APPENDIX "K"

REPORT OF FRASER MILNER CASGRAIN LLP
REGARDING CERTAIN FUNDS HELD IN TRUST
BY MCCARTHY TETRAULT LLP IN CONNECTION WITH UNIT SALES BY
THE ROSSEAU RESORT DEVELOPMENTS INC.

(DECEMBER 7, 2009)

A. INTRODUCTION

This report is prepared further to the second report of Alvarez & Marsal Canada ULC, as Court appointed receiver and manager pursuant to the *Courts of Justice Act* and *Construction Lien Act* Trustee and Alvarez & Marsal Canada Inc. (formerly McIntosh and Morawetz Inc.) as interim receiver pursuant to the *Bankruptcy and Insolvency Act* of the assets of the Rosseau Resort Developments Inc. ("**RRDI**"), dated July 3, 2009 (the "**Second Report**") which reviews certain matters in relation to amounts held in the trust account of McCarthy Tetrault LLP ("**MT**") which were excluded from the definition of "net closing proceeds" in the joint undertakings given by MT and RRDI in favour of its mortgage lenders (the "**Joint Undertakings**").

The Second Report summarizes the itemized deductions from the net closing proceeds to be remitted to WestLB AG, Toronto Branch as agent for the syndicate of lenders (collectively the "**Lenders**") pursuant to the Joint Undertakings and the Second Report states at paragraph 9.5 that MT is holding $1,411,626.66 on account of the Closing Costs Holdback, as defined in paragraph 1(c)(ii) of each Joint Undertaking, in respect of the 73 unit sale transactions that have closed. The Second Report further states at paragraph 9.13 that MT advises that it is holding the following amounts in its trust account:

(a) $15,418.50 of GST on account and $92,806.08 on account of RST, as contemplated in paragraph 1(c)(i) of each Joint Undertaking;

(b) $211,880.32 representing amounts collected from purchasers on account of estimated realty taxes to be held in trust by MT for such purchasers to be applied against such purchasers' future realty tax liability, as contemplated in paragraph 1(c)(iii) of each Joint Undertaking;

(c) $3,263.58 on account of the remaining balance Red Leaves Resort Association (the "**Resort Association**") entry fee (the "**Resort Entry Fee**"), as contemplated in paragraph 1(c)(iv) of each Joint Undertaking; $48,401.20 was remitted by MT to the Resort Association by two cheques, one dated April 7, 2009 in the amount of $14,968.14 and another dated May 11, 2009 in the amount $33,433.06;

(d) $4,704.00 on account of Marriott Gold Membership fees (the "**Marriott Gold Membership Fees**"), as contemplated in paragraph 1(c)(vi) of each Joint Undertaking;

(e) $26,444.55 on account of the fees in relation to the Resort to Resort membership (the "**Resort to Resort Fees**"), as contemplated in paragraph 1(c)(viii) of each Joint Undertaking;

(f) $1,134,407.35 on account of condominium common expenses, as contemplated in paragraph 1(c)(ix) of each Joint Undertaking;

(g) $210,000.00 on account of proposed indulgence cards for use at the resort (the "**Indulgence Cards**"), as contemplated in paragraph 1(c)(vii) of each Joint Undertaking; and

(h) the following amounts as contemplated in paragraph 1(c)(v) of each Joint Undertaking:

  (i) $20,813.62 for realty taxes;

  (ii) $37,751.32 for common expenses;

  (iii) $5,670.00 for telecommunication fee; and

  (iv) $2,812.95 for basic annual fee to the Resort Association.

The Second Report notes that the Receiver has received an opinion from one of its legal counsel that a trust was created that provided for the Closing Costs Holdback, as described in paragraph 1(c)(ii) of each Joint Undertaking, to be used to satisfy certain obligations in respect of closing costs with the remainder to be paid to WestLB, and that a trust exists for the items in paragraphs 1(c)(i) and 1(c)(iii) of each Joint Undertaking (referred to in (a) and (b) above). However, it was determined that further review would be required to determine whether RRDI has claims with respect to the balance of the funds.

We understand that there is confirmation that the Resort to Resort Fees were previously paid by RRDI from other funds, prior to unit closings, and accordingly, there are no claims by other parties with respect to the funds described in paragraph (e) above.

Our analysis of the other amounts is set out below, including our view as to whether the funds are held in trust for the benefit of unit purchasers, RRDI or any other parties.

This report summarizes information and analysis with respect to the incentive categories identified in the existing materials with no reference to individual unit numbers. A detailed supplemental report will also be provided to summarize the details with respect to individual units.

B. OVERVIEW OF CONCLUSIONS AND RECOMMENDATIONS

There may have been an intention by RRDI to create trusts for the benefit of purchasers or third party service providers for specified purposes to which portions of the closing funds paid by unit purchasers were to be contributed. However, for the reasons described below, we are of the view that (i) such trusts were not created with respect to the following funds; (ii) that the following

funds are held by MT in trust for RRDI; and (iii) we recommend that an order be sought that MT pay these funds to the Receiver:

(a) $3,263.58 being the remaining balance shown as being held on account of the Resort Entry Fees;

(b) $4,704.00 shown as being held on account of Marriott Gold Membership Fees;

(c) $703,935.77 shown as being held for condominium common expenses for 30 units for which there is an agreement by RRDI as tenant under a lease to pay common expenses as and when they become due[1];

(d) $210,000.00 shown as being held on account of Indulgence Cards; and

(e) the following amounts shown as being held in respect of prepaid expenses under the modified sale/leaseback transactions:

  (i) $20,813.62 for realty taxes;

  (ii) $5,670.00 for telecommunications services fee; and

  (iii) $2,812.95 for basic annual fee to the Resort Association.

With respect to the following amounts, shown as being held for condominium common expenses, we are of the view that such funds are held in trust by MT for Muskoka Standard Condominium Corporation No. 62 (the "**Condominium Corporation**"), in accordance with Section 78(1) of the *Condominium Act, 1998* and we recommend that the Receiver request the Court's direction for MT to pay these funds to the Condominium Corporation:

(a) $430,471.58 with respect to the condominium expenses for 23 units, for which the purchasers and RRDI agreed to the Common Expense Subsidy in the applicable agreement of purchase and sale; and

(b) $37,751.32 in respect of condominium common expenses under the modified sale/leaseback transactions for 2 units.

C. FACTS AND ASSUMPTIONS

We assume that the MT Chart titled "Calculation of McCarthy Tetrault LLP Payment to WestLB" (the "**MT Chart**") provided to us by MT constitutes an accurate description of the total amount of funds held in respect of each unit. We also assume that the categorization of the amounts for each unit into separate columns in the MT Chart reflects the instructions provided by RRDI to MT as set out in Schedule "B" to each of the Certificates given by RRDI to Lenders pursuant to certain conditions set out in the Credit Agreement dated February 1, 2007 (the

[1]For these units, there is no Common Expense Subsidy contained in the agreement of purchase and sale, except in the case of one unit where the parties entered into a lease and an agreement with a Common Expense Subsidy, as described in Footnote 20, at Section H.3(a) below.

"**RRDI Certificates**"). We are also relying on the agreement of purchase and sale and lease for each unit and statement of adjustment documentation for these units where it was provided to us. We have been provided with all RRDI Certificate Schedule B documentation documents and all statements of adjustments.

In addition, we received the following information from MT in recent e-mail correspondence:

- The amounts listed as Resort Entry Fees in the MT Chart include the entry fees payable by both purchasers and RRDI, but the only references in the statement of adjustments for each unit were to the purchaser's portion of the entry fee.

- Purchasers were not informed of the holdbacks or any trust arrangements, except where specifically required by the applicable agreements of purchase and sale.

- The arrangements (and the reasons for them) were thoroughly discussed by RRDI's counsel and Lenders' counsel. Most of the communications were oral, although the charts were prepared and circulated to all on a daily basis once closings commenced.

- The holdbacks for condominium common expenses and for Indulgence Cards were held back pursuant to instructions received from RRDI as documented in the Schedule "B" documents.

We have also received further e-mail correspondence from MT regarding background for the Indulgence Cards and we have been informed generally by MT regarding discussions between RRDI and MT regarding the arrangements. Finally, we have received information from e-mail correspondence between Ari Katz of Blakes and Kristi Panko of RRDI dated July 6, 2009 regarding certain incentive items (the "**Panko/Katz e-mail**").

Other than as set out herein, we have not reviewed any other collateral or related documentation or correspondence with the purchasers or their solicitors in respect of the relevant incentive items.

D. THE FUNDS

The MT Chart contains a row for each closed unit and columns for various items, including separate columns corresponding to each of the "purchasers incentive" items discussed in this report. The amounts shown in each cell correspond to the amounts set out in Schedule B to each RRDI Certificate.

We note that after comparing the MT Chart to the agreements of purchase and sale, leases and related documents that were provided to us for review, there are some discrepancies in certain amounts. For example, amounts are shown as held back in the MT trust account for a particular incentive for a particular unit, where the sale/lease documents (as provided to us) for the unit do not include any reference to the incentive. We understand from the Panko/Katz e-mail correspondence that some of these incentives may have been discussed with purchasers but never documented. This may have implications as to the accuracy of the calculations used for

Schedule "B" to each RRDI Certificate and the consequent payments to Lenders based on these calculations. However, further evidence may be available showing the basis for these amounts. In any event, for the purposes of this report, we have assumed that the amounts in the MT Chart are an accurate record of the funds currently held in the MT trust account and the basis used for deduction of these amounts in each case from the net sale proceeds pursuant to the Joint Undertakings.

E. THE JOINT UNDERTAKINGS

Pursuant to the Joint Undertakings, RRDI and MT agreed that as long as any amounts continued to be owed to the Lenders under the Lender's security, MT would remit the Net Closing Proceeds (as defined in the Joint Undertakings) received by MT in connection with the final closing of each unit sale transaction to the Lenders within one (1) business day after receipt.

As defined in the Joint Undertakings, "Net Closing Proceeds" for any unit means the balance due on closing in accordance with the final statement of adjustments for the sale of that unit less certain items including the following, each of which will be addressed separately in the sections below:

(a) The entry fees agreed to be paid by RRDI pursuant to the applicable sales agreement payable to the Resort Association on behalf of the purchaser and RRDI (0.5% of the unit's sale price).

(b) The amount agreed to be paid by RRDI pursuant to the applicable sale agreement to cover the fees payable for Marriot Gold membership for a two (2) year period as listed on the Spreadsheet (as defined in the Joint Undertakings).

(c) The value of the Indulgence Card agreed to be issued pursuant to the applicable sale agreement to the purchasers of the units as shown on the Spreadsheet with such amount to be paid by MT to RRDI to be held in trust and applied to satisfy amounts charged against the Indulgence Card.

(d) The amount of common expenses agreed to be paid by RRDI pursuant to the applicable sale agreements on behalf of the purchasers of those units as listed on the Spreadsheet to be paid by MT to the Condominium Corporation for credit to the accounts for those units.

(e) The amounts agreed to be paid by RRDI pursuant to the applicable sale agreements in respect of certain of the Hotel Units as follows:

    (i) The estimated realty taxes attributable to the unit covering the three (3) year period following occupancy date to be paid by MT to the Township of Muskoka Lakes for credit to the tax account for the unit.

    (ii) The estimated common expenses attributable to the unit for the period from the closing date until the third anniversary of the occupancy date to be paid by MT to Muskoka Standard Condominium Corporation No. 62 for credit to the account of that unit.

(iii) The estimated fees for Telecommunication Service attributable to the unit for the period from the closing date until the third anniversary of the occupancy date to be paid by MT to the Rental Pool Manager, Rosseau Resort Management Services Inc., in trust, for credit to the account for that unit.

(iv) The basic annual fee payable to the Resort Association for the three (3) year period following occupancy date to be paid by MT to the Resort Association for credit for that unit.

The Joint Undertakings also include the following trust language in connection with realty tax amounts, which are excepted from "Net Closing Proceeds":

> "amounts collected from purchasers on account of estimated realty taxes which shall be held in trust by McCarthy and paid to the Township of Muskoka Lakes to be applied against the realty taxes attributable to the unit (including realty taxes pursuant to a supplementary tax bill when issued);" [emphasis added]

Similarly, the Joint Undertakings define the "Closing Costs Holdback", as a further exception from the Net Closing Proceeds, and provide the following trust language:

> "The Closing Costs Holdback shall be held in trust by McCarthy deposited into an account to be specified by WestLB (which shall be pledged in favour of WestLB) and shall be used to pay closing costs comprised of brokerage commissions and other reasonable closing costs (including legal fees and disbursements) subject to the prior approval of WestLB acting reasonably and without delay in accordance with a control agreement in favour of WestLB provided that McCarthy shall be entitled to deduct and to pay the following on closing:
>
> A. brokerage commissions which are required to be paid as a term of the agreement of purchase and sale for the unit plus GST; and
>
> B. the levy payable to the Law Society of Upper Canada respecting the sale of the unit plus GST."

We note that similar language is not used in the Joint Undertakings for the other exceptions that are addressed in this report, with respect to the holding of certain amounts in trust by MT.

F. RRDI CERTIFICATES

We have received and reviewed copies of "Schedule B" documents which we understand were attached to the RRDI Certificates, and which certify the amount of funds for each unit that will be received by the Lenders within one business day of each closing. There is a separate Schedule "B" for each unit which contains the relevant calculation for each unit and itemizes the separate purchaser incentive amounts as deductions from the actual sales price to arrive at the amount to be provided to the Lenders. This formula corresponds to the approach set out in the Joint Undertakings.

Our understanding is that the amounts shown in the Schedule "B" documents for the various purchaser incentive deductions were held back from the payment to Lenders and are held in the MT trust account as shown on the MT Chart and the Schedule "B" information as to the specific

amounts for each incentive for each unit was used as the basis for the amounts shown in the corresponding cells in the MT Chart.

G. THE INCENTIVES

1. Resort Association Entry Fees Incentive

Pursuant to the *Red Leaves Resort Association Act, 2006*, all owners of "resort land" as defined therein are members of the Resort Association, and the Resort Association has the right to enforce the financial obligations of members, including payment of fees which are set by the Resort Association's By-laws.

Purchasers were notified in the agreements of purchase and sale as to the intention that the Resort Association would be established. Several agreements of purchase and sale include an incentive provision which states that "the entry fee payable to the Resort Association will be waived". Certain agreements also include an incentive by way of a promised cap on annual fees. The Resort Entry Fee includes a portion to be paid by each of RRDI and the purchaser for any agreement entered into after July 31, 2006 and we are advised that the amounts referenced in the MT Chart in respect of the waived entry fees include both portions.

The MT Chart indicates that a remaining balance of $3,263.58 is held in the MT trust account in respect of this item and that $48,401.20 has been remitted by MT to the Resort Association. It appears from the MT Chart that funds were held for 23 units on this basis, in varying per-unit amounts. It is not clear from the MT Chart to which units and which portions (vendor or purchaser) of the entry fee the remaining amounts are attributable, although we understand from MT that this would relate to the later closings.

2. "Marriott Gold" Membership Incentive

We were advised that some agreements of purchase and sale contain an additional incentive provision which states that the purchaser will be entitled to a paid "Marriott Gold" membership for the first two years of occupancy. We understand that this incentive was discussed with some purchasers although we have found only one agreement which includes reference to this incentive.

The MT Chart indicates that $4,704.00 is held in the MT trust account in respect of this item. It appears from the MT Chart that funds are held for 56 units on this basis in an amount of $84.00 per unit.

The e-mail from Kristi Panko indicates that she did not know "how it was arranged that these would be paid for, or why funds were held back from closing to pay for these". Ms. Panko indicated that she was also under the impression that the "Marriott Gold" membership upgrade did not have an associated cost.

3. Common Expense Subsidy Incentive

Several agreements of purchase and sale contain a provision (usually contained in an addendum #1) whereby RRDI covenants and agrees that (a) on closing, it shall provide to the Condominium Corporation an amount (the "**Common Expense Subsidy**"), to be calculated in accordance with a specified formula, typically amounting to 26 times the estimated common expenses for the unit per accounting period as specified in the budget included in the Disclosure Statement; and (b) on the closing it shall deliver a cheque to the Condominium Corporation in the amount of the Common Expense Subsidy to be applied by the Condominium Corporation towards the common expenses attributable to the unit. The provision contains an acknowledgement by the purchaser that notwithstanding RRDI's obligations to pay the Common Expense Subsidy to the Condominium Corporation, the purchaser will be responsible for all common expenses attributable to the unit.

Common expenses are also addressed in several leases (leasebacks) pursuant to which RRDI as tenant agreed to pay common expenses attributable to the unit during the term of the lease as and when they become due.

The MT Chart indicates that a total of $1,172,158.67 is held in the MT trust account in respect of this item for 54 units in varying per unit amounts. This appears to represent funds for common expenses held back for (i) purchasers who agreed to the Common Expense Subsidy, (ii) purchasers with leaseback arrangements where RRDI, as tenant, agrees to pay expenses during the term; and (iii) purchasers under the modified sale/leaseback arrangements as described below.

4. Indulgence Card Incentive

Some agreements of purchase and sale contain an additional incentive provision which states as follows:

> "Purchaser is entitled to one (1) "Indulgence Card" valued at CDN. $20,000.00 when purchaser takes ownership of their suite in The Longview Building. The Indulgence Card is valid for 2 years from opening. It is non-transferable. It is limited to homeowner's immediate family."

The MT Chart indicates that $210,000.00 is held in the MT trust account in respect of this item for ten (10) units (nine at $20,000.00 and one at $30,000.00).

Indulgence Cards were not provided to purchasers on closing and MT has advised that their understanding was that the actual cards would be issued at the resort after closing. Peter Quinn of MT confirmed that he attended meetings with RRDI where it was understood by RRDI that it was pre-funding these obligations as of the closing date. In recent e-mail correspondence, Mr. Quinn notes that some of the details of the Indulgence Card program still have to be worked out, but, in his view the purposes of the trust were: "(a) to ensure that RRDI was not making a future financial commitment to purchasers on closing (in order to comply with the OSC Exemption Order) and (b) that the monies would be available to be spent by the purchasers for goods and services (and common expenses if they so elected) at and around the Resort."

Mr. Quinn has also provided us with copies of e-mail correspondence among Kristi Panko, Colin Yee, Mr. Quinn and others from March and April, 2009 regarding the proposed details for the

operation of the Indulgence Card program. We have no evidence that these operational details were finalized. It was proposed that a separate third party would manage the administration of the Indulgence Card program and that the Resort Association would open up a separate bank account for the indulgence funds and administer the program. In an e-mail dated April 9, 2009, Julie Michalak asked Colin Yee "Are the funds being forwarded to us from McCarthy when the owners close? Are they segregated from the rest of the funds?" She also noted that "[w]e should think about setting up a separate bank account within the RLA to put the funds into." Mr. Yee responded by confirming that MT "needs to send us the funds" and that the funds "should be segregated so we should set up a separate bank account".

5. Prepaid Expenses for Modified Sale/Leasebacks

We are advised by MT that the "modified sale/leaseback" agreements include an addendum which contains the following (although the executed agreements of purchase and sale that were provided to us do not contain this):

> "The Vendor agrees to make the following payments on Closing for the benefit of the purchaser (such payments being based on the Vendor's estimate of the amounts that will be payable during the period of three years following the Occupancy Date):
>
> (a) $___on account of realty taxes attributable to the Unit to be paid to the Township of Muskoka Lakes for credit to the tax account for the Unit;
>
> (b) $___on account of common expenses attributable to the Unit. This amount shall be paid to the Vendor's solicitors in trust to be distributed as follows:
>
> (i) the Vendor shall be paid the amount of common expenses that would otherwise have been included in the Occupancy Fees for the period from the Occupancy Date to the Closing Date; and
>
> (ii) the balance shall be paid to the Residential Condominium Corporation for credit to the common expenses account for the Unit;
>
> (c) $___ on account of telecommunications service (including telephone, satellite television and internet service) to be paid to the Rental Pool Manager; and
>
> (d) the basic annual fee to be paid to Red Leaves Resort Association equal to $1.00 per square foot per annum.
>
> The above payments will be made by the Vendor directing the purchaser to deliver cheques to satisfy part of the balance due on closing in favour of the payees identified above. The purchaser acknowledges that the amounts specified are the Vendor's best estimates of the amounts that will become due during the period of three years following the Occupancy Date. The purchaser agrees that he or she will be responsible for any additional payments that may be required for such period and the Vendor agrees that the purchaser will be entitled to the benefit of the payments notwithstanding that the amounts paid exceed the amounts actually due."

The leases for these units include similar language. The signed copies provided to us include the following:

The Tenant [RRDI] acknowledges that the Landlord has pre-paid on the Tenant's behalf the following amounts:

(a) $___ on account of realty taxes attributable to the Unit paid to the Township of Muskoka Lakes for credit to the tax account for the Unit;

(b) $___ on account of common expenses attributable to the Unit. This amount has been paid to McCarthy Tetrault LLP in trust to be distributed as follows:

(i) the Tenant shall be paid the amount of common expenses that would otherwise have been included in the Occupancy Fees for the period from the Occupancy Date to the Closing Date; and

(ii) the balance shall be paid to the residential Condominium Corporation for credit to the common expenses account for the Unit

(c) $____ on account of telecommunications service (including telephone, satellite television and internet service) to be paid to the Rental Pool Manager

(d) the basic annual fee to be paid to Red Leaves Resort Association equal to $1.00 per square foot per annum.

H. ANALYSIS

1. Funds Held in the MT Trust Account

Having regard to the terms of the Joint Undertakings, the schedules to each of the RRDI Certificates appear to have been created to itemize the incentive-related deductions from the Net Sale Proceeds for each unit in an organized manner. The MT Chart places all this information in one document, with each cell representing a specific incentive-related amount for a particular unit. In this context, these specific components of the sale proceeds for each unit have been separated for administrative purposes in the MT trust account, identifying the basis for MT holding the funds after payment to the Lenders pursuant to the Joint Undertakings.

The closing funds were paid by unit purchasers to MT in trust, pursuant to directions by RRDI as vendor under the agreements of purchase and sale to make the funds so payable. Upon closing of each transaction, the sale proceeds held in the trust account would, in the ordinary course, be the property of the vendor (RRDI) unless it can be shown that the proceeds or any portions of them are held in trust for the benefit of the purchasers or other parties.

As noted above, the itemizing of the proceeds held back for each unit into separate categories based on the incentives appears to have been done as an administrative matter in the context of the Joint Undertakings and does not in itself mean that these funds were held in trust for the purchasers for these purposes. Typically in real estate transactions, a vendor will direct the purchaser to pay closing funds to the vendor's lawyer "in trust" and the lawyer may be directed by the vendor to pay portions of the closing proceeds to others (for example, as here, to mortgage lenders). Upon the closing of the transaction, absent any other claims to the beneficial interest in those funds, the closing proceeds would be the vendor's. In this case, following payment to the Lenders pursuant to the Joint Undertakings, the amounts shown in the MT Chart have remained

in MT's trust account. The issue for analysis is whether any portions of the property (funds) held by MT in its trust account pursuant to the direction of RRDI constitute specific property impressed with a trust in favour of unit purchasers (or other parties) for the specified purposes.

2. Trust Requirements

A trust can come into existence in one of two ways. It is either clear from a person's words or acts that there is an intention to settle property by way of a trust, or the law imposes trust machinery in a given situation to ensure that property passes from one party to another.[2]

Express/Implied Trust

According to Donovan Waters, "[a] trust is *created* or *set-up*, a verb often used in speech, when there is an intention to create a trust, certainty of property, certainty of objects and the property has vested in the trustees".[3] In common usage today, the terms "express" and "implied" when used in relation to trusts refer to the intention of the alleged settlor.[4] In the absence of express intentions, if the settlor's language or conduct is construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he or she will have created a trust arising by implied intent.

Three Certainties

Certainty of intention to create a trust must be established. A trust may be construed from conduct alone, but Waters confirms that it is unlikely that such evidence will conclusively reveal the necessary intention.[5] Even if the language used in the trust instrument illustrates a clear intention to create a trust, no trust exists unless the subject-matter of the trust is ascertained or ascertainable.[6] Any type of property is capable of being the subject-matter of a trust. The subject-matter is ascertained when it is a fixed amount or specified piece of property; it is ascertainable when a method by which the subject-matter can be identified is available from the terms of the trust or otherwise. Also, in order for the trust to be valid, the objects must be described with sufficient certainty.[7] Any class of beneficiaries must be described with sufficient certainty so as to facilitate the performance of the trust.

Constructive Trust

In addition to the express or implied trust, there are circumstances under which the law will deem a trust to arise in order to secure some result the law considers equitable. In this regard, constructive trusts are generally imposed to prevent unjust enrichment, for which the requirements are: (i) an enrichment; (ii) a claimant suffered a corresponding deprivation; and (iii) there is no juristic reason for the enrichment.[8] The inquiry as to juristic reasons for the

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[2] Donovan A. Waters, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Carswell, 2005) at 19.
[3] *Ibid.*, at 26, fn 36.
[4] *Ibid.*, at 19
[5] *Ibid.*, at 133
[6] A.H. Oosterhoff et al., *Oosterhoff on Trusts*, 6th ed. (Scarborough: Thomson Carswell, 2004) at 171.
[7] *Ibid.*, at 179.
[8] See: *Pettkus v. Becker*, [1980] 2 S.C.R. 834

enrichment must focus on the legitimate expectations of the parties at the relevant time. In a bankruptcy context, courts have held that protection of the interests of all creditors is a juristic reason for permitting an enrichment of a bankrupt estate.[9]

Purpose Trusts

A "purpose trust" is often referred to as a "Quistclose trust" following the House of Lords judgement in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*[10] In a *Quistclose* trust, money is loaned or advanced subject to requirements or restrictions on its use, as specified by the lender.

When a purpose cannot be carried out, the question that will ultimately arise is whether the money falls within the general fund of the assets of the borrower (or transferee) or whether it will be held upon resulting trust for the lender (or transferor). The answer to this question still depends upon the intention of the parties, as evident from the terms of the arrangements and the circumstances of the case.[11] In *Re Westar Mining Ltd.*[12], the British Columbia Court of Appeal confirmed that *Quistclose* does not modify the certainty of intention, subject matter and object required of trusts generally.

In *Quistclose*, the funds were advanced with written conditions that the funds "will only be used" for the specified purposes and the House of Lords held that they were "advanced exclusively" for this purpose. The *Quistclose* trust concept was developed in the loan transaction context, but the approach has been followed in cases where funds are advanced for other reasons. We can find no examples of a sole or unique purpose trust being applied in a case of the purchase and sale of real property, where a vendor has promised to perform other obligations. In *Re Westar Mining Ltd.*[13] the Court looked to the arrangements and the joint venture agreement between the parties to determine whether there was evidence of mutual intent that funds would only be used for the specified purposes, or that they were advanced on condition that they only be used for those purposes.[14]

In *Del Grande v. McCrery,*[15] Mackenzie J. extrapolates from *Quistclose* the criteria for such a trust as follows: (1) Whether the terms of the loan were such as to impress upon the loan sum a trust in favour of the lender if the specific purpose of the loan was not achieved or fulfilled; and (2) Whether the party receiving the loan proceeds had notice of the trust or of the circumstances giving rise to the trust so as to bind such party. The *Del Grande* case involved the advance of deposit funds in the amount of $200,000.00 under a shotgun clause in a shareholders agreement and the court found that no "sole or unique purpose trust" was created in relation to the funds. It

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[9] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada,* 4th edition, revised, at 3-62. See *e.g.*: *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 O.R. (3d) 66 (Gen. Div.).
[10] [1970] A.C. 567 (H.L.)
[11] *Supra* note 6, at 470.
[12] (2001), 26 C.B.R. (4th) 109 (B.C.S.C.), aff'd [2003] 3 W.W.R. 244 (B.C.C.A.).
[13] *Ibid.*
[14] See also: *Ling v. Chinavision* (1992), 10 O.R. (3d) 79 (Gen. Div.); *Eli v. Royal Bank of Canada* (1985), 24 D.L.R. (4th) 127 (B.C.S.C);
[15] (1998) 5 C.B.R. (4th) 36 (Gen. Div.), affirmed.(2000), 127 O.A.C. 394 (C.A.),

was held that the sole purpose of the advance by Ms. Del Grande was to supply a deposit sum and Mackenzie J. noted as follows:

> "Although her expectations may have well been that the use of such funds would result in the acquisition of the shares, there is no evidence before me to establish that such expectations were translated into an express or implied intention that unless such $200,000.00 sum was in fact utilized in due course for the acquisition of the shares, it was to be returned to her by either Mr. Pole, Mr. del Grande or any other person to whom such funds were delivered."[16]

Having regard to the nature of these transactions among RRDI and its purchasers who would have been expected to protect their expectations through the contracts and the pre-closing processes, it is doubtful that the *Quistclose* approach is appropriate in the circumstances. As one commentator has noted:

> "[t]o retain the trust's legitimacy... special care needs to be taken in 'fact situations where the payer has not used rigorous language or explicit terms when making payment", since in this context 'a too-easy judicial inference of a trust could have disturbing implications for insolvency distribution'."[17]

In our view, even if the *Quistclose* authorities could potentially be applied in these circumstances, such trusts do not exist with respect to these funds, having regard to the evidence of the intentions of the parties as to the purpose of the purchasers' closing payments and the absence of any suggestion that purchasers delivered any part of the sale proceeds on closing on the condition that such amount be used for a specific identified purpose.

Formal Trust Documentation

For those matters other than the condominium common expenses which are addressed by the statutory provisions described below, an examination is required as to whether there was an intention or expectation that a trust was to exist for the benefit of the purchasers with respect to these specific portions of the closing proceeds. In determining or identifying the beneficiaries of any such trust, it is necessary to consider the circumstances surrounding the arrangements. As will be discussed below, the "modified sale/leaseback" documents do contain specific trust language in connection with the payment of condominium expenses. However, with respect to the other items, there is no trust language in the documentation. MT have confirmed that the holdbacks and trust arrangements were not known to the purchasers. However, MT has confirmed that RRDI instructed (through oral communications) MT that these amounts were to be held back in trust by MT in its trust account and the RRDI Certificate Schedules suggest that there was an intention that the funds were to be distributed in the future in accordance with the MT Chart following the payment to the Lenders in accordance with the Joint Undertakings.

While documents were circulated to show that funds were being held back from the payments to Lenders in order to satisfy these "purchaser incentive" obligations, we have received no formal

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[16] *Ibid.*, at para. 18

[17] C.E.F. Ricket, "Trusts and Insolvency: The Nature and Place of the Quistclose Trust", in D.W.M. Waters, *Equity, Fiduciaries and Trusts 1993*, at pp. 325-355, at 339, citing F. Oditah, *Legal Aspects of Receivables Financing* (1991), at 17.

documentation (except as set out in the modified sale/leaseback agreements) to confirm or describe the terms of any trust with respect to these items.

In the absence of formal trust documentation, Courts will look at the surrounding circumstances and the evidence as to what the parties intended, what was actually signed and how the parties conducted themselves, to determine whether there was "certainty of intention". In this case there is documentation to show that it was at least understood (by RRDI, purchasers and Lenders) that payments for certain incentive items were the obligation of RRDI and the documentation between RRDI and its Lenders confirmed that payments for these amounts were to be made to the payees (for example, the Resort Association) and funds were held back from the payments to the Lenders for that purpose.

As noted above (at Section E), it is significant that there is trust language used in the Joint Undertakings in connection with funds held for realty taxes, such that amounts collected from purchasers "shall be held in trust by McCarthy and paid to the Township of Muskoka Lakes to be applied against the realty taxes attributable to the unit ...." but a similar approach is not used for the other exceptions from Net Closing Proceeds .

The holding back of proceeds in a lawyer's trust account does not demonstrate an agreement between parties as to who shall be the beneficiaries of the trust funds nor does it demonstrate, by itself, an intention that the proceeds be held by the lawyer in trust for anyone other than the vendor. Something further is required in order to find that a trust was established for these funds and for these beneficiaries and purposes.[18] We will examine each of the relevant itemized incentives in turn.

[18] See: *Re MacKay* (2003), 41 C.B.R. (4th) 144 (B.C. S.C.); *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 O.R. (3d) 66 (Gen. Div.).

3. Funds for Prepaid Expenses

Pursuant to Subsection 78(1) of the *Condominium Act, 1998* , S.O. 1998, c. 19, every agreement of purchase and sale of a proposed unit entered into by a declarant before the registration of the declaration and description that creates the unit shall be deemed to contain covenants by the declarant, including *"a covenant to hold in trust for the corporation the money, if any, that the declarant collects from the purchaser on behalf of the corporation*". The statute (section 1) defines corporation to mean a corporation created or continued under the *Condominium Act, 1998.* Subsection 78(2) provides that these covenants shall be deemed not to merge by operation of law on delivery to the purchaser of a deed that is in registerable form.

We have found no relevant jurisprudence addressing this part of subsection 78(1), which was added to the 1998 legislation, replacing provisions in the prior statute (section 51(1)(d) of the *Condominium Act,* R.S.O. 1990) which specifically stated that every agreement of purchase and sale shall be deemed to contain a provision that the vendor will not collect from the purchaser any money on behalf of the corporation. The revised provisions appear to be consistent with the well-recognized character of the *Condominium Act, 1998* as "consumer protection legislation"[19]

(a) Common Expenses Subsidy

As noted above, the Common Expense Subsidy contained in many agreements of purchase and sale provides a covenant on the part of RRDI to provide the applicable amount to the Condominium Corporation on closing and to deliver a cheque for that amount to the Condominium Corporation to be applied by the Condominium Corporation towards the common expenses attributable to the unit. This is not trust language, but these provisions require that the vendor must deliver applicable amounts from closing funds to the condominium corporation to be applied towards common expenses. In this regard, we believe that a finding that these funds were "collected from purchasers on behalf of the condominium corporation", thereby triggering the deemed Subsection 78(1) trust, is appropriate having regard to the acknowledged "consumer protection" approach to the statute. Accordingly, the agreements of purchase and sale would be deemed to contain the covenant by the vendor to hold these funds in trust for the Condominium Corporation. In the absence of the statutory trust, there is no formal documentation or evidence that a trust was intended with respect to these funds for the benefit of purchasers or the Condominium Corporation.

Based on the information received, this applies to the funds shown on the MT Chart for 23 units, amounting to $430,471.58.[20] In our view, these funds are held by MT in trust for the Condominium Corporation.

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[19] *Ward-Price v. Mariners Haven Inc.*, (Ont. C.A.; May 8, 2001; File No. C34484), at para. 25

[20] For one of the units, the parties had entered into an agreement of purchase and sale with a Common Expense Subsidy (for 26 months of expenses) and a lease back pursuant to which RRDI pays common expenses as tenant (for 36 months). The MT Chart shows an amount being held for common expenses for this unit which is greater than the Common Expense Subsidy amount, so we have allocated the portion of the amount held by MT for this unit which is equivalent to 26 months of common expenses to the Common Expense Subsidy and the balance of the amount held by MT for this unit to the leaseback amount.

(b) Payment of Common Expenses by RRDI as Tenant under Leases

In addition to the prepaid condominium expenses held back by MT pursuant to the Common Expense Subsidies, funds are shown on the MT Chart for estimated condominium expenses as being held back in connection with other units where leaseback arrangements provide that RRDI as tenant shall pay common expenses attributable to the unit during the term of the lease, as and when such expenses become due. In our view, having regard to the future obligation language that is used and also the fact that the requirement is contained in the lease and not an agreement of purchase and sale (although there are cross-references in the sale and leaseback documents), this does not fall within the terms of the deemed covenant in the *Condominium Act, 1998* and there is no evidence that a trust for the benefit of purchasers (or the Condominium Corporation) was intended in respect of such amounts. Rather, the funds represent money set aside by RRDI to comply with future payment obligations of RRDI as tenant under these leases.

Based on the information received, there are funds within this category on the MT Chart for 30 units, amounting to approximately $703,935.77.[21] In our view, these funds are held by MT in trust for RRDI.

(c) Modified Sale/Leasebacks

There are specific trust provisions in the documentation for the two "modified sale/leaseback" transactions that have closed and in our view the funds held by MT representing prepaid condominium common expenses in respect of these units (see paragraph (b) in the Addendum quoted in Section G.5 above) are impressed with a trust for the benefit of the Condominium Corporation having regard to the provisions of the documentation, and the statutory deemed covenant set out in section 78(1) of the *Condominium Act, 1998* .

Based on the information received, there are funds within this category on the MT Chart for 2 units, amounting to $37,751.32 for condominium common expenses. In our view, these funds are held by MT in trust for the Condominium Corporation.

4. Funds for Marriott Gold Membership

The MT Chart indicates that $4,704.00 is held in the MT trust account in respect of the "Marriott Gold" membership (for 56 units in an amount of $84.00 per unit).

As discussed above, the details with respect to this incentive remain unclear, and it is documented in only one agreement of purchase and sale.

Having regard to the absence (in all but one case) of documented evidence of entitlement and the uncertainty regarding the payment arrangements, we are not persuaded that these per-unit amounts constitute specific trust funds for the benefit of these purchasers, or any other parties (for example, Marriott, if it had delivered Gold cards to RRDI on the basis that it would have been paid from closing proceeds). In our view, these funds are held by MT in trust for RRDI.

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[21] This amount includes the portion allocated to the leaseback category for the unit described in footnote 20, *supra*

5. Funds for Indulgence Card Value

The MT Chart shows that funds in the aggregate amount of $210,000.00 are held in respect of this item. Pursuant to the Joint Undertakings, these amounts were to be exempted from "Net Closing Proceeds" and the specific exception in the Joint Undertakings states that "such amount [is] to be paid by McCarthy to RRDI to be held in trust and applied to satisfy amounts charged against the Indulgence Card."

The incentives in the agreements of purchase and sale state that these purchasers are "entitled" to the Indulgence Card when the purchaser takes ownership of the unit. Although we have been provided with internal e-mail correspondence and draft documents regarding how and for what purposes the card might be used, it is apparent that the terms of use and the operation details of the card program have not been finalized. We understand that the terms of use were to be finalized and provided to these purchasers along with the cards in some form of cardholder agreement, but it is our understanding that this has not been done.

We understand that there may have been discussions with these purchasers regarding the proposed benefits and the intended terms of use at the time of entering into their purchase and sale amending agreements which contained the reference to the Indulgence Card incentive.

Although RRDI may have had the future intention to create a trust for the benefit of the indulgence cardholder unit owners or alternatively, for the benefit of those providing services to the holders of Indulgence Cards, with respect to these amounts, the evidence indicates that no such trust has been established. As indicated by e-mail correspondence provided to us by MT, it was being proposed in April, 2009 that a separate third party would manage the administration of the Indulgence Card program and that the Resort Association would open up a separate bank account for the indulgence funds and administer the program. If these steps had been taken, and these "indulgence funds" were in the separate bank account established for the administration of the program, there would be a greater likelihood that these are trust funds for the benefit of the cardholders, but this is not the case.

In addition, there remains some uncertainty with respect to the nature of the Indulgence Cards and the "Indulgences" for which they may be used and accordingly there is no certainty of subject matter. The Indulgence Card would be for use over time at the resort by the purchaser and the purchaser's family and RRDI would have obligations over this period to reimburse the appropriate party at the resort (*e.g.* the restaurant, spa or Condominium Corporation) which provides the services for which the card may be used. These purchasers are not entitled to $20,000.00 pursuant to these incentives in the agreements, but rather to a card with a value of $20,000.00, the terms of use of which are not yet confirmed. In our view, at this stage, the terms are not sufficiently certain to impress these funds with a trust for the benefit of the applicable purchasers or the service providers. Without evidence of the terms of cardholder use (*e.g.* are refunds available if less than $20,000.00 is used?) and a clear identification of those for whose benefit these funds were held it appears to us that the funds are held in MT's trust account simply at the direction of RRDI to facilitate the funding of future obligations of RRDI as they come due. The scope and timing of these future obligations will depend on the actual use of the cards by the

cardholders and the terms of cardholder use, which were to be established by RRDI. Therefore, in our view, these funds are held by MT in trust for RRDI.

6. Funds for the Resort Entry Fee

We understand that the amounts shown on the MT Chart are intended to include purchaser and vendor portions for the Resort Entry Fees that RRDI agreed to waive. As noted above, it is not clear to which units the remaining balance is attributable. MT advises that payments to the Resort Association were made after unit closings in April and May and accordingly, the remaining balance would appear to relate to the later closings.

The relevant incentive in the agreements of purchase and sale is the waiver of the Resort Entry Fee. Assuming that this can be interpreted as the vendor's agreement to pay or to have the Resort Association waive the purchaser's portion of the entry fee on or after closing, this is a contractual obligation of the vendor, but, there is no evidence that a trust for the benefit of the purchasers was established with respect to these amounts. In addition, there is no statutory trust language in the *Red Leaves Resort Association Act, 2006*, and there is no evidence that a trust was created for the benefit of the Resort Entry Fees. Accordingly, in our view, these funds are held by MT in trust for RRDI.

7. Funds for Prepaid Expenses (other than Common Expenses) for Modified Sale/Leasebacks

The specific provisions in the documentation for the two "modified sale/leaseback" transactions provide evidence as to possible future intentions with respect to prepaid realty taxes, telecommunications services and annual fees for the Resort Association, but the agreements of purchase and sale and the leases do not use the words "trust" for these items, as they do for the prepaid common expenses. In our view the treatment of these other contractual pre-payment obligations can be distinguished from the treatment of common expenses. Although the documents indicate an agreement that the closing proceeds were to be used for these purposes and that payments would be made from the closing proceeds to the identified payees on the purchaser's behalf, these payments were not in fact made, presumably in part because RRDI had not yet directed MT to make the payments. RRDI had a contractual obligation with respect to these payments, but we are of the view that the evidence does not establish that a trust for the benefit of the purchasers or the third party payees was created with respect to these funds.

The MT Chart shows the following amounts for these items for these two "modified sale/leaseback" units: (i) $20,813.62 for realty taxes; (iii) $5,670.00 for telecommunications fees; and (iv) $2,812.95 for basic annual fee to the Resort Association. In our view, these funds are held by MT in trust for RRDI.

APPENDIX "L"

Blakes

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 2800, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

Katherine McEachern
Dir: (416) 863-2566
katherine.mceachern@blakes.com

December 11, 2009

Reference: 00075334/000002

VIA E-MAIL AND COURIER/REGULAR MAIL

TO: All of those unit owners of The Rosseau who are affected by a proposal of the Receiver in respect of funds held by McCarthy Tetrault LLP from proceeds of sale of units to pay common area expenses pursuant to sale/leaseback transactions

Dear Sir/Madam:

Re: The Rosseau Resort Developments Inc. ("RRDI")

As you may know, we are the lawyers for Alvarez & Marsal Canada ULC (the "Receiver"), the Court-appointed receiver and manager of RRDI, which owns The Rosseau. We are writing to you as you are an owner of a condominium unit ("unit owner") in The Rosseau.

This letter is to provide notice to you that the Receiver will be in Court (located at 330 University Avenue, Toronto, Ontario, 8th Floor) on **Monday December 21, 2009, at 10:00 a.m.** in order to seek the advice and directions of the judge on a number of issues in respect of The Rosseau.

One of those issues is directly relevant to you. The Receiver will be seeking the judge's approval of a proposal by the Receiver to settle all claims of unit owners to money held by McCarthy Tetrault LLP from closing proceeds. **We are providing this notice to you as this proposed settlement may affect your interests.**

As you may know from communications with Miller Thomson LLP in their capacity as legal counsel to the Ad Hoc Committee of Unit Owners, McCarthy Tetrault LLP currently has on deposit in its trust account certain funds that were deducted from the proceeds of sale of certain condominium units. These funds were retained on behalf of RRDI in order to enable RRDI to meet certain obligations arising out of the various agreements of purchase and sale with unit owners. **McCarthy Tetrault is currently holding certain funds retained from your proceeds of sale in the amount as specified in Schedule "A" attached to this letter. These funds were retained in connection with RRDI's obligation under sale/leaseback transactions to pay common area expenses.**

As you may also know from Miller Thomson LLP, the Receiver instructed its independent counsel, Fraser Milner Casgrain LLP, to undertake an analysis of the terms on which these funds were set aside, in order to determine the legal entitlements to those funds.

After receiving this analysis, the Receiver initiated discussions with Miller Thomson LLP, in its capacity as counsel for the Ad Hoc Committee of Unit Owners, in order to determine if an agreement could be reached with unit owners in respect of the conclusions that were made in the analysis.

After several discussions with Miller Thomson LLP, and based on the legal analysis provided to the Receiver, the Receiver proposed a settlement to Miller Thomson LLP. Under the proposed settlement, the Receiver will receive for the benefit of the estate of RRDI all funds that were retained by McCarthy Tetrault LLP to honour future common expense obligations to unit owners that were undertaken by RRDI under sale/leaseback arrangements. The Receiver has determined that these funds are not held in trust for unit owners.

The Receiver has agreed, in the context of this proposed settlement, that other amounts held in trust by McCarthy Tetrault LLP for realty taxes, Resort Association entry fees, Marriott gold memberships, indulgence cards and non-sale/leaseback common expense subsidies (as well as common expense subsidies payable under certain modified sale/leaseback transactions) are held in trust for the benefit of unit owners to be remitted to the appropriate third party on behalf of the particular unit owner, and to be applied in respect of those specific obligations.

The Receiver has been advised by Miller Thomson LLP that it is in agreement with the proposed settlement, and that it has recommended the settlement to unit owners. The Receiver understands that all unit owners have been advised of and concur with the settlement.

The Receiver intends to seek the approval of the proposed settlement when it is in Court on December 21, 2009.

We are writing to you because as disclosed in Schedule "A" attached hereto, there are currently funds held by McCarthy Tetrault LLP arising from the proceeds of sale of your Unit. These funds will be paid to the Receiver for the benefit of the RRDI estate as a result of the proposed settlement. You are therefore affected by the proposed settlement. By this letter, the Receiver is providing to you notice of the upcoming Court date so that you may attend and oppose the settlement, if you so wish.

The Notice of Motion, Report of the Receiver, and draft Order, which will be filed with the Court in support of the requested Order, are voluminous, and therefore have not been included with this letter. If you would like to view these, you will be able to download them from the Receiver's website prior to the hearing of the motion, at www.alvarezandmarsal.com/rosseau. Alternatively, you may contact my office by contacting my assistant, Wendy Robinson, at 416-863-4186, to request a copy by email or regular mail.

In the event that you wish to oppose the request of the Receiver to approve the settlement, you will need to attend the hearing in Court. If you intend to do so, please advise me in writing by no later than 5:00 p.m. on December 17, 2009. If you have any specific questions regarding the upcoming hearing, please speak to either Jeffrey Carhart or Margaret Sims of Miller Thomson LLP, who can assist you with your questions.

Yours truly,

Katherine McEachern

c: Adam Zalev – *Alvarez & Marsal Canada ULC*
Richard Morawetz – *Alvarez & Marsal Canada ULC*
Shayne Kukulowicz – *Fraser Milner Casgrain LLP*
Jane Dietrich – *Fraser Milner Casgrain LLP*
Pamela L.J. Huff – *Blake, Cassels & Graydon LLP*
Silvana D'Alimonte – *Blake, Cassels & Graydon LLP*

APPENDIX "M"

FRASER MILNER CASGRAIN LLP

R. Shayne Kukulowicz
Direct Line: (416) 863-4740
shayne.kukulowicz@fmc-law.com

Sent Via E-mail

October 14, 2009

Solomon, Blum,
Heymann & Stich LLP
Barristers & Solicitors
40 Wall Street, 35th Floor
New York, New York 10005
U.S.A.

Attention: Mr. David P. Stich

Dear Sirs:

Subject: **Complaint filed by Ken Fowler Enterprises Limited et al against WestLB AG Toronto Branch et al in the Supreme Court of the State of New York (the "Complaint")**

We are counsel for Alvarez & Marsal Canada ULC, the court-appointed receiver and manager and trustee (collectively, the "Receiver") of the assets of The Rosseau Resort Developments Inc. ("RRDI") pursuant to the *Courts of Justice Act* and the *Construction Lien Act* (Ontario).

We have been provided a copy of the Complaint filed by you on behalf of the Plaintiffs in the New York Supreme Court. From our review of the Complaint, it in part appears to be an allegation that the Plaintiffs have a claim in some fashion for damages suffered by RRDI as a result of the appointment of the Receiver and/or the actions of the Receiver in the court supervised receivership. In this regard, the Receiver was appointed pursuant to an order of the Ontario Court and the Receiver has the exclusive authority to deal with any claims available to RRDI. It is also noteworthy that your allegations regarding damages arising from the actions of the Receiver are contrary to Orders made in the receivership proceedings which approved such actions.

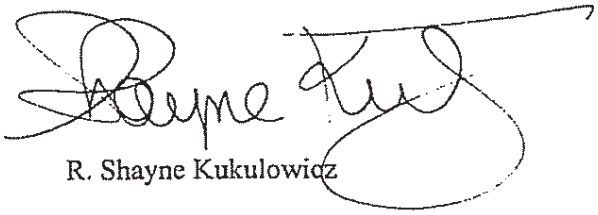
We would invite you to review the Receiver's Reports and various orders made in the receivership which are available on the Receiver's website at www.alvarezandmarsal.com/rosseau.

Our concern from reviewing the Complaint is that the Plaintiffs are seeking to claim damages, if any, allegedly suffered by RRDI which are under the exclusive control of the Receiver and within the jurisdiction of the Ontario Court. In this regard, we would request that you confirm that the Plaintiffs are not seeking to assert damage claims that are the property of RRDI.

We look forward to your confirmation at your earliest convenience.

Yours truly,

FRASER MILNER CASGRAIN LLP



R. Shayne Kukulowicz

RSK*mk

cc: Richard Morawetz, Alvarez & Marsal

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EASON ROHDE
ATTORNEYS AT LAW

Bruce E. Rohde
David R. Eason
Richard L. Eason, Of Counsel

1129 Cherokee Street
Denver, CO 80204
303-381-3400

October 15, 2009

R. Shayne Kukulowicz
FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West
Toronto ON Canada M5X 1B2

Via Email and U.S. Mail

Re: KEN FOWLER ENTERPRISES LIMITED, et al ("KFE") v. WESTLB AG,TORONTO BRANCH, et al; Supreme Court of the State of New York ("the New York Proceedings")

Dear Mr. Kukulowicz:

We represent the Plaintiffs in the New York Proceedings and are in receipt of your letter to our local counsel, David Stich, of October 14, 2009. We do not purport to represent RRDI, RRDI is not a named Plaintiff in the New York Proceedings, and the named Plaintiffs do not seek to recover damages on behalf of RRDI. However, that is not to say that RRDI has not, in fact, suffered damages as a result of WestLB's failure to abide by the terms of the loan commitment which is the subject of the New York Proceedings and its having obtained the appointment of the Receiver. To the contrary, we believe RRDI has suffered and will suffer substantial damages and the Receiver should, in order to fulfill its legal duties, pursue claims against WestLB, CIT, RZB and perhaps others to recover those damages. Please advise whether the Receiver is willing to intervene in the New York Proceedings (as a new Plaintiff or otherwise) and assert claims on behalf of RRDI. If the Receiver is not willing to intervene, or to assert claims against WestLB or others (whether in the New York Proceedings or elsewhere), please advise whether the Receiver is willing to permit KFE to pursue derivative claims on behalf of RRDI in the New

York Proceedings and, if so, whether the Receiver will share in the costs and fees KFE will incur. If the Receiver is not willing to intervene in the New York Proceedings or to assert claims against WestLB or others in some other forum, and the Receiver is not willing to permit KFE to pursue derivative claims on behalf of RRDI, please explain why the Receiver believes RRDI's claims should not be pursued.

Very truly yours,

Bruce E. Rohde

BER/ssh
cc: David Stich, Esq.
Ken Fowler
Simon Romero

FRASER MILNER CASGRAIN LLP

R. Shayne Kukulowicz
Direct Line: (416) 863-4740
shayne.kukulowicz@fmc-law.com

Via E-mail

October 23, 2009

Eason & Rohde
Attorneys At Law
1129 Cherokee Street
Denver, CO 80204 USA

Attention: Mr. Bruce E. Rohde

Dear Mr. Rohde

Subject: **Ken Fowler Enterprises Limited, et al v. WESTLB AG, Toronto Branch, et al; Supreme Court of the State of New York**

Thank you for your letter dated October 15, 2009.

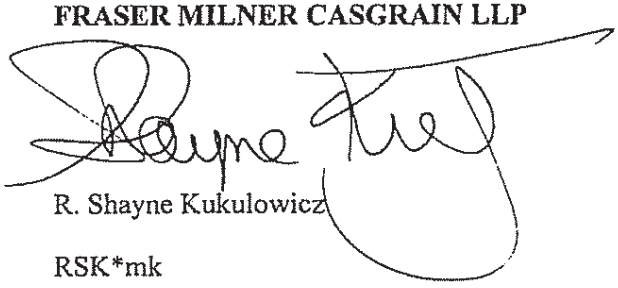
Regardless of your views as to whether or not RRDI has claims of any nature, the purpose of our letter of October 14, 2009 was to put you on notice that the Receiver of RRDI has the exclusive authority to deal with any claims available to RRDI and the proper forum is the Ontario Court which has jurisdiction over the RRDI receivership proceedings. Your clients have appeared before the Ontario Court in such proceedings and are well aware of the appropriate forum for the issues. They are also aware that there is a stay of proceedings in respect of RRDI and its assets and we trust that your clients will govern themselves accordingly.

We also note that there was a valid appointment of the Receiver by the Ontario Court and the Appointment Order was not appealed. Accordingly, such appointment and any alleged claims arising therefrom are not actionable.

As you may be aware, the Receiver is a court-officer and, in such capacity, will bring to the attention of the Ontario Court a copy of the Complaint and our exchange of correspondence, including your acknowledgement that the Plaintiffs are not seeking to recover damages on behalf of RRDI.

Yours truly,

FRASER MILNER CASGRAIN LLP



R. Shayne Kukulowicz

RSK*mk

Cc: Richard Morawetz, Alvarez & Marsal

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EASON ROHDE
ATTORNEYS AT LAW

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Richard L. Eason, Of Counsel

1129 Cherokee Street
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303-381-3400

October 28, 2009

R. Shayne Kukulowicz
FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West
Toronto ON Canada M5X 1B2

Via Email and U.S. Mail

Re: KEN FOWLER ENTERPRISES LIMITED, et al ("KFE") v. WESTLB AG,TORONTO BRANCH, et al; Supreme Court of the State of New York
("the New York Proceedings")

Dear Mr. Kukulowicz:

I am in receipt of your letter of October 23, 2009. I understand that, as you say in your letter, "the Receiver of RRDI has the exclusive authority to deal with any claims available to RRDI..." Our questions, however, remain unanswered. **How** does the Receiver intend to deal with those claims? We ask you, once again, to please advise whether the Receiver has considered, or will consider, pursuing claims against WestLB, CIT, RZB, and perhaps others, whether in the New York Proceedings, the Ontario Court, or elsewhere. Further, once again, please advise whether, if the Receiver is not willing to assert such claims, the Receiver is willing to permit KFE to pursue derivative claims on behalf of RRDI and, if so, whether the Receiver will share in the costs and fees KFE will incur. Finally, once again, if the Receiver is not willing to pursue such claims and is not willing to permit KFE to pursue derivative claims on behalf of RRDI, please explain why the Receiver believes RRDI's claims should not be pursued.

Very truly yours,

Bruce E. Rohde

BER/ssh
cc: David Stich, Esq.
Ken Fowler

FRASER MILNER CASGRAIN LLP

R. Shayne Kukulowicz
Direct Line: (416) 863-4740
shayne.kukulowicz@fmc-law.com

Via E-mail

November 17, 2009

Eason & Rohde
Attorneys At Law
1129 Cherokee Street
Denver, CO 80204 USA

Attention: Mr. Bruce E. Rohde

Dear Mr. Rohde

Re: Ken Fowler Enterprises Limited, et al v. WESTLB AG, Toronto Branch, et al; Supreme Court of the State of New York

We are in receipt of your letter dated October 28, 2009.

As we advised in our letter of October 23, 2009, there was a valid appointment of the Receiver by the Ontario Court and any alleged claims based on such appointment or on the facts and circumstances which led to such appointment are not actionable. There is simply no basis for the Receiver to commence or to fund an action for alleged damages arising from its own appointment by the Ontario Court, nor to consent to derivative proceedings by shareholders for the same claim which it views as not actionable.

In any event, we understand that the shares of RRDI are owned by Red Leaves Resort, an Ontario partnership, not Ken Fowler Enterprises Limited, which shares have been pledged as security to WestLB Toronto AG.

We do not see any merit in continuing with this exchange of correspondence and once again, we advise that your client is at liberty to bring whatever issues it has before the Ontario Court.

Yours truly,

FRASER MILNER CASGRAIN LLP

R. Shayne Kukulowicz
RSK*mk

cc: Richard Morawetz, Alvarez & Marsal

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APPENDIX "N"

From: Zalev, Adam
Sent: Friday, November 06, 2009 10:25 AM
To: Bruce Campbell
Cc: Ferguson, Stephen; PAM.HUFF@blakes.com; Morawetz, Richard; Karpel, Greg; sromano@stikeman.com
Subject: RE: RRDI, RRMSI Books and Records

Bruce,

Greg and Steve forwarded your below email to me and I will respond on behalf of the Receiver. Further to the discussion I understand that you had with Greg Karpel, the Receiver does require what may be considered the books and records of RRCI so that it may, among other things, complete its obligations pursuant to the construction lien claims process. RRCI was/is the construction manager to RRDI and accordingly, we would assert that these records rightfully belong to RRDI. I understand that you agreed with this and would ask you to confirm that this is the case in writing.

While it is certainly your right to engage security services, and while you have indicated it is not your intention to do so, I would like to remind you that any attempt to prevent the Receiver from taking possession of the books, records and assets of RRDI, RRCI and/or RRMSI will be in direct contravention of the Receiver's respective appointment orders. The Receiver will take those actions necessary to permit it to undertake its duties.

Finally, the Receiver will not be responsible nor will it agree to pay any portion of the costs associated with your engagement of security personnel which we view as completely unnecessary.

Adam

Adam Zalev
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From: Karpel, Greg
Sent: Thursday, November 05, 2009 4:35 PM
To: Zalev, Adam; Morawetz, Richard; PAM.HUFF@blakes.com
Cc: Ferguson, Stephen
Subject: FW: RRDI, RRMSI Books and Records

All,

Please see an e-mail received from Bruce Campbell this afternoon.

Greg

From: Bruce Campbell [mailto:bcampbell@kfe.on.ca]
Sent: Thursday, November 05, 2009 4:19 PM
To: Ferguson, Stephen; Karpel, Greg
Cc: sromano@stikeman.com
Subject: RRDI, RRMSI Books and Records

Steve and Greg,

As confirmation of our discussion just now, you have had RRDI staff assembling and compiling records in bankers boxes over the last couple days at the Wallace Marine offices you have been utilizing since the beginning of A+M's appointment as receiver.

Clearly, you are entitled to the records and assets owned by RRDI and RRMSI, but are not entitled to any other records or assets being maintained on site on behalf of any other company, including but not limited to those owned by Wallace Marine Ltd.

As such, you will only be entitled to remove records that can be confirmed to our mutual satisfaction to be RRDI and RRMSI records, and we will work with you to that end.

To ensure the above, we have hired 24/7 security, and instructed them to not allow the removal of any records or assets without our mutual consent.

Thanks in advance for your cooperation,

Bruce