record, dated April 5, 2024, Tab 2 and Tab 2K, pgs. 20, 109-111.

[21] Bogdanovich Affidavit, at para 19 and Exhibit “L,” Application Record, dated April 5, 2024, Tab 2 and Tab 2L, pgs. 20, 113-115.

[22] Bogdanovich Affidavit, at para 20 and Exhibit “D,” section 7(f), pg. 2-3, section 12(b), pg. 4, Application Record, dated April 5, 2024, Tab 2 and Tab 2D, pgs. 20, 70, 71.

[23] Bogdanovich Affidavit, Exhibit “M,” Application Record, dated April 5, 2024, Tab 2M, pgs. 117-118. See also, Bogdanovich Affidavit, Exhibit “D,” section 7(f), Application Record, dated April 5, 2024, Tab 2D, pg. 70.

[24] Bogdanovich Affidavit, at para 21 and Exhibit “D,” section 7(f), pg. 2-3, section 12(b), pg. 4, Application Record, dated April 5, 2024, Tab 2 and Tab 2D, pgs. 20, 70, 71.

E. Orkhan's Purported Interest in the Property

21. Orkhan registered a Notice pursuant to Section 71 of the *Land Titles Act* against title to the Property on October 17, 2023 for $2 (the "**Notice**").[25] The Notice relates to a purported Trust Agreement as between Orkhan, as beneficiary, and the Debtor, as trustee, allegedly dated October 22, 2020, which states that the Debtor holds 50% of the Property in trust for Orkhan (the "**Trust Agreement**").[26]

22. DUCA first became aware of the Trust Agreement on or about January 16, 2024. At the time DUCA and the Debtor entered into the Credit Agreement, the Debtor confirmed that it had good and marketable fee simple title to the Property.[27] The Credit Agreement provides for a Trustee and Beneficial Owner Agreement or Charge of Beneficial Interest if the Debtor holds the Property as nominee or trustee for another person.[28] Had DUCA been made aware of the purported Trust Agreement, it would have insisted on additional security with respect to the purported beneficial interest, as it was entitled to do under the Credit Agreement, or it would not have advanced the Loan.[29]

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[25] Bogdanovich Affidavit, at para 22 and Exhibit "N," Application Record, dated April 5, 2024, Tab 2 and Tab 2N, pgs. 20, 120-121.

[26] Bogdanovich Affidavit, at para 23 and Exhibit "O," Application Record, dated April 5, 2024, Tab 2 and Tab 2O, pgs. 21, 123-125.

[27] Bogdanovich Affidavit, Exhibit "B," pg. 4, Exhibit "D," section 7(a), (e), pgs. 2-3, Application Record, dated April 5, 2024, Tab 2B and Tab 2D, pgs. 43, 69, 70.

[28] Bogdanovich Affidavit, Exhibit "B," pg. 4, Application Record, dated April 5, 2024, Tab 2B, pg. 43.

[29] Bogdanovich Affidavit, at para 24, Application Record, dated April 5, 2024, Tab 2, pg. 21.

23. In addition, the registration of the Notice on title to the Property represents an event of default under the Mortgage.[30]

F. Notice of Non-Renewal and Demand

24. As mentioned above, on November 1, 2023, and December 1, 2023, DUCA sent the Debtor letters advising that the Loan would be maturing on the Maturity Date and that DUCA would not be renewing the Loan. DUCA demanded payment for the outstanding principal under the Loan, plus the discharge fee which, as at December 1, 2023, was $4,243,000 (with daily accruing interest, the "**Indebtedness**").[31]

25. DUCA made the decision not to renew the Loan due to delays in zoning approval for the Project and outstanding property tax arrears, which resulted in DUCA losing confidence in the Debtor.[32]

26. The Debtor failed to repay the Indebtedness on the Maturity Date, which constitutes a default under the terms of the Credit Agreement and Mortgage. The full amount due and owing to DUCA under the Loan continues to remain outstanding.[33]

27. As a result, on January 16, 2024, DUCA's then lawyers, Lerners LLP, issued payment demands the ("**Demands**") and a Notice of Intention to Enforce Security ("**NITES**") pursuant to

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[30] Bogdanovich Affidavit, at para 25 and Exhibit "D," section 7(a), (e), pgs. 2-3, section 12(b), pg. 4, Application Record, dated April 5, 2024, Tab 2 and Tab 2D, pg. 21, 69-71.

[31] Bogdanovich Affidavit, at para 26 and Exhibit "C," Application Record, dated April 5, 2024, Tab 2 and Tab 2C, pg. 21, 63-64.

[32] Bogdanovich Affidavit, at para 27, Application Record, dated April 5, 2024, Tab 2, pg. 22.

[33] Bogdanovich Affidavit, at para 28, Application Record, dated April 5, 2024, Tab 2, pg. 22.

section 244 of the BIA on behalf of DUCA to the Debtor. Payment demands were also issued on January 16, 2024 to the Guarantor.[34]

28. All of DUCA's demands have expired and the Indebtedness owing by the Debtor and Guarantor to DUCA remains outstanding.[35]

29. As of April 2, 2024, the Debtor is indebted to DUCA in the amount of $4,378,516.86, with $4,242,000 relating to principal and $136,516.86 relating to interest (excluding legal expenses). The Indebtedness continues to accrue daily interest in the amount of $1,109.89.[36]

G. Attempts to Refinance

30. On or about February 27, 2024, the Debtor's counsel advised counsel for DUCA, Blaney McMurtry LLP ("**Blaney**"), that the Debtor required three to six weeks to refinance.[37]

31. On March 13, 2024, counsel for the Debtor and counsel for DUCA attended before the Commercial List to schedule the return of the within receivership application. While DUCA was seeking a return date at the end of March, this matter was scheduled for April 11, 2024, to allow the Debtor additional time to refinance.[38]

32. A commitment letter from Vector Financial Services Limited to the Debtor, dated March 20, 2024, was provided to Blaney by the Debtor's counsel on April 2, 2024 (the "**Vector**

[34] Bogdanovich Affidavit, at para 29, Application Record, dated April 5, 2024, Tab 2, pg. 22.

[35] Bogdanovich Affidavit, at para 32, Application Record, dated April 5, 2024, Tab 2, pg. 22.

[36] Bogdanovich Affidavit, at para 33, Application Record, dated April 5, 2024, Tab 2, pg. 23.

[37] Bogdanovich Affidavit, at para 37, Application Record, dated April 5, 2024, Tab 2, pg. 24.

[38] Bogdanovich Affidavit, at para 38, Application Record, dated April 5, 2024, Tab 2, pg. 24.

Commitment"). The Vector Commitment is highly conditional in nature and, even if funds are advanced under the Commitment, there is still a shortfall in respect of the Indebtedness.[39]

33. Notably, there is no mention in the Vector Commitment to the Debtor holding a portion of the Property in trust for Orkhan or any other third party. Indeed, the Vector Commitment states that the Debtor owns the Property for its own account, records the Property as an asset on its financial statements, and does not hold the Property in trust for any other party.[40]

34. In addition, counsel for the Debtor has advised that the balance of the funds to repay the Indebtedness will come from the sale of a property located at 202 Mcallister Road in Toronto ("**Mcallister Property**"), which is owned by 8570442 Canada Inc. ("**857 Canada**").[41] The Debtor has not provided any independent source of valuation for the Mcallister Property or any information regarding the equity to be expected from the sale or the general creditworthiness of 857 Canada.[42]

35. DUCA has received no indication that the conditions under the Vector Commitment have been waived or satisfied, and no level of comfort that the transaction with respect to the Mcallister Property will be concluded as proposed.[43]

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[39] Bogdanovich Affidavit, at para 34 and Exhibit "Q," Application Record, dated April 5, 2024, Tab 2 and Tab 2Q, pgs. 23, 138-164.

[40] Bogdanovich Affidavit, at Exhibit "Q," Application Record, dated April 5, 2024, Tab 2Q, pg. 139.

[41] Bogdanovich Affidavit, at para 36, Application Record, dated April 5, 2024, Tab 2, pg. 23.

[42] Bogdanovich Affidavit, at para 36, Application Record, dated April 5, 2024, Tab 2, pg. 23.

[43] Bogdanovich Affidavit, at para 38, Application Record, dated April 5, 2024, Tab 2, pg. 24.

36. DUCA has provided the Debtor with more than sufficient time to repay the Indebtedness and refinance, and now seeks to exercise its rights under its Security to appoint the Receiver.[44]

PART III – ISSUES

37. The sole issue before this Honourable Court is whether it is just or convenient to appoint the Receiver.

PART IV – LAW AND ARGUMENT

A. Statutory Authority to Appoint Receiver

38. Pursuant to Section 243 of the BIA, the Court may, on application by a secured creditor, appoint a receiver to take control of a debtor's property if it is just or convenient to do so:

> ***Court may appoint receiver***
>
> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.[45]

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[44] Bogdanovich Affidavit, at para 40, Application Record, dated April 5, 2024, Tab 2, pg. 24.

[45] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243.

39. Section 101 of the CJA provides for the appointment of a receiver when "it is just or convenient" to do so:

> 101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.[46]

40. The Mortgage and GSA granted by the Debtor in favour of DUCA charge the Property and all assets, property and undertaking of the Debtor as security for the Debtor's obligations under the Commitment Agreement. DUCA is, therefore, a "secured creditor" within the meaning of the BIA.[47]

41. The Debtor has failed to repay the Indebtedness notwithstanding the maturity of the Loan and the issuance of the Demands and NITES. The Debtor is unable to meet its obligations generally as they become due and are therefore an "insolvent person" within the meaning of the BIA.[48]

42. Where a notice of intention to enforce security as been issued under s. 244(1) of the BIA, s. 243(1.1) prohibits the court from making a receivership order until the expiry of ten (10) days following the date when the notice is sent.[49] In this case, the Demands and NITES were delivered on January 16, 2024, approximately three (3) months before the return of this application.[50]

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[46] *Courts of Justice Act*, RSO 1990, c C 43, s 101.

[47] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2.

[48] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2.

[49] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1.1).

[50] Bogdanovich Affidavit, at para 29, Application Record, dated April 5, 2024, Tab 2, pg. 22.

B. The Appointment of a Receiver is Both "Just" and "Convenient"

43. In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Clair Creek*. In *Freure Village*, Blair J. set out that, in deciding whether the appointment of a receiver is just or convenient, the court "must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto," which includes the rights of the secured creditor under its security.[51]

44. Courts have considered the following factors, among others, when determining whether it is just or convenient to appoint a receiver: (a) the existence of a debt and a default; (b) the quality of the security; (c) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (d) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others; (e) the likelihood of maximizing the return to the parties; and (f) the risk to the security holder.[52]

45. The fact that a secured creditor has a right under its security documentation to appoint a receiver is of central importance. In cases where the security documentation provides for the appointment of a receiver, the analysis is focused on a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. As noted by Justice Morawetz (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or

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[51] *Bank of Nova Scotia v Freure Village of Clair Creek*, 1996 CanLII 8258, at para 10.

[52] *PricewaterhouseCoopers Inc v Northern Citadel*, 2023 ONSC 37, at para 91. Certain cases cite a lengthier list of factors: see, for example, *Canadian Western Bank v 2563773 Ontario Inc*, 2023 ONSC 4766, at para 9.

> equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties (emphasis added).[53]

46. It is not necessary for a creditor to demonstrate that it will suffer irreparable harm if the appointment is not granted by the court.[54]

47. In this case, the Security provided by the Debtor to DUCA provides that, upon the occurrence of an event of default, DUCA may appoint a receiver over the Property. In particular, the following Security provides for the appointment of a receiver:

a. The "Appointment of Receiver" section in Schedule "A" – Additional Loan Terms to the Credit Agreement;[55]

b. Section 13.01 "Remedies" of the GSA;[56] and

c. Section 13(d) "Remedies" of the Mortgage.[57]

48. The appointment of the proposed Receiver is, therefore, not an extraordinary remedy in the circumstances; DUCA is simply relying on its contractual rights in seeking the appointment order.

49. In addition to the fact that the Debtor has agreed to the appointment of a receiver upon default pursuant to the terms of the Security, appointing a receiver is just and convenient because

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[53] *Elleway Acquisitions Limited v The Cruise Professionals Limited*, 2013 ONSC 6866, at para 27.

[54] *Bank of Nova Scotia v Freure Village of Clair Creek*, 1996 CanLII 8258, at para 10.

[55] Bogdanovich Affidavit, Exhibit "B," pg. 18, Application Record, dated April 5, 2024, Tab 2B, pg. 58.

[56] Bogdanovich Affidavit, Exhibit "F," pgs. 6-7, Application Record, dated April 5, 2024, Tab 2F, pgs. 87-88.

[57] Bogdanovich Affidavit, Exhibit "D," pg. 5, Application Record, dated April 5, 2024, Tab 2D, pg. 72.

the Loan has matured, and the Debtor owes approximately $4.38 million to DUCA.[58] The Indebtedness has been outstanding for almost three and a half months. No payments have been made to DUCA since the Maturity Date and the Demands and NITES were delivered on January 16, 2024.[59]

50. Prior to the maturity of the Loan, there was limited communication between DUCA and the Debtor with respect to the status of the Project.[60] Delays with zoning approvals for the Project and property tax arrears, which represented a default under the Mortgage, led to DUCA losing confidence in the Debtor and making the decision to not renew the Loan.[61] In addition, the registration of Notice and the Construction Lien represent defaults under the Mortgage, which have not been cured.[62]

51. The Debtor has had more than three months to refinance and has failed to secure firm funding. The Debtor has recently obtained the Vector Commitment, which is conditional on a long list of pre-funding deliverables, including:

a. two years of externally prepared financial statements of the Debtor and net-worth statements from the Guarantor;

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58 Bogdanovich Affidavit, paras 26, 31-33, Application Record, dated April 5, 2024, Tab 2, pgs. 21-23.

59 Bogdanovich Affidavit, at para 29-32, Application Record, dated April 5, 2024, Tab 2, pgs. 22-23.

60 Bogdanovich Affidavit, at para 11, 31, Application Record, dated April 5, 2024, Tab 2, pgs. 18, 22.

61 Bogdanovich Affidavit, at para 27, Application Record, dated April 5, 2024, Tab 2, pg. 22.

62 Bogdanovich Affidavit, at para 20 and Exhibit "D," section 7(f), pg. 2-3, section 12(b), pg. 4, Application Record, dated April 5, 2024, Tab 2 and Tab 2D, pgs. 20, 69-71. Bogdanovich Affidavit, at para 25 and Exhibit "D," section 7(a), (e), pgs. 2-3, section 12(b), pg. 4, Application Record, dated April 5, 2024, Tab 2, pg. 21, 69-71.

b. credit checks, corporate and personal due diligence checks, and biographical information detailing real estate development business experience for the Debtor and the Guarantor;

c. evidence that there shall be not less than $2 million of cash equity in the Property and/or Project from the Debtor and/or the Guarantor's own resources and not from borrowed sources;

d. appraisal reports on an "as is" basis, environmental reports, geotechnical reports, a planning report, current zoning and status progress, site plan and architectural or engineering drawings; and

e. a current up-to-date survey of the Property or evidence of title insurance satisfactory to the lender.[63]

52. There is no evidence from the Debtor that the conditions under the Vector Commitment have been met or satisfied such that the refinancing can occur on the proposed closing date of April 19, 2024.[64]

53. There will also be a shortfall from the Vector Commitment that the Debtor will fund through the sale of the Macallister Property. However, the Debtor has provided no evidence as to

[63] Bogdanovich Affidavit, at para 34 and Exhibit "Q," pgs. 9-12, Application Record, dated April 5, 2024, Tab 2 and Tab 2Q, pg. 23, 146-149.

[64] Bogdanovich Affidavit, at para 38, Application Record, dated April 5, 2024, Tab 2, pg. 24.

the equity expected from the sale of the Macallister Property or the creditworthiness of the owner, 857 Canada.[65]

54. Given the contingent nature of the Debtor's refinancing efforts, DUCA views the appointment of the proposed Receiver as the only path forward that will protect its security in the Property, and bring stability, certainty and oversight to the Project with a view to maximizing value for all stakeholders.

55. A Court-appointed Receiver lends transparency to the process as a Court-appointed receiver acts in a fiduciary capacity as an officer of the Court.[66] A Court-appointed receivership, therefore, is the best way to ensure that the realization of the Debtor's assets is conducted in a fair and equitable manner, in recognition of the interests of all stakeholders.

C. Orkhan's Purported Interest Does Not Preclude Receivership Order

56. The Trust Agreement is allegedly signed on October 22, 2020 and purports to give Orkhan a 50% interest in the Property. DUCA submits that the validity of the Trust Agreement is in question because:

a. The Guarantor, on behalf of the Debtor, granted a 50% interest in the Property to Orkhan, and the Guarantor and Orkhan are seemingly related as they have the same last name;

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[65] Bogdanovich Affidavit, at para 36, Application Record, dated April 5, 2024, Tab 2, pg. 23.

[66] *7451190 Manitoba Ltd v CWB Maxium Financial Inc et al*, 2019 MBCA 95, at para 27.

b. The Trust Agreement was only registered on title to the Property on October 17, 2023, more than two and a half years after the Mortgage was registered on title to the Property;[67]

c. The Trust Agreement and Orkhan's purported interest in the Property was not revealed to DUCA at the time the Credit Agreement was signed. By signing the Credit Agreement, the Debtor confirmed that it held good title to the Property. Had DUCA been aware of the Trust Agreement or any beneficial interest in the Property, it would have sought a Trustee and Beneficial Owner Agreement or Charge of Beneficial Interest, as provided for under the Credit Agreement, or it would not have advanced the Loan;[68] and

d. the Vector Commitment confirms that the Debtor does not hold the Property in trust for any other party.[69]

57. Moreover, the registration of the Trust Agreement on title to the Property is contrary to s. 62(1) of the *Land Titles Act*, which states:

> **Trusts not to be entered**
>
> 62(1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.[70]

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[67] Bogdanovich Affidavit, Exhibit "L," Application Record, dated April 5, 2024, Tab 2L, pg. 114.

[68] Bogdanovich Affidavit, para 24, Exhibit "B," pg. 4, Exhibit "D," section 7(a), (e), pgs. 2-3, Application Record, dated April 5, 2024, Tab 2, Tab 2B and Tab 2D, pgs. 21, 69-71.

[69] Bogdanovich Affidavit, at Exhibit "Q," section 4, pg. 2, Application Record, dated April 5, 2024, Tab 2Q, pg. 139.

[70] *Land Titles Act*, RSO 1990, c L5, s 62(1).

58. The clear intent of s. 62 of the *Land Titles Act* is that the existence of a trust relationship "does not interfere with the right of the registered owner to deal with the land."[71] Put differently, a trust interest does not give rise to a proprietary interest, but only gives the beneficiary rights as against the trustee for damages.[72]

59. Even if the Trust Agreement is legitimate (which is highly dubious), it does not create an interest in the Property. As such, the existence of the Trust Agreement and the registration of the purported trust interest by way of the Notice should not preclude the appointment of the Receiver.

60. Orkhan's beneficial interest in the Property, to the extent it exists, is not altered by the receivership order.[73] The validity of the Trust Agreement and the interest conveyed by the Trust Agreement to Orkhan can be more fully addressed when the Receiver seeks to vest the Notice off title to the Property in the context of a motion for an approval and vesting order, or on a distribution motion.

61. Having relied on the Debtor's representations that it did not hold the Property in trust for any other party, DUCA submits that it is entitled to exercise its contractual rights and seek the appointment of the Receiver before the legitimacy of the Notice is dealt with on a full hearing. In circumstances where the Indebtedness has been outstanding for more than three months and a firm

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[71] *Bao v Mok*, 2019 ONSC 915, at para 61.

[72] *Bao v. Mok*, 2019 ONSC 915, paras 62, 150. See also *McLeod v Walker*, 2015 ONSC 5984, para 39, and *Claireville Holdings Limited v Botiuk*, 2014 ONSC 6505, at paras 14-19.

[73] *Adelaide Capital Corp v St Raphael's Nursing Homes Ltd*, 1995 CarswellOnt 1379, 42 CBR (3d) 17 (Ont Gen Div) at para 55.

refinancing is not imminent, it is just and convenient to appoint a Receiver over the Debtor's assets, including the Property.

PART V – ORDER REQUESTED

62. The Applicant requests that this application to appoint a Receiver and the Appointment Order attached at Tab 3 of the Application Record be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of April, 2024.

Timothy R. Dunn / Alexandra Teodorescu
Blaney McMurtry LLP
Lawyers for the Applicant

Schedule "A" – Authorities

1. *7451190 Manitoba Ltd v CWB Maxium Financial Inc et al*, 2019 MBCA 95
2. *Adelaide Capital Corp v St Raphael's Nursing Homes Ltd*, 1995 CarswellOnt 1379, 42 CBR (3d) 17 (Ont Gen Div)
3. *Bank of Nova Scotia v Freure Village of Clair Creek*, 1996 CanLII 8258
4. *Bao v Mok*, 2019 ONSC 915
5. *Canadian Western Bank v 2563773 Ontario Inc*, 2023 ONSC 4766
6. *Claireville Holdings Limited v Botiuk*, 2014 ONSC 6505
7. *Elleway Acquisitions Limited v The Cruise Professionals Limited*, 2013 ONSC 6866
8. *McLeod v Walker*, 2015 ONSC 5984
9. *PricewaterhouseCoopers Inc v Northern Citadel*, 2023 ONSC 37

1995 CarswellOnt 1379
Ontario Court of Justice (General Division)

Adelaide Capital Corp. v. St. Raphael's Nursing Homes Ltd.

1995 CarswellOnt 1379, [1995] O.J. No. 4553, 42 C.B.R. (3d) 17

Adelaide Capital Corporation (Plaintiff) and St. Raphael's Nursing Homes Limited, Paul Richmond and Paul Posesorski, In Trust, 766915 Ontario Limited and Hugh J. MacLean (Defendants)

Spence J.

Heard: May 15-19 and June 8 and 16, 1995
Judgment: November 29, 1995
Docket: Commercial Court B295/94, 92-CQ-15858

Counsel: *P.J. Cavanagh* and *J. Silver*, for plaintiff.
J.W. McDonald and *C. MacLean*, for defendants other than Hugh J. MacLean.
H.J. MacLean, in person.

Subject: Corporate and Commercial; Insolvency; Contracts
Related Abridgment Classifications
Contracts
VIII Rectification or reformation
VIII.1 Prerequisites
VIII.1.a Common intention
Contracts
IX Performance or breach
IX.3 Obligation to perform
IX.3.b Miscellaneous
Headnote
Contracts --- Performance or breach — Obligation to perform — Miscellaneous issues
Contracts --- Rectification or reformation — Prerequisites — Common intention
Contracts — Performance or breach — Obligation to perform — Successor to secured creditor bringing action for order declaring it entitled to allocate proceeds of sale of secured property in accordance with agreement — Debtors opposing — Action allowed.
Contracts — Rectification or reformation — Prerequisites — Common intention — Evidence indicating that at all times during negotiations parties intending security to cover all property and licences and not just goods, inventory and equipment as provided in general security agreement — Omission being result of oversight — Plaintiff being entitled to rectification.
The plaintiff ACC was the successor to all right, title, and interest of a trust company in and to the indebtedness of HJM and SR Ltd., and to all security for such indebtedness. HJM was the principal of SR Ltd., a company carrying on various nursing home operations. In 1985, the trust company loaned HJM $10 million. That loan was followed by a $3.2 million loan in 1988, which was secured by a second mortgage on a property in Scarborough on which was operated a nursing home, and on nearby vacant land. In 1990, when HJM and a business associate, JAL, wanted to acquire and develop a property, a group of investors (the "intervenors") loaned them $2 million through a mortgage broker. A general security agreement (the "GSA") was prepared, giving two of the four intervenors an interest in the goods, inventory, and equipment of SR Ltd. No charge was made on the assets or undertaking of SR

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Ltd., nor on the nursing home licences held by SR Ltd. The intervenors also took security in the form of third to sixth mortgages on the Scarborough property and the vacant land. HJM gave them a general assignment of rents. In 1991, HJM, on behalf of SR Ltd., executed written assignments of three nursing home licences. Another general security agreement was executed, giving the trust company a security interest in the undertaking and property of SR Ltd. HJM, on behalf of SR Ltd., executed a written guarantee and postponement of claim in favour of the trust company under which SR Ltd. guaranteed payment to the trust company of all debts and liabilities incurred by HJM, with SR Ltd.'s liability limited to $7.5 million. SR Ltd. signed a promissory note acknowledging its debt to the trust company and promising to pay the lesser of (a) a principal sum of $1 million, and (b) the unpaid principal balance of all advances made by the trust company to SR Ltd. The advances made by the 1991 arrangement were repaid to ACC out of procceds from the eventual receivership of assets of HJM and SR Ltd.

In 1992, on the trust company's motion, a receiver was appointed over certain property, undertaking, and assets of HJM, his wife, SR Ltd., and a related company. A receiver was also appointed over the interests of HJM and SR Ltd. in certain nursing home licences. In 1993, the receiver sold the Scarborough property and the nursing home assets to TN Ltd. for $14.8 million. A vesting order issued in 1994 vested the Scarborough property and assets free of any other interest. One of the nursing home licences was sold for $1.75 million, and the proceeds were paid to ACC.

In 1994, ACC and the intervenors entered into a settlement agreement (the "allocation agreement") under which the intervenor indebtedness and security were assigned to ACC, and ACC allocated the TN Ltd. sale proceeds to particular debts and security in a particular sequence, and reassigned the remaining ACC indebtedness and security to the intervenors.

In June 1994, the parties appeared on a motion brought by the receiver for an order authorizing it to pay to ACC the sum of $14,075,723, representing a part of the TN Ltd. sale proceeds, and an order authorizing it to pay to ACC the net proceeds of the sale, when received, of two of the nursing home licences. The judge ordered the receiver to pay ACC $11,929,803.71, and directed that a trial be heard to determine the priorities to the balance of the proceeds held by the receiver, with additional proceeds to be received by the receiver from the sale of certain nursing home licences, and to determine the allocation of the $11,929,803.71 and the licence sale proceeds. As there was no appeal from the order, the receiver paid $11,929,803.71 to ACC.

At the trial, ACC sought an order declaring it to be entitled to allocate the sale proceeds in accordance with the allocation agreement, or, in the alternative, an order rectifying the GSA. The allocation agreement provided that the TN Ltd. sale proceeds were to be applied, first, to the intervenor indebtedness to the extent of those proceeds received from the receiver with respect to the land, and, second, to the ACC indebtedness in a prescribed sequence. The defendants, HJM and SR Ltd. among them, sought a different order for distribution.

Held:

The action was allowed.

The allocation agreement was valid and enforceable. There was no deficiency in ACC's claim against SR Ltd. as argued by the defendants. Their argument that SR Ltd. was not the principal debtor, but merely a covenantor or surety, was rejected. The 1985 and 1988 mortgages provided that SR Ltd. was "primarily liable to the chargor, as principal debtor and not as surety." Therefore, there was no need for creditors to pursue HJM before turning to SR Ltd.

The defendants' argument that ACC was paid in full at the time the allocation agreement was made should also be rejected. The payment of amounts owing to ACC under the promissory note did not operate to discharge the GSA and licence agreements to the extent that SR Ltd. was still obligated to ACC under other instruments. Further, the vesting order did not operate to discharge ACC's security interest in the property subject to the order, as argued by the defendants. The vesting order did not purport to deal with any security interest that ACC might have in the proceeds of sale of property over which it had held security. The vesting order was in a standard form, and simply permitted the completion of the sale of assets in the possession of the receiver. It did not discharge the security held by secured creditors.

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The defendants' argument that the allocation agreement was null and void for want of a final order of the court should also be rejected. The agreement provided that it was conditional upon a final order of the court approving the distribution to ACC; the result of the case before the court would be the final order.
The defendants also argued that the allocation agreement was void for usurping the jurisdiction of the court. The orders appointing the receiver contained a stay provision that provided that "no legal actions
. . . . .
shall be asserted or taken or continued against the Defendants or the Receiver and Manager
. . . . .
without leave of the court." However, since the allocation agreement was before the court, and would have application only with the approval of the court, the stay provision had not been breached.
In view of the finding regarding the validity of the allocation agreement, it was not necessary to rectify the GSA; however, the GSA was capable of rectification. The GSA charged only goods, inventory, and equipment. ACC wished to have the GSA rectified so that it would charge all assets and undertakings of SR Ltd., including the nursing home licences, and wanted all four of the intervenors listed as lenders and secured parties. The evidence of JAL regarding the intention of the parties should be accepted. He testified that it was clear throughout the negotiations that the intervenors wanted comprehensive security over two nursing homes and their licences, so that the homes could be sold as going concerns, if necessary. ACC was entitled to rectification. The defendants' argument that rectification was inappropriate because nursing home licences were not property that could be mortgaged should be rejected. Provisions in the *Nursing Homes Act* (Ont.) expressly contemplate the creation of a security interest in a licence, while, at the same time, making a licence non-transferable. Therefore, the Act would not be offended by recognition of the validity of a security interest, as long as that recognition was not seen as authorizing the transfer of the licence.

Table of Authorities

Cases considered:

Brisebois c. Chamberland (1990), (sub nom. *Brisebois v. Chamberland)* 75 O.R. (2d) 333, 1 O.R. (3d) 417, 42 O.A.C. 26, 77 D.L.R. (4th) 583 — *referred to*

Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co., [1953] 2 Q.B. 450, [1953] 2 All E.R. 739 (C.A.) — *referred to*

H.F. Clarke Ltd. v. Thermidaire Corp., [1973] 2 O.R. 57, 9 C.P.R. (2d) 203, 33 D.L.R. (3d) 13 (C.A.) [reversed [1976] 1 S.C.R. 319, (sub nom. *Thermidaire Corp. v. H.F. Clarke Ltd.)* 3 N.R. 133, 17 C.P.R. (2d) 1, 54 D.L.R. (3d) 385, varied [1976] 1 S.C.R. 340n, 18 C.P.R. (2d) 32, 54 D.L.R. (3d) 399n] — *referred to*

Jenny Lind Candy Shops, Re (1935), 16 C.B.R. 193, [1935] O.R. 119, [1935] 1 D.L.R. 654 (S.C.) — *referred to*

Josecelyne v. Nissen, [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213 (C.A.) — *referred to*

Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. (1978), 22 O.R. (2d) 291, 93 D.L.R. (3d) 221 (H.C.) [affirmed (1980), 26 O.R. (2d) 746, 106 D.L.R. (3d) 576 (C.A.), leave to appeal to S.C.C. refused (1980), 32 N.R. 538 (S.C.C.)] — *referred to*

209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce (1988), 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135, 39 B.L.R. 44 (Ont. H.C.) — *considered*

Statutes considered:

Mercantile Law Amendment Act, R.S.O. 1990, c. M.10

s. 2(1)*referred to*

Nursing Homes Act, R.S.O. 1990, c. N.7

s. 1(1)(j) "security interest"*referred to*

s. 4*referred to*

s. 5(1)*referred to*

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s. 5(7)*referred to*

s. 5(9)*referred to*

s. 10(1)*referred to*

s. 10(2)*referred to*

s. 13*referred to*

Personal Property Security Act, 1989, S.O. 1989, c. 16

generally*referred to*

ACTION by successor of secured creditor for order declaring it entitled to allocate proceeds of sale of secured property in accordance with agreement, or, in alternative, for order rectifying general security agreement.

***Spence J.*:**

1 Adelaide Capital Corporation ("Adelaide") seeks an order declaring that it is entitled to allocate certain sale proceeds relating to the nursing home business of St Homes Limited ("SRNHL") in accordance with the Allocation Agreement mentioned below or in the alternative an order for rectification of the General Security Agreement mentioned below, and certain related orders. The defendants oppose the order requested. The defendants other than MacLean request an order for distribution which is different from that proposed by the plaintiff, on a basis that disregards the alleged entitlements to allocation and rectification. The action is brought pursuant to the order of Houlden, J. dated June 28, 1995 which is considered below.

The Parties and Others Involved

2 The parties provided the following cast of characters.

Adelaide Capital Corporation ("Adelaide") — Successor to Central Guarantee Trust Company ("Central"); Assignee of indebtedness and security held by Intervenors (subject to terms of settlement agreements);

Hugh J. MacLean ('MacLean") — Principal and former shareholder of St Homes Limited; principal debtor of amounts owing to Adelaide;

St Homes Limited ("SRNHL") — Operator of nursing home at 1020 McNicoll Avenue, Scarborough; former holder of nursing home licence in respect of McNicoll Nursing Home and Kitchener Nursing Home; current operator of nursing home in Durham, Ontario;

Paul Richmond and Paul Posesorski, in Trust — Mortgagee of Scarborough Property and Vacant Land; mortgage debt guaranteed by SRNHL;

766915 Ontario Limited — Mortgagee of Scarborough Property and Vacant Land;

Gary Bluestein — Principal of Presidential Management and Development Corp. ("Presidential"), Yonge Crescent Holdings Limited ("Yonge Crescent"), Minicorp Realty Inc. ("Minicorp"); administrator of charitable foundation which is the beneficiary of the loan, referred to below, made by Alan Sugarman, in Trust;

The Intervenors — Presidential, Yonge Crescent, Minicorp and Alan Sugarman, in Trust were intervenors in the proceeding originally commenced by Central; they made, in aggregate, a $2,000,000 loan to MacLean

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and took security in the form of various mortgages together with a general security agreement from St Homes Limited. It is this general security agreement which is the subject of the claim for rectification. The Intervenors entered into a settlement with Adelaide which provides for the assignment to Adelaide of the Intervenors' debt and security, the allocation of proceeds by Adelaide according to a certain sequence and the re-assignment by Adelaide to the Intervenors of the remaining Adelaide indebtedness and security;

Alan Sugarman — Lawyer who represented the Intervenors with respect to loan transaction with MacLean and SRNHL; drafted the form of general security agreement which is the subject of the claim for rectification;

John Lennox — Business associate of MacLean and guarantor of loan made by Intervenors to MacLean; acted as agent for MacLean in connection with negotiating the terms of the $2,000,000 loan to be made by the Intervenors;

Bernard Kamin — Lawyer who represented the Intervenors after default by MacLean; had several conversations with MacLean concerning the Intervenor security;

J.N. Carr — Representative of Loan Star Financial Corporation who acted as mortgage broker in connection with the $2,000,000 loan made by the Intervenors to MacLean.

Background Facts:

3 The parties provided the following agreed statement of facts. Text in square brackets has been added by me.

The Parties

4 Central Guaranty Trust Company ("Central") was, at all material times, a trust company under the laws of Canada. Adelaide Capital Corporation ("Adelaide") is the successor to Central of all right, title and interest of Central in and to the indebtedness of Hugh J. MacLean, St Homes Limited, St. Raphael's Centres Limited and Pamela MacLean to Central and all security for such indebtedness.

5 Hugh J. MacLean ("MacLean") was, formerly, the owner of certain real property municipally known as 1020 McNicoll Avenue, Scarborough, Ontario (the "Scarborough Property") and certain vacant lands comprising approximately 5.4 acres situated on the east side of Victoria Park Avenue, north of McNicoll Avenue in Scarborough (the "Vacant Land"). MacLean was also the owner of certain real property municipally known as 2727 Kingsway Drive, Kitchener, Ontario (the "Kitchener Property"). MacLean was also the owner of certain personal property used in the operation of the nursing home and retirement home businesses carried on at the Scarborough Property.

6 St Raphael's Nursing Homes Limited ("SRNHL") is an Ontario corporation whose shares were owned or controlled by MacLean and/or his wife, Pamela MacLean. On May 18, 1994, MacLean assigned to his wife (for $2 and natural love and affection) his beneficial interest in the issued common shares of SRNHL. SRNHL formerly carried on a nursing home business at the Scarborough Property (the "McNicoll Nursing Home") and was the licensee of a nursing licence issued by the Ministry of Health for 254 beds at the McNicoll Nursing Home (the "McNicoll Licence"). SRNHL was also the licensee of a nursing home licence issued by the Ministry of Health for 150 beds (the "Kitchener Licence") at a nursing home operated and maintained by SRNHL at the Kitchener Property (the "Kitchener Nursing Home"). In addition, SRNHL was the licensee of other nursing home licences issued by the Ministry of Health for 48 beds at a nursing home located at 415 Durham Road East, Durham, Ontario (the "Durham Licence") and numbered 2270, 1142 and 0941 (the "Finch Ave. Licences").

7 St. Raphael's Centres Limited ("SRCL") is an Ontario corporation whose shares are owned or controlled by MacLean and/or Pamela MacLean. SRCL formerly operated a retirement home at the Scarborough Property (the "McNicoll Retirement Home").

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8 The Intervenors in the proceeding initially commenced by Central were Alan Sugarman, In Trust ("Sugarman"), Presidential Management & Development Corp. ("Presidential"), Yonge Crescent Holdings Ltd. ("Holdings") and Minicorp Realty Inc. ("Minicorp") (collectively, the "Intervenors"). The Intervenors were, prior to June 16, 1994, creditors of MacLean and held security as described in paragraph 12 herein.

9 766915 Ontario Limited ("766915") is a creditor of MacLean. Paul Richmond/Paul Posesorski, In Trust ("Richmond/Posesorski") is also a creditor of MacLean. 766915 holds seventh, ninth and tenth mortgages against the Scarborough Property and the Vacant Land. Richmond/Posesorski holds an eighth mortgage against the Scarborough Property and the Vacant Land. The mortgage debt owing by MacLean to Richmond/Posesorski was guaranteed by SRNHL.

10 Coopers & Lybrand Limited (the "Receiver") was appointed as Receiver and Manager over certain of the property, undertaking and assets of MacLean, Pamela MacLean, SRNHL and SRCL pursuant to the Order of Dunnet, J. dated March 3, 1992. The property, undertaking and assets over which the Receiver was appointed by the Order of Dunnet, J. included:

- the Kitchener Property;
- the Scarborough Property;
- the Vacant Land;
- the assets, property and undertaking of SRNHL, SRCL and MacLean in connection with the McNicoll Nursing Home, the McNicoll Retirement Home and the Kitchener Nursing Home.

By Order of Lane, J. dated July 9, 1992, the interest of SRNHL in the Finch Ave. licences issued by the Ministry of Health under the Ontario *Nursing Homes Act* numbered 2279, 1142 and 0941 were ordered to be part of the receivership of SRNHL.

The 1985 Central Loan: $10 Million

11 Pursuant to a written loan commitment dated July 31, 1985 and amended by letter dated November 22, 1985, Central agreed to lend $10 million in accordance with the terms of the said commitment letters. [The security which was given in connection with this loan is considered below.]

The 1988 Central Loan: $3.2 Million

12 Pursuant to a mortgage commitment letter dated June 24, 1988, Central agreed to lend $3.2 million to MacLean with security to be given in the form of a second mortgage on the Scarborough Property and the Vacant Land and other security as specified in the said commitment letter. A mortgage was given by MacLean as chargor and by SRNHL as covenantor which was registered on July 29, 1988.

The 1990 Intervenor Loan: $2 Million

13 In late May and June, 1990, MacLean was in contact with Mr. John A. Lennox ("Lennox") with whom he was working on a proposed acquisition of a property in the Port Perry area (the "Port Perry Property"). Lennox was a business associate of MacLean and they had interests together in some properties. Lennox suggested that they might be able to arrange financing for this proposed acquisition through his lawyer, Harvey Wortzman ("Wortzman"). MacLean and Lennox intended to develop the Port Perry Property as a residential subdivision. Lennox contacted Wortzman to seek financing for the real estate acquisition and Wortzman put Lennox and MacLean in touch with the Intervenors.

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14 By June 20, 1990, MacLean was seeking a loan of $2 million. Wortzman was dealing with a mortgage broker, Loan Star Financial Corporation ("Loan Star"), whose representative was Mr. J.N. Carr ("Carr").

15 A draft loan commitment letter dated June 25, 1990 was submitted by Carr to Lennox and MacLean setting out the terms upon which the $2 million loan would be approved. The security for the loan included "Mortgages on 1020 McNicoll Avenue, Toronto, and a floating charge debenture on the Nursing Home Operation

. . . . .

". Although this form of loan commitment was revised through negotiations between the parties and their representatives, the requirement for a floating charge debenture on the McNicoll 'Nursing Home Operations" did not change. By letter dated July 10, 1990, MacLean accepted the terms of the draft commitment letter dated June 25, 1990, with amendments thereto contained in certain revision letters.

16 Sugarman represented the Intervenors in connection with the drafting of the loan documents and security documents. MacLean represented himself as well as Lennox, SRNHL and the other companies that provided other security for the loans.

17 Sugarman prepared a form of general security agreement in the name of SRNHL as debtor which was executed on behalf of SRNHL by MacLean. MacLean made handwritten corrections on the form of general security agreement for the purpose of clarifying that the principal debtor was Hugh J. MacLean and that SRNHL was simply providing additional security for the loans to him. The general security agreement which MacLean executed on behalf of SRNHL showed only two of the Intervenors to be lenders and secured parties, namely Minicorp and Presidential. The general security agreement provided for the grant of a security interest by SRNHL in its goods, inventory and equipment. The form of general security agreement prepared by Sugarman did not provide for a charge on all of the assets and undertaking of SRNHL at the McNicoll Nursing Home or the Kitchener Nursing Home, nor did it provide for a charge over the nursing home licences or the general category of "intangibles". As well, three lines of text from Sugarman's standard precedent of general security agreement were omitted from paragraphs 14(o) and (p) of the document as executed. It is this general security agreement in respect of which rectification is being sought in this proceeding.

18 The Intervenors also took security for the aggregate $2 million advance made by them in the form of third to sixth mortgages registered against the Scarborough Property and the Vacant Land on July 24, 1990. MacLean also entered into General Assignments of Rents in favour of the Intervenors which were registered on July 24, 1990. A subordination and postponement agreement on behalf of SRNHL was also executed by MacLean in favour of the Intervenors.

19 Financing Statements were registered under the PPSA by each of the Intervenors against SRNHL as debtor on July 26, 1990 marking the collateral classifications "equipment" and "other". On January 28, 1994, Financing Statements were registered on behalf of each of the Intervenors against SRNHL as debtor pursuant to the PPSA. In addition, Financing Change Statements were registered on January 28, 1994 on behalf of the Intervenors against SRNHL as debtor to amend the collateral classification categories by adding the categories "inventory" and "accounts". There were no relevant registrations against SRNHL as debtor during the period after the original registrations under the PPSA on July 26, 1990 became ineffective (July 25, 1991) and before January 28, 1994 when new Financing Statements were registered.

20 The amount claimed by Adelaide and the Intervenors as owing by MacLean as of June 22, 1994 in respect of indebtedness originally owing to the Intervenors was $4,671,877.75 (the "Intervenor Indebtedness"). The defendants have not admitted this indebtedness.

The 1991 Central Loan Facility to SRNHL

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21 MacLean on behalf of SRNHL executed and delivered to Central specific written assignments dated January 25 or 28, 1991 of Nursing Home Licences issued by the Ministry of Health to SRNHL in respect of the McNicoll Nursing Home, the Kitchener Nursing Home and the Durham Nursing Home.

22 A General Security Agreement dated January 28, 1991, was also executed by MacLean on behalf of SRNHL in favour of Central pursuant to which SRNHL granted to Central a security interest in the undertaking and property of SRNHL, as set forth in the said General Security Agreement.

23 MacLean, on behalf of SRNHL, executed a written Guarantee and Postponement of Claim in favour of Central whereby SRNHL guaranteed payment to Central of all the debts and liabilities which MacLean has incurred or may incur with Central, with the liability of SRNHL limited to $7.5 million plus interest from the date of demand for payment.

24 Financing Statements were registered on behalf of Central under the Ontario *Personal Property Security Act* (the "PPSA") to perfect the security interests of Central in the personal property of SRNHL, MacLean and SRCL. In particular, Financing Statements were registered on January 29, 1991 on behalf of Central against SRNHL as debtor marking the collateral classifications "inventory",. "equipment", "accounts" and "other" for registration periods of five years. A Financing Statement was registered on behalf of Central against SRCL as debtor on January 28, 1991 for a five-year registration period marking the same collateral classifications. A Financing Statement was registered on behalf of Central against Hugh J. MacLean as debtor on July 29, 1988 marking the collateral classifications "equipment", "book debts" and "other". This registration was renewed on January 24, 1991 for a five-year period. Financing Change Statements were registered in respect of each of the aforesaid registrations to reflect the assignment by Central to Adelaide of the rights of Central against each of SRNHL, MacLean and SRCL.

25 A Promissory Grid Note dated March 13, 1991, was executed by MacLean on behalf of SRNHL in favour of Central whereby SRNHL acknowledged itself indebted and promise to pay on demand to Central the lesser of (a) the principal sum of $1 million; and (b) the unpaid principal balance of all advances made by Central to SRNHL; together with interest thereon.

26 The advances made by Central to SRNHL under this facility were repaid to Adelaide out of proceeds from the receivership of certain assets of MacLean, SRNHL and SRCL.

The Receivership of Certain Assets of MacLean & SRNHL

27 On March 3, 1992, on a motion made by Central, Dunnet, J. appointed the Receiver over certain assets of MacLean and SRNHL, including the Scarborough Property and the McNicoll Nursing Home and not including the Finch Ave. Licences.

28 By Order dated July 9, 1992, Lane, J. ordered that the Receiver be appointed Receiver of the interest of MacLean and SRNHL in the Finch Ave. Licences.

The Sale of the Scarborough Property and the McNicoll Nursing Home Assets to Tendercare Nursing Homes Limited

29 On October 26, 1993, the Receiver executed a purchase and sale agreement with Tendercare Nursing Homes Limited ("Tendercare") for a purchase price of $14.8 million (subject to adjustments) for the purchase of the Scarborough Property and the McNicoll Nursing Home and the McNicoll Retirement Home operations, excluding the Vacant Land. The Tendercare sale closed on May 19, 1994, resulting in a net payment of $13,471,624 to the Receiver (the "Tendercare Net Sale Proceeds"). Tendercare allocated the gross purchase price for the property and assets purchased by it from the Receiver to particular categories of property and assets (the "Tendercare Allocation").

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30 The following is the percentage of the gross purchase price which was allocated to particular assets as well as the dollar amount allocated to each of these categories, assuming that expenses are applied proportionately to each category of assets, pursuant to the Tendercare Allocation, based upon the Tendercare Net Sale Proceeds:

Property	Percentage	Allocation
Land	7.77	$ 1,046,745
Building	56.83	7,655,924
Equipment	4.66	627,778
Licence Rights	30.04	4,046,876
Food Inventory	.36	48,498
Non-Food Inventory	.34	45,803
	------	-----------
	100.00	$13,471,624

31 The Order of Ferrier, J. dated March 31, 1994 (the "Vesting Order") provided for the vesting of the Scarborough Property and the McNicoll Nursing Home assets, free of any and all other interest in such property and assets in accordance with the provisions of the Vesting Order.

The Sale of one of the Finch Ave. Licences to the Jewish Home for the Aged (the "JHA")

32 By Order of Borins, J. dated April 18, 1994, it was ordered that, on completion of the release of 100 nursing home beds issued to SRNHL pursuant to one of the Finch Ave. Licences to JHA, the Receiver pay to Adelaide the net cash proceeds received on the closing of the sale to JHA not earlier than thirty days after the date of the Order, unless otherwise ordered by the Court.

33 On or about May 24, 1994, the Receiver paid to Adelaide the sum of $1,750,000 representing the net cash proceeds from the sale of the said nursing home licence to JHA, in accordance with the Order of Borins, J.

The Settlement Between Adelaide and the Intervenors

34 Agreements were entered into between the Intervenors and by Adelaide as of June 16, 1994 and as of June 22, 1994. Additional agreements were entered into in September, 1994. These agreements are referred to as the "Agreements". The Agreements provide for, among other things, the assignment by the Intervenors to Adelaide of the Intervenor Indebtedness and the Intervenor Security; the allocation by Adelaide of the Tendercare Net Sale proceeds to particular debts and security in a particular sequence and the assignment by Adelaide to the Intervenors of the remaining Adelaide Indebtedness and Security upon satisfaction of certain conditions. The defendants are disputing the validity and effectiveness of the Agreements on various grounds.

Order of Mr. Justice Houlden dated June 28, 1994

35 On June 28, 1994, counsel for the parties attended before Houlden, J. on a motion brought by the Receiver for an Order authorizing the Receiver to pay to Adelaide the sum of $14,075,723 representing a portion of the Tendercare Net Sale Proceeds as well as an Order authorizing the Receiver to pay to Adelaide the net proceeds of sale, as and when received by the Receiver, of two of the Finch Ave. Licences (referred to in paragraph 35). Houlden, J. ordered, on consent of SRNHL, Richmond/Posesorski and 766915, that the Receiver pay to Adelaide the sum of $11,929,803.71. Houlden, J. directed that a trial be conducted in the Commercial Court to: "(i) determine the priorities to the balance of the proceeds in the hands of the Receiver together with additional proceeds to be received by the Receiver representing the net proceeds of sale of the licences for the 50 nursing beds to The Chinese Community Nursing Home of Greater Toronto (collectively, the "Remaining Proceeds") and (ii) to determine the allocation of the sum of $11,929,803.71 referred to in paragraph 4 above and the Remaining Proceeds". Houlden,

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J. also approved the Receiver's fees for the period May 9, 1994 to June 12, 1994 in the amount of $22,346.23 and the fees for the Receiver's legal counsel for the period May 1, 1994 to June 17, 1994 in the amount of $77,552.32. These fees were to be paid out of the funds held by the Receiver. There was no appeal from this Order. On July 28, 1994, after the expiry of the applicable appeal period, the Receiver paid the sum of $11,929,803.71 to Adelaide.

36 The sum of $11,929,803.71 is equivalent to the amount claimed by Adelaide to have been due and owing to it as of June 22, 1994, exclusive of the Intervenor Indebtedness.

The Sale of the Remaining two Finch Ave. Licences

37 On September 26, 1994, the Receiver completed the sale of the two of the Finch Ave. licences for 50 beds and received proceeds of sale of $910,000, which it continues to hold pending the outcome of this action.

The Vacant Land

38 The Vacant Land has been listed for sale by the Receiver since February, 1993. It remains unsold.

39 This concludes the agreed statement of facts submitted by the parties.

The Issues:

40

The Allocation Agreement:

41 The contested allocation is provided for in one of the Agreements dated June 16, 1994. The allocation provided for in paragraph (3) of the applicable agreement (the "Allocation Agreement) requires the Tendercare Net Sale Proceeds to be applied first to the Intervenor Indebtedness to the extent of those Proceeds received from the Receiver with respect to the land and secondly, to allocate the balance of those Proceeds against the Adelaide Indebtness in a prescribed sequence.

42 Counsel for the plaintiff made submissions in support of the validity of an agreement whereby one secured creditor of a debtor takes an assignment of secured indebtedness and security held by another creditor from the same debtor and the two creditors then agree as to the allocation of the proceeds to be received from the realization of the security thus assembled. In the event, counsel for the defendants attacked the Allocation Agreements only on the grounds dealt with below so it is unnecessary to deal with other arguments to which the submissions of counsel for the plaintiff would be considered apposite.

Status of SRNHL

43 The defendants contend that SRNHL is not a principal debtor in respect of the debts of MacLean to Central but only a covenantor or surety and that the claim of Adelaide against SRNHL will therefore not support the Allocation Agreement. To the extent that SRNHL is a guarantor, any claim against it would have to be asserted against it under the guarantee and this would give rise to subrogation rights in favour of SRNHL under s. 2(1) of the *Mercantile Law Amendment Act*. The terms of the two mortgages given by MacLean to Central, one in 1985 to secure $10 million and the other given in 1988 to secure $3.2 million, each provide that the covenantor, which is SRNHL, is to be "primarily liable to the chargor, as principal debtor and not as surety", so there is no deficiency in Adelaide's claim against SRNHL on this point. The covenants do not require the creditor to go against Mr. MacLean first before resorting to its rights against SRNHL. Whether subrogation rights could arise is a matter I am not required to decide.

Adelaide Indebtness

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44 The defendants contend that the Adelaide Indebtness was paid in full at the time when the Allocation Agreement was made and accordingly the Agreement could not be effective to create a new priority through the agreed allocation. This argument is considered below with respect to the loans which are comprised in the Adelaide Indebtedness.

1991 Credit Facility

45 The defendants say that all amounts owing under the March 13, 1991 Note from SRNHL to Central were paid in full November 1, 1993 and the security given for the loans under the Note was discharged. The plaintiffs do not dispute that the amounts were paid by November 1, 1993. However, it is clear from the terms of the security documents that they are not only security for amounts advanced under the Note with respect to the 1991 Credit Facility, Central had received security in the form of three licence assignments, a general security agreement, a general assignment of accounts receivable and a guarantee of SRNHL.

46 By letter dated March 13, 1991, Mr. MacLean, in his capacity of counsel to SRNHL, provided his opinion to Central that the three licence assignments, the general security agreement, the general assignment of accounts receivable and the guarantee by SRNHL of the debts of MacLean to Central constituted valid, legal and binding obligations of SRNHL enforceable by Central in accordance with the terms thereof.

47 Each of the three specific licence assignments expressly provides that the security interest granted by SRNHL was:

> a general and continuing security for the due and timely payment and satisfaction of all indebtedness, liabilities and obligations, present or future, direct or indirect, absolute or contingent, material or not, extended or renewed whensoever and howsoever incurred at any time owning or remaining unpaid by the Debtor [i.e. SRNHL] to the Secured Party whether arising from dealings between the Secured Party and the Debtor of from other dealings or proceedings in which the Secured Party may be or become in any manner whatever a creditor of the Debtor, and in any currency, and whether the Debtor is bound alone or with another or others, and whether as principal or a surety, and whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again

. . . . .

48 The general security agreement executed by SRNHL in favour of Central expressly provides that SRNHL grants to Central a continuing security interest in the collateral broadly defined in the GSA and a general and continuing security for the due and timely payment and satisfaction of the Indebtedness. The word "indebtedness" is defined in the GSA to mean:

. . . . .

> all debts, liabilities and obligations, present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wheresoever and howsoever incurred, at any time owing or remaining unpaid by the Debtor to the Secured Party whether arising from dealings between the Secured Party and the Debtor or from other dealings or proceedings by which the Secured Party may be or become in any manner whatever a creditor of the Debtor, and in any currency, and whether the Debtor is bound alone or with another or others, and whether as principal or a surety,

. . . . .

49 The payment of the amounts owing to Adelaide under the SRNHL credit facility do not operate to discharge the GSA and the licence assignments to the extent that SRNHL is still obligated to Central (now Adelaide) under other instruments. There is no basis whatsoever for this submission.

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50 The guarantee given by SRNHL to Central in respect of the debts of MacLean is, subject to its limitation of liability to $7.5 million, a "continuing guarantee" of all debts of MacLean on the terms set out in the guarantee.

51 The terms of the GSA include book debts as "collateral" and accordingly a general assignment of book debts given pursuant to the GSA would continue in force as security in the same way as the GSA itself. (It appears no copy of the assignment of book debts was included in the document brief).

The Vesting Order of March 31, 1994

52 The defendants argue that by reasons of the vesting order made by Ferrier J. on March 31, 1994 with respect to the Tendercare sale, the security interest of Adelaide in the property subject to the vesting order has been discharged and the proceeds held by the Receiver are held by it as trust funds for Adelaide, and that the amounts owing to Adelaide are therefore to be regarded as having been paid or satisfied to the extent of the amount received and held by the Receiver from the sale.

53 The vesting order vests title in the assets transferred to the purchaser free and clear of all claims of Adelaide an other named parties. The order does not contain any provision for distribution, unlike two other vesting orders in this matter (by Matlow J. dated December 9, 1993 and Borins J. dated April 18, 1994). The vesting order of Ferrier J. does not purport to deal with any security interest that Adelaide may have in the proceeds of the sale of the property over which it had held security.

54 The submission of the defendants does not reflect the legal effect of a receivership and a vesting order such as that granted by Ferrier J.

55 The appointment by the court of a receiver does not by itself alter title to the assets of the debtor. The receiver is an officer of the court and is not the agent or trustee of any party. The receiver simply takes possession of these assets with authority to deal with them in accordance with the powers conferred by the Court: *Bennett on Receiverships*, pp. 109-111; 117-119; *Re Jenny Lind Candy Shops*, [1935] O.R. 119 (S.C.).

56 The vesting order of Mr. Justice Ferrier is a standard form of order which simply permits the completion of the sale of assets which are in the possession of the receiver and vests title to such assets in the purchaser free and clear of any interest of the debtor or other party. Such a vesting order does not discharge the security held by the secured creditors. Where property is sold by the receiver, the proceeds of realization in the possession of the receiver take the place of the assets which were sold and become subject to the security interests of secured creditors. The entitlement to such proceeds is determined by the court, if contested, on a motion for distribution: *Bennett on Receiverships, pp. 154-158; 292-296, Plaintiff's Brief of Authorities, Tab 4A*.

57 Nothing in the terms of the receivership orders of Dunnet J. dated March 3, 1992 and Lane J. dated July 9, 1992 (to the extent applicable) is inconsistent with this analysis of the legal effect of the receivership and the vesting order of Ferrier J.

58 Accordingly the vesting order of Ferrier J. did not have the effect of discharging the security interest of Adelaide in the proceeds of sale or of satisfying the debt then outstanding at March 31, 1994 with respect to which that security interest was held.

Condition Precedent

59 The Allocation Agreement contains the following provision in paragraph 11:

> This Agreement and the assignments provided in paragraphs (1) and (4) hereof are conditional upon a final order of the court approving the distribution to Adelaide of the Scarborough Net Sale Proceeds and the proceeds of the Spencer Licenses on the application for distribution contemplated in paragraph (c) hereof;

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if such joint approval is not given, then this Agreement and the said assignments shall be null and void and the parties shall be entitled to pursue all remedies otherwise available to them against any or all of the Defendants. If any objection is made at any time to such proposed or completed distributions in relation either to Adelaide's reliance on its right of allocation pursuant to paragraph (3) hereof or the right of the Bluestein Companies to receiver any portion of the Remaining Adelaide Indebtedness pursuant to paragraph (4) hereof, or otherwise as to any matter of substance reasonably related to these matters, then the Bluestein Companies shall at their discretion be permitted by Adelaide to use the name of Adelaide (jointly with that of the Bluestein Companies as assignors) through counsel appointed by the Bluestein Companies either to justify the availability of rectification of the SRNHL GSA as recited in paragraph 12 hereof or to seek formal rectification of such security as assigned to Adelaide.

60 Paragraph 9(c) of the Allocation Agreement provides as follows:

Forthwith upon the execution of this Agreement, Adelaide will:

(c) Request the Receiver to make a joint application to the court both for distribution of the Scarborough Net Sale Proceeds and the net sale proceeds of the Spencer Licenses as and when and received by the Receiver pursuant to the approval already given by the court for such sale;

61 The defendants contend that there has been no final order of the court as required by paragraph 11 and accordingly the Allocation Agreement is null and void.

62 Specifically, it is contended that the motion that was brought on June 28, 1994 for an order authorizing the payments out of Tendercare Net Proceeds resulted in a disposition which did not satisfy the condition in paragraph 11. The substance of the order made by Houlden J. is set out above under "Background Facts".

63 As I understand it, the order of Houlden J. dealt with all of the proceeds referred to in paragraph 11 of the Allocation Agreement. No final order was made, either of approval of the distribution, or of disapproval. Instead Houlden J. ordered a trial of an issue as to priorities and allocation and the present proceeding is the trial so ordered. The condition in paragraph 11 must be interpreted reasonably as meaning "if the court refuses to grant a final order for the distribution to Adelaide". The order of Houlden J. did not constitute such a refusal and no such refusal has yet occurred. Indeed, it is the final order which will result from the present proceedings which will either satisfy the condition or show that it has failed. If the order were such that it could be argued that the condition had failed, it would be necessary to deal with the question whether the condition was effectively waived by the subsequent agreement between Adelaide and the Intervenors in September, 1994 for that purpose. That question can be deferred at this stage.

Usurpation of Jurisdiction of Court, etc.

64 The defendants argue that the Allocation Agreement usurps the jurisdiction of the court and is improper on other grounds as well.

65 The orders of Dunnet J. and Lane J. both contain a stay provision that "no legal actions, administrative proceedings, self-help remedies or any other acts or proceedings including without limitation, the filing of any construction lien

. . . . .

shall be asserted, taken or continued against the defendants or the Receiver and Manager

. . . . .

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without leave of the court". Since the Allocation Agreement is now before the court and it will have application only with the approval of the court, if given, I cannot see how the stay provision can be said to have been breached.

66 Counsel for the defendants said that only the assignment from the Intervenors to Adelaide and not the Allocation Agreement was brought to the attention of the court on the motion on June 28, 1994. That may be so, and one wonders why, but the Allocation Agreement is here now and I cannot see why that is not enough. The defendants object to the fact, recited in the Allocation Agreement that no proceeds had been distributed by the Receiver and Manager pending the execution of the Allocation Agreement but the Receiver and Manager had no distribution order to authorize a distribution. Objection was also taken to the control rights given to the Intervenors under the Allocation Agreement, but these rights seem simply to be designed for the proper protection of the interests of the Intervenors under the Agreement. No case of maintenance is evident to me.

Lack of Consideration

67 The defendants argue that the only consideration given by the Intervenors is their forbearance to sue and that is not good consideration because their claim is frivolous and vexatious. Recital 12 to the Allocation Agreement states as follows:

> *AND WHEREAS* in the course of discussion between the Bluestein Companies and Adelaide, and their respective solicitors, Adelaide has become satisfied by evidence presented to it by the solicitors for the Bluestein Companies that the Bluestein Companies would be entitled to obtain an order rectifying the SRNHL GSA so as to charge in favour of the Bluestein Companies the nursing home license for about 150 beds for the Scarborough Property and the proceeds of sale thereof and the proceeds of sale of a nursing home license for about 100 beds for a former SRNHL property in Kitchener, Ontario, subject to the priority of Adelaide over the Bluestein Companies in respect of the nursing home licenses and receivables of SRNHL for the Scarborough and Kitchener Properties operated by SRNHL;

68 Counsel for Adelaide contends that if the Intervenors were successful in obtaining rectification, the rectification would be granted with an effective date as of the date of the original documents held by the Intervenors which was in July 1990. The rectification would apply to the Intervenors' registration under the *Personal Property Security Act* which was made at that time, and would thereby perfect their security interest in the licences at a time some months prior to the time in 1991 when Central or Adelaide registered its security interest in the licence, thus giving the Intervenors priority over Adelaide in respect of the licences, (except perhaps with respect to $700,000 of indebtedness owing to Adelaide). For the purpose of the issue of consideration, I am not required to decide whether this argument would prevail. It seems to me that, at the very least, it is a sufficiently plausible argument that the prospect of a legal contest over the matters would give Adelaide a good reason to reach a settlement with the Intervenors, which is what happened.

Conclusion

69 For the reasons given above, none of the objections made to the Allocation Agreement prevails and it is therefore to be regarded as a valid agreement and to be given effect to accordingly.

Rectification

70 The plaintiff seeks rectification of the general security agreement dated July 20, 1990 given by SRNHL in connection with the Intervenor Indebtness. The GSA provided for a charge over the "Goods, Equipment and Inventory" (as defined) of SRNHL. It did not also charge other assets and the undertaking of SRNHL, including in particular its nursing home licences. The plaintiff seeks rectification of the GSA so that there will be charge on all assets and the undertaking, including the nursing home licences, and they seek rectification in certain other respects

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as well. The claim for rectification is based principally on the contention that the loan commitment letter dated June 25, 1990 contemplated security which would have included the licences and this security was never granted.

71 The commitment letter provided for security which was to include:

> "(i) "mortgage on 1020 McNicholl Ave., Toronto, and a floating charge debenture on the Nursing Home Operation", subject to the existing first and second mortgages," and
>
> "(ii) mortgage on Kitchener Nursing Home, 2727 Kingsway Dr. and a fixed and floating charge debenture", subject to the existing first mortgage."

72 The commitment was conditional on various matters including the borrower supplying to the lender proof of "licensing for 254 beds and 150 beds respectively" for McNicholl and Kitchener. The words in quotation marks were added by Mr. MacLean in substitution for the words which had earlier appeared in the letter, "compliance with all governmental regulations"; these words were deleted.

73 The plaintiff now seeks rectification of the GSA to add to it a charge on the undertaking, property and assets used in and forming part of the two nursing homes, including the licence for each home and the proceeds thereof. The plaintiff also seeks rectification of the GSA to show as the lenders and secured parties, all four of the Intervenors and not only the two (Minicorp and Presidential) who are actually so shown. The plaintiffs claim that the omission of the other two (Yonge Crescent and Sugarman) was an oversight. Oversight is also said to be the cause of the third matter requiring rectification, which is the omission of three lines of standard text from paragraphs 14(o) and (p) of the document as executed. The plaintiff submits that the GSA, as rectified, should be in the form annexed to the Statement of Claim as Schedule B.

Law

74 The remedy of rectification is available where there is an agreement antecedent to the document sought to be rectified or where there is evidence of a continuing common intention in regard to the particular provision in question, and where the concluded instrument does not represent the parties' common intention, as evidence by their outward expressions of intent or by the antecedent agreement. *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.)at 295-296.

75 The following statement of Lord Denning from his reasons for judgment in *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 All E.R. 739 (C.A.) has been approved by the Ontario Court of Appeal:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. *Brisebois c. Chamberland* (1990), 77 D.L.R. (4th) 583 (Ont. C.A.).

76 The onus of proof and the standard of proof was summarized by Mr. Justice Eberle in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* as follows:

> In passing, I observe that some of the cases have suggested that the onus of proof on a party seeking rectification is "proof beyond a reasonable doubt" although others have placed the onus at an apparently lower level with the use of such language as "convincing proof" or "irrefragable". It does not appear to be wise to import from criminal law a phrase such as "beyond all reasonable doubt". I prefer the phrase "convincing

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> proof" as used in the *Joscelyne* case, for it imports the notion that the evidentiary standard is high in keeping with the seriousness associated with a claim for rectification

. See *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.*, ante and *Joscelyne v. Nissen*, [1970] 2 Q.B. 86 (C.A.), 86 (English C.A.) at p. 296.

77 The burden on a party seeking rectification was summarized by Mr. Justice Anderson in the *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 39 B.L.R. 44 (Ont. H.C.) at p. 61. He refers to the statement of Brooke, J.A., writing for the court, in *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57 (C.A.) at 64-65, as follows:

> In order for a party to succeed on a plea of rectification, he must satisfy the court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the court being asked to speculate about the parties intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement. The court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done:

. . . . .

Facts

78 The parties did not exchange any document other than the commitment letter concerning their agreement as it relates to the security in issue. Evidence was led concerning the actions taken by Mr. Sugarman to implement the transaction in accordance with the commitment letter.

79 Evidence was also given concerning oral communications between the parties. Mr. Bluestein for the Intervenors said it was always his intention that the security should cover the licences so that, if a default occurred, the nursing homes could be sold as a going concern. He said he might have discussed this position with John Lennox (who acted as agent for MacLean and himself in negotiating the loan transaction with the Intervenors) but he could not recall if he had actually done so.

80 It appears to me that Mr. MacLean acted throughout the loan transaction in at least two capacities: his own personal capacity and as the authorized representative of SRNHL as circumstances required. I did not discern any dispute between counsel on this matter. On the evidence adduced, it would be reasonable to conclude that Mr. MacLean had at least apparent authority to act on behalf of SRNHL at all relevant times.

81 Mr. McLean said he never met with Mr. Bluestein and did not recall any discussion concerning the security extending to the licences.

82 Mr. Lennox's evidence was that, in the course of the loan negotiations, Mr. Bluestein made it clear to him that the Intervenors wanted comprehensive security over the two nursing homes so that they would be able to sell them on an operating basis. He stated he always understood the Intervenors wished to have such security, including security over the licences. Mr. Lennox also stated that he told Mr. MacLean that the Intervenors wished have security over the licences and Mr. MacLean said that such security might not be valid because the licences could not be transferred without government approval. The evidence of Mr. Lennox concerning these matters is not contradicted by the other witnesses, and I accept it.

83 Considering only the text of the relevant parts of the commitment letter and the GSA it would have to be concluded that the parties agreed to a charge which would include the licences and then incorrectly completed this transaction with an instrument that did not grant such a charge. The phrase a "floating charge debenture on

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the Nursing Home Operations" is not qualified by any specification or limitation, so it is reasonable to interpret it as meaning a debenture security upon all of the assets and the undertaking used in the business, including the licence. The phrase used in respect of the Kitchener home refers only to a "fixed and floating charge" and does not have the words "Nursing Home Operations" but, in view of the context, I see no reason to interpret it differently. The communications between the parties, as described in the evidence of Mr. Lennox, are consistent with the conclusion that a comprehensive charge was intended and therefore that the GSA was incorrectly limited.

84 For the defendants it was objected that Mr. Wortzman, the lawyer for Sandhill Mortgages, a mortgage broker involved in the transaction, was not called to give evidence. Mr. MacLean said he told someone, possibly Mr. Wortzman, that there was an issue whether a debenture could be given by an individual, but this issue could properly be raised whether or not licences were to be included in the charge. This by itself does not amount to a reason for concluding that the plaintiff has failed to meet the burden of proof. The defendants raised an objection concerning the failure to call Mr. Carr who signed the commitment letter for the Intervenors. There was no evidence to suggest that Mr. Carr has relevant evidence to give about any communications with Mr. MacLean or Mr. Lennox or anyone on their behalf.

85 Evidence was led as to how it happened that the GSA was drafted in a form that applied only to goods, inventory and equipment. Mr. Sugarman's evidence was to the effect that this happened through an oversight on his part which involved and was compounded by his use of an inappropriate precedent. His evidence withstood cross-examination. Counsel for the defendants sought to make a case that the Intervenors were eager to complete the transaction promptly so as not to lose the loan deal, and for that reason decided just to take the specific charges contained in the GSA, without more. The evidence relating to this contention was too fragmentary to support it.

86 In any case, there was no evidence of any communication between the Intervenors and Mr. MacLean as to any proposed alteration or amplification of the security other than that there would be a GSA (instead of a debenture) and an assignment of rents and a guarantee by SRNHL of the debts of Mr. MacLean and a subordination by SRNHL of its claims against Mr. MacLean in favour of the Intervenors. It appears these were put forward as standard documents to implement the loan transaction and were treated as Mr. MacLean was unexceptionable.

87 Against this background, the question to be asked is this: is there anything in the circumstances of the transaction which would give Mr. MacLean reason to believe that the restriction of the GSA in a way that excluded the licences was more likely to be an intentional alteration on the part of the Intervenors than an oversight? Since the GSA came to him from lenders and their lawyer who might reasonably be supposed to be very experienced in lending transactions, it is arguable that Mr. MacLean might reasonably have thought that the GSA must set out what they intended in the way of security. On the other hand, he knew or had reason to know from Mr. Lennox that the Intervenors wished security over the operating business and no reason has been suggested why he might properly suppose they had changed their intentions in that regard. Clearly they had made other changes in the security package but all of those changes enhanced the position of the lenders and there was no indication given to Mr. MacLean that these were to be regarded as trade offs balanced by a reduction in the scope of the charge.

88 On this basis I conclude that Mr. MacLean, representing SRNHL, could not have held any reasonable expectation that the restricted scope of the GSA was more likely to be intentional than an oversight. Accordingly, there is no basis for refusing to grant the rectification which the plaintiffs seek. The plaintiffs are entitled to rectification.

Security on Nursing Home Licenses

89 The defendants contend that the proposed rectification is not in order because a nursing home license issued under the *Nursing Home Act* is not property that can be mortgaged. They refer to the decision in *20991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 39 B.L.R. 44 (Ont. H.C.) at p. 52, where it was stated that a nursing home licence:

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> Whatever the nature of the interest, rights or privileges which it comprises or represents, is not property which can be mortgaged.
>
> . . . . .
>
> Whatever the legal nature and incidents of the creature may be, one thing is clear from the statute which calls it into existence: it is not transferable. That, in my view, is fatal to the claim under the chattel mortgage.

90 The relevant provisions of the *Nursing Home Act*, R.S.O. 1990, c. N. 7 as amended have not changed during the period in question. They are as follows:

> 1.(1)(j) "security interest" means an agreement between a person and a licensee that secures the licensee's payment or performance of an obligation by giving the person an interest in the license.
>
> 4. No person shall establish, operate or maintain a nursing home except under the authority of a license issued by the Director under this Act.
>
> 5.(1)
>
> . . . . .
>
> any person who applies in accordance with this Act and the regulations for a license to establish, operate or maintain a nursing home and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the license.
>
> (7) Subject to section 15, the Director may refuse to issue a license
>
> . . . . .
>
> (9) A license is not transferable.
>
> 10.(1) A person who has a security interest in a license shall not exercise that interest without the approval of the Director if exercise of the interest would change the ownership or controlling interest in the license.
>
> (2) In deciding whether to approve an exercise of a security interest under subsection (1), the Director shall treat the person seeking to exercise the interest as if the person were an applicant for a license and subsection 5 (1) (2) and (5) and clauses 5 (7) (b), (c) and (d) apply with necessary modifications.
>
> 13. The Director may revoke or refuse to renew a nursing home license.
>
> . . . . .

91 It seems clear that the provisions of the Act expressly contemplate the creation of a security interest in a license while at the same time they make a license non-transferable. It appears that the scheme of the statute is not offended by recognizing the validity of a security interest so long as that recognition is not treated as authorizing a transfer of the license which would be contrary to the statute. It was not suggested that there has been any purported transfer of the licenses to a third party in contravention of the provisions of the Act.

92 In any event, this issue was squarely before Lane, J. when he ordered that the Receiver be appointed over all of the defendants' interest in respect of the Finch Avenue Licences with power to sell the licences. This order was opposed by MacLean and SRNHL. They did not seek leave to appeal this order. The issue determined by Lane, J. is now final and binding on MacLean and SRNHL. They are estopped by the doctrines of issue estoppel and *res judicata* from now asserting that the order of Lane, J. was wrongly made.

93 Further, the order of Houlden, J. on June 28, 1994 authorized the payment to Adelaide of an amount equivalent to the Original Adelaide Indebtedness which included proceeds from the sale of the McNicoll licence. This order was consented to by SRNHL. SRNHL is now estopped from denying that a security interest in licences can be lawfully taken.

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Security on Nursing Home Licences

94 The defendants dispute that the GSA which SRNHL Homes Limited entered into with Central in connection with the 1991 Credit Facility provided security upon the Finch Avenue licenses and they accordingly submit that Lane, J. wrongly included those licenses among the assets under the control of the Receiver.

95 The order of Lane, J. was made after hearing the submissions of counsel for MacLean and SRNHL and provides, among other things, as follows:

> 1. THIS COURT ORDERS that effective at 2:30 p.m. July 9, 1992, Coopers & Lybrand Limited be and is hereby appointed Receiver and Manager, without security, of all of the defendants' interest in respect of the licences issued to St. Raphael's Nursing Homes pursuant to the *Nursing Homes Act*, numbers 2279, 1142, 0941 (the "Licences") with power to sell the licences.

96 Neither MacLean nor SRNHL sought leave to appeal this order. The order is valid and binding in every respect.

97 In his written reasons, Lane, J. expressly addressed the issue of whether the Central general security agreement provided for a security interest in the Finch Avenue Licences. Lane, J. concluded as follows:

> The three licences are part of the debtors' undertaking pledged as security and are properly subject to the remedies provided n the GSA. It appears on the evidence that they have recently been renewed upon terms that they be activated by 1994 and they are therefore potentially of diminishing value. It is just and convenient that the Receiver take possession of them and realize upon them.

98 MacLean and SRNHL are now estopped from asserting that the Order of Lane, J. was wrong as a result of the doctrines of issue estoppel and *res judicata*.

99 In any event it is doubtful that this matter is properly raised here having regard to the limited scope of the order of Houlden J. which is the basis for the present proceedings.

Orders Sought by the Defendants

100 1. The defendants seek an order that the Receiver is to pay to SRNHL all monies held by the Receiver. No basis for this order has been established. As noted below, the order that is appropriate is for a distribution in accordance with the Allocation Agreement. If a distribution on that basis could give rise to rights in favour of SRNHL in the event that a balance remains with the Receiver after distribution in accordance with the Allocation Agreement, the defendants may seek an order on to the proper distribution of that balance.

101 2. The defendants seek to have delivered to SRNHL title to the 5.54 acre parcel or the net proceeds from the sale of that property. As I understand it, the present proceedings are for the purpose of determining the proper distribution of the Tendercare Net Proceeds and neither the 5.54 acre parcel nor the amount of its sale proceeds is included in the Tendercare Net Proceeds so the requested order is not a matter for decision here.

102 3. The defendants seek a reference "to determine the precise claim under the limited SRNHL $7,500,000 guarantee and the allocation of assets, income and expenses attributable to Mr. MacLean or SRNHL". The defendants argue that there had never been a valuation of the goodwill of the business and this necessitates a reference. This argument appears to be beside the point. These proceedings are for purposes of determining the proper distribution of the Tendercare Net Proceeds. The amount of those proceeds has been generated by a sale of the business and it is whatever it is, regardless of whatever someone else might say is the fair value of the business. I understand that the parties have agreed on the allocation of the assets as between the real property and the other assets involved. The request for a reference is premised on the contention that the SRNHL guarantee

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obligation is limited to $7,500,000 but this takes into account only the guarantee given in 1991 and not the two earlier covenants given by SRNHL in connection with the borrowings in the 1985 and the 1988 loans in respect of which SRNHL is liable as a principal debtor under the terms of the covenants given by it. Under those covenants, the creditor could assert its claims against the principal debtors in the order it chooses without being required to go against Ms. MacLean first. Counsel for the plaintiff asserted that after all available security has been realized upon, the amounts owing to Adelaide and the Intervenors will not have been fully paid off, so it appears that any question of subrogation will be moot. In any event, if such a subrogation claim is available it could be presumably be initiated by separate proceedings and a reference could be sought if necessary.

Amount Owing

103 The Agreed Statement of Facts states that the defendants have not admitted the indebtedness claimed to be owing in respect of the debt to the Intervenors. The arguments of fact and law raised by counsel for the defendants did not appear to go to the calculation of the amount owing but rather the extent of the obligation of SRNHL and the security for that obligation.

104 The plaintiffs provided evidence as to the computation of the indebtedness which did not appear to be challenged. Accordingly, I conclude that the amount claimed by the plaintiff as owing in respect of the Intervenor Indebtedness should be determined to be correct. If the submissions made by the defendants in these proceedings were intended to be understood as challenging the computation of the indebtedness, they may make submissions to that effect.

Conclusion

105 For the reasons given above, orders are to go in favour of the plaintiff as requested in paragraphs 1(a), (c) and (d) in the Statement of Claim, subject in respect of paragraph 1(d) as set out below and subject to any submissions the defendants may make in accordance with the comments above under "Amount Owing". The intent of the orders is that the distribution of all proceeds shall be on a basis that gives effect to the Allocation Agreement. In view of this order, it is not necessary to make an order as requested in paragraph 1(b) of the Statement of Claim, for the rectification of the General Security Agreement, but such an order would have been appropriate if no order were made as requested in paragraph 1(a). In consequence, the amount is to be paid to the plaintiff are to be the total of all the amounts now owing to Adelaide on both its acquired debt and its assigned debt. In the unlikely event that the amounts available for distribution under paragraph 1(d) of the order exceed the amounts owing to the plaintiff, the excess should be paid to the other interested persons as their interests may appear. The order with respect to paragraph 1(d) is to reflect that contingency if any of the defendants so request.

106 Counsel may make submissions as to costs.

Action allowed.

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Schedule "B" – Statutory Provisions

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3, sections 2, 243(1) and 243(1.1)**

Definitions

2 In this Act,…

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice;

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

Court may appoint receiver

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

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

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

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

***Courts of Justice Act*, RSO 1990, c C.43, s. 101**

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

***Land Titles Act*, RSO 1990, c L.5, s. 62**

Trusts not to be entered

62 (1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration. R.S.O. 1990, c. L.5, s. 62 (1).

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DUCA FINANCIAL SERVICES CREDIT UNION LTD.	-and-	10503452 CANADA INC. et al.
Applicant		Respondents

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT **TORONTO**

FACTUM OF THE APPLICANT

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Timothy R. Dunn (LSO #34249I)
Tel: (416) 597-4880
Email: tdunn@blaney.com

Alexandra Teodorescu (LSO #63889D)
Tel: (416) 596-4279
Email: ateodorescu@blaney.com

Lawyers for the Applicant