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COURT FILE NUMBER	**1801-04745**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**HILLSBORO VENTURES INC.**
DEFENDANT	**CEANA DEVELOPMENT SUNRIDGE INC.**
PLAINTIFFS BY COUNTERCLAIM	**CEANA DEVELOPMENT SUNRIDGE INC., BAHADUR (BOB) GAIDHAR AND YASMIN GAIDHAR**
DEFENDANTS BY COUNTERCLAIM	**HILLSBORO VENTURES INC., NEOTRIC ENTERPRISES INC., KEITH FERREL AND BORDEN LADNER GERVAIS LLP**
DOCUMENT	**JOINT WRITTEN BRIEF OF EUREKA PRESCRIPTIONS INC. and MOUNIR ALEIN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	First West Law LLP 100, 1501 1st Street SW Calgary, Alberta T2R 0W1 Attn: Ryan D. Moneo P: (403) 543-7757 F: (403-543-7759 File No.: 5-13897	JENSEN SHAWA SOLOMON DUGUID HAWKES LLP 800, 304 - 8 Avenue SW Calgary, AB T2P 1C2 Attn: William M. Katz P: (403) 571-1520 F: (403) 571-1528 File No.: 15040.001

Joint Written Brief of Eureka Prescriptions Inc. and Mounir Alein in respect of a Commercial List Application to be heard on January 14, 2021

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INTRODUCTION

1. The Applicant, Eureka Prescriptions Inc. ("Eureka"), is a purchase depositor and joint venturer of a project originally developed by Ceana Development Sunridge Inc. ("Ceana Sunridge").

2. The Applicant, Mounir Alein ("Mr. Alein"), is also a purchase depositor and joint venturer of a project developed by Ceana Sunridge.

3. Eureka and Mr. Alein are hereinafter referred to as the "Trust Purchase Depositors".

4. Pursuant to a Receivership Order made by Justice B.E.C. Romaine on July 3, 2019, Alvarez and Marsal were appointed to act as receiver and manager (the "Receiver") of Ceana Sunridge.

5. The Receiver's counsel, Torys LLP, holds $200,000.00 in trust for Eureka. Eureka paid to Ceana Sunridge via cheques a total of $335,000.00. The other $135,000.00 is separate, missing and has not been accounted for.

6. The Receiver's counsel, Torys LLP, holds $76,000.00 in trust for Mr. Alein. Mr. Alein also paid to Ceana Sunridge via cheques a total of $576,000.00.[1] The other $500,000.00 is separate, missing, and has not been accounted for.

FACTS

Relevant Facts for Eureka

7. The relevant facts as it pertains to Eureka are set out in the Receiver's Reports and the Affidavit of Andrew Uwubanmwen, sworn on October 30, 2020.

8. On May 25, 2016, Eureka entered into a Purchase Contract (the "Eureka Contract") with Ceana Sunridge to purchase Unit 7B of the project located at 2255—32nd Street NE, Calgary, Alberta (the "Project").[2]

9. The Eureka Contract required that Eureka pledge a deposit subject to section 14 of the *Condominium Property Act*, R.S.A. 2000, c-C-22 (*"Condominium Property Act*").

10. On June 8, 2016, Eureka entered into a Joint Venture Agreement with Ceana Sunridge for the purported amount of $200,000 for 200 Class "C" Common Non-Voting Shares.[3]

11. The initial deposit receipt was received by Ceana Sunridge on June 10, 2016 in the amount of $50,000.00.[4]

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[1] Second Report of the Receiver dated June 8, 2020, filed June 10, 2020 (the "**Second Report**") at paras 39 and 50
[2] Exhibit A of the Affidavit of Andrew Uwubanmwen (Oct. 30, 2020).
[3] Exhibit B of the Affidavit of Andrew Uwubanmwen (Oct. 30, 2020).
[4] Exhibit A of the Affidavit of Andrew Uwubanmwen (Oct. 30, 2020).

12. Eureka made the following further deposits to Ceana Sunridge in the amounts as follows[5]:

    a. $119,000.00 on August 5, 2016;
    b. $10,000.00 on August 6, 2016;
    c. $21,000.00 on August 17, 2016;
    d. $40,000.00 on March 1, 2017;
    e. $80,000.00 on November 3, 2017; and
    f. $15,000.00 on July 18, 2018.

13. The Eureka Contract was entered into prior to the Joint Venture Agreement. Accordingly, the cheque deposits made by Eureka were made with a dual purpose to the Project and the corresponding condominium unit.

14. In the Second Report of the Receiver, filed June 10, 2020, Ceana Sunridge's external counsel's trust account, KH Dunkley Law Group, held $200,000.00 in trust for Eureka in respect of the Eureka Contract.[6] These funds held by KH Dunkley Law Group were transferred to the Receiver's counsel, Tory's LLP. The $200,000.00 held in trust for Eureka remains in the Tory's trust account as of the date of this brief.[7]

15. Hillsboro has claimed a shortfall of $439,000.00 and specifically a shortfall made up by Hillsboro in respect of $200,000.00 of Eureka's purchase deposit that was to be held in trust by Ceana Sunridge's external legal counsel, KH Dunkley Law Group ("KH Dunkley").[8]

16. At the date of this brief, Ceana Sunridge nor KH Dunkley have stated why there was a shortfall of $439,000.00 in corresponding purchase deposit trust accounts.

17. Multiple parties that had a shortfall signed a Postponement of Claim agreement. However, Eureka did not sign any such agreement.[9]

18. At the date of this brief, Ceana Sunridge has not accounted for the remaining $135,000.00 that Eureka paid to Ceana Sunridge and the Receiver has not been able to trace the missing "deposits".[10]

Relevant Facts for Mr. Alein

19. The relevant facts as it pertains to Mr. Alein are set out in the various Receiver's Reports and the Affidavit of Mr. Alein, sworn and filed on November 23, 2020 (the "Alein Affidavit")

[5] Exhibit "C" of the Affidavit of Andrew Uwubanmwen (Oct. 30, 2020).
[6] Second Report of the Receiver at para 39.
[7] Second Report of the Receiver at paras 39 and 40.
[8] Exhibit "B" to the Affidavit of Keith Ferrel (Oct. 26, 2020) [Tab 12] [D608-609].
[9] Exhibit "B" to the Affidavit of Keith Ferrel (Oct. 26, 2020) [Tab 14] [D613-619].
[10] Third Report of the Receiver at para 48.

20. On December 12, 2015, Mr. Alein entered into a Purchase Contract with Ceana Sunridge ("Alein Contract") for the purchase of a condominium unit located at 2255 32 Street NE, Calgary, Alberta and identified more specifically in the Contract.[11]

21. The Alein Contract required that Mr. Alein pledge a deposit subject to section 14 of the *Condominium Property Act*, and accordingly, on or around that date Mr. Alein paid a deposit in the sum of $76,000.00 to be held in trust by KH Dunkley Law Group ("Dunkley") but addressed to Ceana Sunridge (the "Alein Deposit").[12]

22. Mr. Alein was expressly advised by the Defendant, and the Alein Contract expressly states, that the Alein Deposit "shall be held in trust by [Dunkley]" returnable in the scenario that, among others, the Project is never completed, or a breach of the Contract arises.[13]

23. Concurrently, Mr. Alein was asked to participate in a joint venture by representatives of the Defendant (the "Joint Venture") and separately decided to participate in the Joint Venture but the $500,000.00 in funds provided therein were separate and distinct from the Alein Deposit.[14]

24. The project was never completed, and these proceedings then unfolded after which Dunkley forwarded the Alein Deposit in the sum of $76,000.00 to Torys LLP as the Prescribed Trustee pursuant to the Receivership Order dated July 3, 2019. KH Dunkley notified Mr. Alein of this transfer by letter dated August 22, 2019, a copy of which is attached to the Alein Affidavit as Exhibit "D" but for ease or reference reads, in part, as follows:[15]

> *With respect to the above referenced transaction, we confirm that we hold a deposit in the sum of $76,000.00 (the "Deposit"). We are providing you with this notice pursuant to Section 20.32(8) of the Condominium Property Regulation (Alberta) to advise you that we have transferred the Deposit to Kyle Kashuba at Torys LLP, who will now act as the "Prescribed Trustee" (as such term is defined in the Condominium Property Regulation). You should receive a notice from the Prescribed Trustee advising of their receipt of the Deposit in the near future. We are required to transfer the Deposit as described above pursuant to a Receivership Order appointing Alvarez & Marshal Canada Inc. (the "Receiver") as the receiver and manager of Ceana Development Sunridge Inc. Torys LLP are the solicitors for the Receiver. Please direct any questions or concerns on this matter to Mr. Kyle Kashuba (kkashubagtorys.com).*

25. Shortly thereafter, on August 29, 2019, Torys LLP in its capacity as the “Prescribed Trustee” noted by KH Dunkley in its letter of August 22, 2019, acknowledged receipt of the Alein Deposit on behalf of the Receiver; a copy of which is attached to the Alein Affidavit as Exhibit "E" but for ease or reference reads, in part, as follows:[16]

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[11] Alein Affidavit at para 2 and Exhibit “A”.
[12] Alein Affidavit at para 3 and Exhibit “B”.
[13] Alein Affidavit at para 4 and Exhibit “A”.
[14] Alein Affidavit at paras 5-6 and Exhibit “C”.
[15] Alein Affidavit at para 8 and Exhibit “D”.
[16] Alein Affidavit at para 8 and Exhibit “E”.

> *With respect to the above referenced transaction, we confirm that we hold a deposit in the sum of $76,000.00 (the "Deposit"). We are providing you with this notice pursuant to Section 20.31(1) of the Condominium Property Regulation (Alberta) to advise you that we have received the Deposit from Khalil Haji at KH Dunkley Law Group, and we act as the "Prescribed Trustee" (as such term is defined in the Condominium Property Regulation).*
>
> *The transfer of the Deposit as described above was initiated pursuant to a Receivership Order dated July 3, 2019 appointing Alvarez & Marsal Canada Inc. (the "Receiver") as the receiver and manager of Ceana Development Sunridge Inc. Torys LLP is legal counsel for the Receiver. Please feel free to contact the undersigned if you have any questions or comments regarding this matter.*

26. Since receiving the Prescribed Trustees' letter on August 29, 2019, Mr. Alein has repeatedly, on his own and through counsel, requested the return of the Alein Deposit asserting that the Alein Deposit was provided to KH Dunkley for the sole purpose of purchasing the Unit.[17]

27. In these proceedings, the sole opposition to the return of the Alein Deposit is the Plaintiff Hillsboro Ventures Inc. ("Hillsboro"). Accordingly, and by way of example, on August 4, 2020 Mr. Alein's former counsel, Brian Phillips, Q.C., sent a letter to the Plaintiff's counsel, Mr. Derek Pontin, with a courtesy copy provided to the Receiver outlining precisely this position; a copy of which is attached to the Alein Affidavit as Exhibit "F" but for ease or reference reads, in part, as follows:[18]

> *Please be advised that we act on behalf of Mounir Alein in respect of this matter. I understand that you act for Hillsboro Ventures Inc. ("Hillsboro"). Mr. Alein provided a deposit of $76,000.00 in respect of the above noted property. Those funds were held in trust by the Dunkley law firm. I am enclosing a copy of Mr. Dunkley's letter of August 22, 2019 indicating that they were holding the deposit in trust pursuant to the Condominium Property Regulation (Alberta).*
>
> *We understand from the Receiver that Hillsboro is now taking the position that in fact they paid the deposit of $76,000.00 and not Mr. Alein. We request copies of all documentation which Hillsboro relies upon in support of their position. In addition, we understand that Hillsboro takes the position that Mounir Alein may have signed documentation postponing his claim to the $76,000.00 to that of Hillsboro. We again request copies of all documentation that Hillsboro relies upon in support of such position.*
>
> *We understand that the Receiver does not have any documentation in support of Hillsboro's position. In the event that Hillsboro is unable to produce for us any relevant documentation which supports their position, then we will require that the Receiver return the deposit of $76,000.00 forthwith to Mounir Alein in accordance with the*

[17] Alein Affidavit at para 9 and Exhibit "F".
[18] Alein Affidavit at para 9 and Exhibit "F".

terms of the purchase contract and the letters from the Dunkley law firm and Torys LLP confirming that they hold the $76,000.00 in trust for Mr. Alein in respect of this matter.

28. To date, Hillsboro has not substantively responded to such requests for information.

29. At the date of this brief, Ceana Sunridge nor KH Dunkley Law Group have stated why there was a shortfall of $439,000.00 in corresponding purchase deposit trust accounts.

30. At the date of this brief, Ceana Sunridge has not accounted for the remaining $76,000.00 that Mr. Alein paid to Ceana Sunridge in accordance with the *Condominium Property Act* and the Receiver has not been able to trace the missing "deposits".[19]

Relevant Facts for the Trust Purchase Depositors

31. In the Second Report of the Receiver, the Receiver outlined that it is in possession of $992,376.25 from the Trust Account of KH Dunkley and held in Trust for the benefit of the Trust Purchase Depositors and 5 others.

32. For ease of reference, In the Second Report of the Receiver at paras 39-40 the Receiver states:[20]

Purchase Contracts and Deposits

39. The Receiver is in possession of 20 Purchase Contracts that were entered into by Ceana Sunridge, pre-Receivership Date, with 17 individual purchasers. Based on the Purchase Contracts, Ceana Sunridge should have received approximately $3.5 million in Purchase Deposits held in a separate trust account. As of the Receivership Date, the Receiver can confirm that $992,376.25 was in Ceana Sunridge's external counsel's trust account, KH Dunkley Law Group, representing the following 7 individuals/companies and that these funds were transferred to the Receiver's counsel:

[19] Third Report of the Receiver at para 48.
[20] Second Report of the Receiver at Paras 39-40.

Purchaser Name	Deposit
Mounir Alein	$ 76,000
Paul Ng	$ 195,625
2035043 Alberta Ltd.	$ 230,000
Karim Sharifat	$ 127,751
Eureka Prescriptions Inc.	$ 200,000
1989207 AB Inc.	$ 90,000
Central Hala Meat	$ 73,000
TOTAL	**$ 992,376**

> *40. Paul Ng, 2035043 Alberta Ltd., Eureka Prescriptions Inc., 1989207 AB Inc. and Central Halal Meat have informed the Receiver that they wish to continue with their transaction of the Units that total $788,622 of the $992,376 Purchase Deposits. The two parties representing the remaining $203,751 purchase deposits, namely, Karim Sharifat and Mounir Alein, have indicated that they wish to have their purchase deposits returned and not proceed with their respective Purchase Contracts.*

33. In the Second Report of the Receiver, the Receiver goes on to outline Hillsboro's position in this regard and, for ease of reference, at para 44 of the Second Report states:

> *44. Hillsboro has claimed that Mr. Mounir Alein, Eureka Prescriptions Inc., 1989207 Alberta Inc and Central Halal were enticed to become investors in the Project and that they released their deposits to Ceana Sunridge in consideration of taking a participatory interest in same;*
>
> *however, the Receiver has been unable to substantiate these claims, although it is possible that, if Hillsboro is correct, this may have occurred as a result of the subject purchasers entering into the JV Contracts. As noted above, however, the arrangement related to the JV Contracts is unclear and the Receiver has requested on multiple occasions from Mr. Gaidhar and through his counsel, to provide evidence/information/clarity that could assist the Receiver with these allegation. This being said, to date, no evidence, information or clarity has been provided by Mr. Gaidhar or his counsel.* [*emphasis added*]

34. In its most recent Report, the Fifth Receiver's Report dated December 2, 2020 (the "Fifth Report"), the Receiver confirmed the essence of the dispute at issue which it referred to as the "Disputed Trust Funds."[21]

35. In essence, Four purchasers, including the Trust Purchase Depositors (the "Four Purchasers"), pursuant to their respective purchase and sale agreements, each paid the applicable deposits in to Ceana Sunridge and have provided evidence of the same yet the

[21] Fifth Report of the Receiver at paras 26 and 32 [F276 - F279].

funds were not initially placed into KH Dunkley's trust account and it is unclear, at this time, what happened to those deposits initially.[22]

36. At some point in time, KH Dunkley subsequently noted this error and replaced the trust monies as deposited by the Four Purchasers into the appropriate trust account and on or around August 22, 2019 ultimately provided those funds, held in trust, to the Receiver in accordance with the *Condominium Property Act.*[23]

37. For ease of reference, the Second Report of the Receiver reads, in part, and in this regard as follows:[24]

> *25. As at the Receivership Date, $992,376.25 was held in the trust account of Ceana's external counsel, KH Dunkley Law Group ("KH Dunkley"), which were held in trust pursuant to the Condominium Property Act for the following seven (7) individuals/entities (the "Trust Account Purchasers")…*
>
> *26. As discussed in the Second Report, on January 31, 2020, Hillsboro advised the Receiver that it had a priority claim against certain of the Purchase Deposits paid to Ceana by the Trust Account Purchasers on the basis that it had advanced said deposits to KH Dunkley to replace a purchaser deposit shortfall by Ceana in such trust account. The disputed Purchase Deposits relate to the deposits held in trust on behalf of Mr. Mounir Alein, Eureka Prescriptions Inc., 1989207 Alberta Inc. and Central Halal Meat (the "Four Purchasers") and represent $439,000 of the $992,376 of funds currently held in trust by the Receiver's Counsel (the "Disputed Trust Funds").*
>
> *32. While each of the Four Purchasers has advised the Receiver that they paid the applicable deposits pursuant to their respective purchase and sale agreement and have provided evidence of the same, the funds were not placed in a trust account and it is unclear, at this time, what happened to their deposits.*

38. Notwithstanding that the Disputed Trust Funds may initially have not been placed into the appropriate trust account by KH Dunkley, KH Dunkley eventually remedied this omission and later provided the funds to the Receiver in accordance with the *Condominium Property Act* and its regulations.

ISSUES PERTAINING TO EUREKA AND MR. ALEIN

39. The Trust Purchase Depositors' position in respect to the money deposited to Ceana Sunridge discussed herein as follows:

    a. **Issue 1:** Is the $276,000.00 held in Torys LLP trust account is for the benefit of the Trust Purchase Depositors to use in accordance with the *Condominium Property Act* for the benefit of the Trust Purchase Depositors as any shortfall of $439,000.00 is not due to the negligence or any act of the Trust Purchase

[22] Fifth Report at para 32 [F279].
[23] Fifth Report at paras 25 - 32 [F276 - F279].
[24] Fifth Report at paras 25, 26 and 32 [F276 - F279].

Depositors, as these funds were supposed to be held in trust pursuant to section 14 of the *Condominium Property Act*?

b. **Issue 2:** Can the remaining amount of $135,000.00 be traced for the benefit of Eureka?

c. **Issue 3:** Can the remaining amount of $76,000.00 be traced for the benefit of Mr. Alein?

LAW AND ARGUMENT

40. The answer to all three Issues noted above can be answered with relative ease in reference to the *Condominium Property Act,* the Fifth Report of the Receiver, and the applicable jurisprudence.

41. Under the *Condominium Property Act*, RSA 2000 at section 14 (3) states as follows:

> 14(3) A developer or prescribed trustee, as the case may be, shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

42. In the Fifth Report of the Receiver at para 33 and 34 the Receiver states:

> "33. Based on the Receiver's Counsel's review of the jurisprudence and applicable legislation, which, for certainty was not clear, it appears the Four Purchasers may have an argument that their deposits for the purchase of their applicable unit from Ceana should be returned notwithstanding that the Disputed Trust Funds were provided by Hillsboro/Connect First as such funds were transferred to the Receiver's Counsel by KH Dunkley pursuant to the *Condominium Property Act* for the benefit of such purchasers.
>
> 34. Pursuant to the Receiver's Counsel analysis of the jurisprudence, when a trustee misappropriates trust monies from a trust account and subsequently replaces the misappropriated trust monies, provided that the funds deposited by the trustee were deposited with the intention of replacing the misappropriated trust monies, the replacement trust monies impressed with the trust and the beneficiaries of that trust are entitled to the funds therein."

43. The analysis of the jurisprudence referenced in paragraph 34 of the Fifth Report by the Receiver would lead to the conclusion that in any event the Disputed Trust Funds are still held in trust by the Receiver for the benefit of the Four Purchasers. These funds were deposited by KH Dunkley, at the time with the intention of replacing the misappropriated trust monies, the replacement trust monies were therefore impressed with the trust and the beneficiaries of that trust (the "Trust Purchase Depositors") are entitled to them.

44. This was confirmed in *Imor Capital Corp.*, wherein Pre-Receivership Tenants trust deposits were replenished by ATB. The trust funds were identifiable and traceable and had the

hallmarks of a trust under general law: there was certainty of intent, certainty of objects and certainty of subject matter.[25]

45. Furthermore, a trust fund can be replenished when there is a clear intention to do so.[26]

46. Eureka and Mr. Alein submit that the trust funds were misappropriated by Ceana Sunridge and when they were replaced by Hillsboro it was replaced for the benefit of the Trust Account Depositors. The offices of KH Dunkley and Hillsboro made it clear that the replenishment of trust funds was intended for the Trust Account Depositors.[27] KH Dunkley realized the mistake that the Trust Account Depositors monies were not in the appropriate trust fund and did so for the benefit of the Trust Account Depositors and their respective purchase units.

47. Accordingly:

    a. **Issue 1:** the $276,000.00 held in Torys LLP trust account is for the benefit of the Trust Purchase Depositors to use in accordance with the *Condominium Property Act*;

    b. **Issue 2:** The remaining amount of $135,000.00 to Eureka has been confirmed as traceable to the benefit of Eureka; and

    c. **Issue 3:** The remaining amount of $76,000.00 has been confirmed as traceable to the benefit of Mr. Alein.

CONCLUSION AND RELIEF REQUESTED:

48. A declaration that the commercial condominium unit 7B located at the Project, is impressed with a trust in favour of Eureka, to the extent of the deposit in the amount of $200,000.00 (the "Trust Deposit Funds") currently held by the Receiver's counsel in trust.

49. Directing that the Trust Deposit Funds currently held by the Receiver's counsel be used in accordance with the Purchase Contract of Eureka.

50. A declaration for a constructive trust in the amount of $135,000.00 to be held for the benefit of Eureka for the purchase deposit of the commercial condominium unit 7B.

51. In the alternative, that an Order for accounting be traced to locate where the $135,000.00 went in respect of the rest of the Eureka deposits.

52. A declaration that the Alein Deposit, in the amount of $76,000.00 currently held by the Receiver's counsel in trust is for the benefit of Alein Mounir.

53. Directing that the Alein Deposit be returned to Mr. Alein forthwith;

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[25] *Imor Capital Corp. v Horizon Commercial Development Corp.* ("*Imor Capital"*), 2018 ABQB 39 (CanLII) at para 68 **[Authorities, Tab 2]**.
[26] *Brookfield Bridge Lending Fund v Karl Oil and Gas Ltd.,* 2009 ABCA 99 (CanLII) at paras 15-16 **[Authorities, Tab 3]**.
[27] Exhibit "B" to Affidavit of Keith Ferrell (sworn October 26, 2020) [D608-612].

54. Costs of this application; and

55. Such further and other relief as this Honourable Court deems necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of January, 2021.

FIRST WEST LAW LLP

Per: _____

RYAN D. MONEO, Solicitor for Eureka Prescriptions Inc.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

WILLIAM KATZ, Solicitor for Alein Mounir

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Condominium Property Act*, R.S.A. 2000, c-C-22
2.	*Imor Capital Corp. v Horizon Commercial Development Corp.,*2018 ABQB 39 (CanLII)
3.	*Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd.*, 2009 ABCA 99 (CanLII)

TAB 1

Province of Alberta

CONDOMINIUM PROPERTY ACT

Revised Statutes of Alberta 2000
Chapter C-22

Current as of January 1, 2019

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Rescission of purchase agreement

13(1) A purchaser may rescind a purchase agreement by providing written notice to the developer within 10 days of the later of

(a) the date the purchaser receives all of the information and documents required to be delivered to the purchaser under section 12, and

(b) the date the purchaser signs the purchase agreement.

(2) If a purchase agreement is rescinded under subsection (1), the developer shall, within 15 days from the developer's receipt of a written notice of the rescission from the purchaser, return to the purchaser all of the money paid in respect of the purchase of the unit.

RSA 2000 cC-22 s13;2002 c30 s3;2014 c10 s6

Material change before purchaser takes possession

13.1(1) If at any time before a purchaser takes possession of a unit there is a material change in the information and documents provided by the developer to the purchaser under section 12, the developer shall deliver a written notice to the purchaser.

(2) The notice required under subsection (1) must clearly identify all changes that in the reasonable belief of the developer may be material changes, and summarize the particulars of them.

(3) The developer shall in accordance with the regulations deliver the notice required under subsection (1) to the purchaser within a reasonable time after the material change occurs and, in any event, before the day the purchaser takes possession of the unit.

(4) Where a material change referred to in subsection (1) occurs, the purchaser may exercise any of the remedies provided under the regulations.

2014 c10 s6

Act prevails

13.2 Any waiver or release by a purchaser of the rights, benefits or protections under this Act is void.

2014 c10 s6

Payments held in trust

14(1) For the purposes of this section,

(a) "common property" includes facilities and property that are intended for common use by the owners notwithstanding that the facilities or property may be located in or comprise a unit or any part of a unit;

(b) "cost consultant" means a person who meets the requirements of the regulations to be a cost consultant or is otherwise designated as a cost consultant pursuant to the regulations;

(c) "developer" includes any person who, on behalf of a developer, acts in respect of the sale of a unit or a proposed unit or receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement;

(d) "financial institution" means a bank, treasury branch, credit union or trust corporation;

(e) "substantially completed" means, subject to the regulations,

(i) in the case of a unit, when the unit is ready for its intended use, and

(ii) in the case of related common property, when the related common property is ready for its intended use.

(2) A reference in this section to "related common property" is, in relation to a unit, a reference to the following:

(a) the common property or a portion of the common property that is necessarily incidental to the completion of the unit;

(b) the common property or a portion of the common property that is necessarily incidental to the intended use of the unit;

(c) in the case of a unit other than a bare land unit, the common property or a portion of the common property consisting of

(i) utilities required to service the unit and the common property,

(ii) a facility providing for reasonable access to or entrance into the unit,

(iii) a facility providing for reasonable access to highways, municipal roads or streets,

(iv) waste removal facilities or other facilities for handling waste, and

(v) any other improvements or areas

(A) designated by the regulations, or

(B) required under any other Act or regulations,

that are necessarily incidental to the intended use of the unit;

(d) in the case of a unit other than a bare land unit, in addition to the common property referred to in clauses (a) to (c), any common property or any portion of the common property that has been represented in the purchase agreement by the developer as being or as going to be available for the use of the owner of the unit and, without limiting the generality of the foregoing, may include one or more of the following:

(i) roadways, parking areas and walkways;

(ii) fences or similar structures;

(iii) landscaped areas and site lighting;

(e) in the case of a bare land unit, the common property or a portion of the common property consisting of

(i) a facility providing for reasonable access to or entrance into the unit,

(ii) a facility providing for reasonable access to highways, municipal roads or streets, and

(iii) any other improvements or areas

(A) designated by the regulations, or

(B) required under any other Act or regulations,

that are necessarily incidental to the intended use of the unit;

(f) in the case of a bare land unit, in addition to the common property referred to in clauses (a), (b) and (e), any common property or any portion of the common property that has been represented in the purchase agreement by the developer as being or as going to be available for the use of the owner of the unit and, without limiting the generality of the foregoing, may include one or more of the following:

(i) utilities required to service the unit and the common property;

(ii) roadways, parking areas and walkways;

(iii) fences or similar structures;

(iv) landscaped areas and site lighting;

(v) waste removal facilities or other facilities for handling waste.

(3) A developer or prescribed trustee, as the case may be, shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

(4) Notwithstanding subsection (3), if a unit is not substantially completed, the developer or prescribed trustee, as the case may be, shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

(5) Notwithstanding subsection (3), if the related common property is not substantially completed, the developer or prescribed trustee, as the case may be, shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant based on the unit factors of the units sharing the same related common property.

(6) A developer who receives money that is to be held in trust under this section shall, within 3 days of receiving it, exclusive of holidays and Saturdays, deposit the money into a trust account maintained in a financial institution in Alberta.

(6.1) A trust account referred to in subsection (6) must be maintained by a prescribed trustee.

(7) A developer or prescribed trustee, as the case may be, who is in possession or control of money that is to be held in trust under this section shall ensure that the money is kept on deposit in Alberta.

(7.1) A developer or prescribed trustee, as the case may be, who is in possession or control of money that is to be held in trust under this section shall comply with the requirements respecting trust accounts established by the regulations.

(8) If money is being held in trust under this section and the purchaser of the unit takes possession of or occupies the unit prior to the certificate of title being issued in the name of the purchaser, the interest earned on that money, if any, from the day that the purchaser takes possession or occupies the unit to the day that the certificate of title is issued in the name of the purchaser is to be applied against the purchase price of the unit.

(9) Subject to subsection (8), the developer is entitled to the interest earned on money held in trust under this section.

(10) Subject to subsection (11), this section does not apply in respect of money paid to a developer under a purchase agreement if that money is held, secured or otherwise dealt with under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both.

(11) Where

(a) money is to be held, secured or otherwise dealt with under the provisions of a plan, agreement, scheme or arrangement referred to in subsection (10), and

(b) an amount of that money that is to be held, secured or otherwise dealt with exceeds the limits of the protection against loss provided for under the plan, agreement, scheme or arrangement,

that amount that exceeds the limits of the protection against loss under the plan, agreement, scheme or arrangement is to be held in trust under this section.

(12) Notwithstanding subsections (3) to (11),

(a) where in relation to a unit or related common property, or both, a developer is required to provide security under another enactment for the purpose of completing construction, and

(b) that construction referred to in clause (a) is the same or substantially the same construction with respect to a unit or related common property in respect of which money is to be held in trust under this section,

the developer may, subject to the regulations, reduce the amount of money to be held in trust under this section by the amount of the security provided under the enactment referred to in clause (a).

(13) Where, with respect to a unit or related common property, or both,

(a) money is held in trust under this section or held, secured or otherwise dealt with pursuant to the provisions of a plan, agreement, scheme or arrangement approved under subsection (10), and

(b) the developer has not met the requirements under which that money is to be paid out of the trust or otherwise disbursed,

the corporation or an interested party may apply to the Court for an order for that money to be paid out for the purposes of substantially completing the unit or related common property, as the case may be, or to be used as directed by the Court.

(14) On hearing an application under subsection (13), the Court may do one or more of the following:

(a) give directions as to whom the money is to be paid;

(b) give directions as to how the money is to be used for the purposes of substantially completing the unit or related common property, or both, as the case may be;

(c) give directions as to how the money is to be used or otherwise disposed of if it is not to be used for the purposes referred to in clause (b);

(d) appoint an administrator, a receiver or a receiver and manager for the purpose of carrying out any matters dealt with pursuant to the application;

(e) give any other directions, not referred to in clauses (a) to (d), that the Court considers appropriate in the circumstances;

(f) award costs.

(15) Once the unit or the related common property, or both, as the case may be, in respect of which money is being held in trust under this section are, as determined by a cost consultant, substantially completed, any money remaining in trust may be paid to the developer.

RSA 2000 cC-22 s14;2014 c10 s7

Exemption

15 Section 14 does not apply if the purchaser does not perform the purchaser's obligations under the purchase agreement.

RSA 1980 cC-22 s12

TAB 2

Court of Queen's Bench of Alberta

Citation: Imor Capital Corp v Horizon Commercial Development Corp, 2018 ABQB 39

Date: 20180116
Docket: 1603 12068
Registry: Edmonton

Between:

Imor Capital Corp.

Plaintiff

- and -

**Horizon Commercial Development Corp,
Prism Capital Corp, Granite Man Ltd,
Prism Real Estate Investment Corporation,
Ali Ghani, Abdul Ghani, and Kamal Elkadri**

Defendants

**Reasons for Judgment
of the
Honourable Madam Justice Dawn Pentelechuk**

Introduction

[1] The Plaintiff Imor Capital Corp [Imor] is a secured creditor of the Defendant Horizon Commercial Development Corp [Horizon], a company now in receivership.

[2] The assets of Horizon have been sold and distributed except for the sum of $134,200.52, which is the subject of this application.

[3] Horizon owned a student residence at MacEwan University. The monies represent security deposits paid by two groups of tenants: tenants whose lease agreements had ended before the receivership, and tenants residing at the time of the receivership.

[4] Horizon was subject to the *Residential Tenancies Act*, SA 2004, c R-17.1 [*RTA*], which mandates that security deposits paid by tenants be held in a separate, interest-bearing trust account.

[5] Horizon failed to do this, giving rise to competing claims to the funds. Imor argues that in both instances, the security deposits paid form part of Horizon's estate and it is entitled to these funds as a secured creditor.

[6] It is well established that deemed trusts created through provincial legislation cannot trump the distribution scheme established under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], unless the requirements of a general trust are satisfied: certainty of intention, certainty of objects, and certainty of subject matter (see ***British Columbia v Henfrey Samson Belair Ltd***, [1989] 2 SCR 24, 59 DLR (4th) 726 [***Henfrey Samson***] at para 15).

[7] Imor concedes certainties of intention and objects are likely satisfied, but argues the trust fails because there is no certainty of subject matter as Horizon either co-mingled the trust funds in its operating account, or the trust funds have been dissipated, or are otherwise unaccounted for.

[8] Thus, the central issue in this case is whether the security deposits are subject to a valid trust under general law and specifically, whether certainty of subject matter exists. The answer to this question turns on the following issues:

1. whether co-mingling the funds destroyed the trust;
2. if not, whether the trust funds can be sufficiently identified or traced; and
3. whether, on the facts of this case, the trust was replenished for the benefit of the intended beneficiaries.

[9] Before turning to these issues, I will provide some background facts, derived from the Affidavits of Kristin Gray, Assistant Vice-President with Bowra Group Inc [the Receiver] sworn September 6, 2017 and October 4, 2017 and the Second Report of the Receiver filed September 6, 2017.

Background

[10] Horizon, incorporated in 2012, developed a 120- unit (311- bedroom) student residence adjacent to MacEwan University [the Residence]. This was Horizon's sole asset.

[11] Horizon obtained financing through a first mortgage with People's Trust and second and third mortgages with Imor. As of August 2016, People's was owed approximately $15.1 million and Imor approximately $12.5 million.

[12] The Residence was managed by Campus Living Centre [CLC]. CLC was responsible for signing lease agreements, collecting and holding security deposits, collecting rent, and managing the day- to- day operations of the Residence.

[13] The Tenant Room Lease between the tenants and Horizon referred to a "Damage Deposit" and the date it was received, but the lease agreement did not reference the *RTA* or indicate the deposit would be held in trust.

[14] CLC complied with the *RTA*, depositing all security deposits received from tenants into a trust account with Royal Bank of Canada [RBC].

The Pre-Receivership Tenants

[15] Between June 9, 2016 and July 8, 2016, prior to the receivership, CLC issued from its trust account with RBC, 87 cheques to individual payees [the Pre-Receivership Tenants] totalling $74,898.64. The cheques represented the return of the security deposit paid by each tenant and ranged between $379.50 and $1700. Instead of mailing these cheques directly to the payees, CLC sent the cheques to Horizon for distribution to the Pre-Receivership Tenants.

[16] Rather than return the cheques to the payees, Horizon forged the signatures of the payees and, between June 28, 2016 and August 6, 2016, deposited the 87 cheques into its operating account at ATB Financial [ATB]. Horizon held no trust account.

[17] On August 8, 2016, Bowra Group Inc was appointed as Horizon's Receiver [the Receiver] under a general security agreement granted by Horizon in favour of Imor. A Certificate of Appointment was issued August 26, 2016, appointing the Receiver as insolvency trustee of Horizon.

[18] On August 8, 2016, the balance in the ATB account was $12,148.21.

[19] On August 10, 2016, the Receiver attended at ATB and froze Horizon's account.

[20] At some point, unclear from the evidence, RBC learned that Horizon had forged the payees' signatures and demanded reimbursement from ATB. ATB concluded it was liable for the tort of conversion when it negotiated and paid out on forged endorsements. Conversion is a strict liability tort: ***Teva Canada Limited v TD Canada Trust***, 2017 SCC 51 at para 3. Between August 16, 2016 and October 7, 2016, ATB charged back the sum of $74,898.64, plus applicable charge-back fees, to Horizon's operating account.

[21] The sum of $74,898.64 was sent by ATB to RBC and deposited back into CLC's trust account with RBC. It is unknown when this was done or whether this was done in a series of transactions or in one transaction. At some point, CLC forwarded this amount to the Receiver, but the circumstances surrounding this decision are not in evidence. The dates and particulars of these transactions are unknown, as the RBC account information is not in evidence either.

The Post-Receivership Tenants

[22] The Receiver took steps to set up its own accounts for Horizon's deposits and withdrawals, including a trust account for incoming students' security deposits. There was a lag time in setting up the Receiver's accounts. For a brief period, the Receiver collected first month's rents and security deposits and deposited these into Horizon's ATB account. The Receiver intended to "sweep" the new rents and security deposits from Horizon's ATB account into the Receiver's new operating account and trust account, respectively.

[23] The Receiver reconciled the first month's rents and security deposits received on behalf of new tenants during this interval and credited them to the new tenants.

[24] When the Receiver was appointed, 180 tenants lived in the Residence. CLC provided the Receiver with all security deposits it held in trust. The Receiver reconciled Horizon's records and determined security deposits totalling $59,301.88 for 68 tenants [the Post-Receivership Tenants], were unaccounted for [the Missing Deposits].

[25] The Receiver later learned the Missing Deposits had been paid by the Post-Receivership Tenants directly to Horizon or to its related entities, not to CLC. Horizon never forwarded the Missing Deposits to CLC, nor did it have its own trust account. The Receiver does not know what became of these funds.

History of the Receivership Proceedings

[26] On August 23, 2016, the Receiver was appointed by court order.

[27] On July 11, 2017, the Receiver obtained an Order approving the sale of the Residence to 1937394 Alberta Ltd as contemplated in an Offer to Purchase dated February 16, 2017. The Residence was sold for $28.25 million. Notably, the Order contained a vesting clause which read in part:

> ... all of the Debtors' right, title and interest in and to the Purchased Assets described in the Sale Agreement shall vest absolutely in the name of the Purchaser (or its nominee) free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise...*trust or deemed trust whether contractual, statutory or otherwise* [emphasis added].

[28] The Receiver acknowledges that the affected tenants were not served with notice of the July 11, 2017 application, nor was the issue of security deposits brought to the Justice's attention before the Order was granted.

[29] The sale of the Residence closed and the Receiver held the sale funds pending Court approval of the distribution of those funds.

[30] In its Second Report to the Court filed September 6, 2017, the Receiver flagged the issue of the security deposits. The Receiver reported it had obtained a legal opinion that both groups of tenants should be considered unsecured creditors, having no priority to the funds. In the Receiver's view, because the individual claims of the Pre-Receivership Tenants could not be specifically traced to the funds held by the Receiver at the time of its appointment, no trust existed. With the Post-Receivership Tenants, the Receiver was unable to identify or trace those funds and therefore concluded no trust existed under general law.

[31] Before the Application came before me on September 21, 2017, I asked the Receiver to provide a legal brief on this issue. As the issue of priority to the security deposits was the sole remaining issue, Imor requested that the Receiver be discharged and Imor be allowed to argue the issue of priority to these funds.

[32] On September 21, 2017, Orders were granted approving distributions to various creditors (including Imor), discharging the Receiver and directing Imor to take steps to ensure notice of

the application on all affected tenants. The sum of $134,200.52 was ordered held in trust by Imor's counsel.

[33] The application was adjourned to November 23, 2017 and Imor advised that through a combination of its dedicated website, email and regular mail, all but eight of the 173 affected creditors received notice of the application. While a number of tenants were in the courtroom, no submissions, written or oral, were made on their behalf.

[34] With that background, I turn to the applicable legislation.

Applicable Legislation

[35] In Alberta, a landlord's obligations are set out in s 44 of the *RTA*:

> 44(1) A landlord shall
>
> (a) deposit each security deposit consisting of money received by the landlord into an interest-bearing trust account at a bank, treasury branch, credit union or trust corporation in Alberta within 2 banking days after receiving the deposit, and
>
> (b) ensure that the security deposit remains in trust until it is disposed of in accordance with this Act and the regulations.
>
> (2) A landlord is the trustee of the money in a trust account on behalf of the tenant who paid it or, if the tenant has assigned the residential tenancy agreement with the consent of the landlord under section 22, the assignee.
>
> (3) A landlord shall deposit only money that is a security deposit in the trust account.
>
> (4) Money in the trust account is subject to this Act and the regulations and to the provisions of the residential tenancy agreement respecting security deposits that are not in conflict with this Act or the regulations.
>
> ...

[36] Section 47 of the *RTA* impresses the obligation to hold security deposits in trust, on any subsequent landlord:

> 47(1) A person who acquires the interest of a landlord in residential premises has the rights and is subject to the obligations of the previous landlord with respect to a security deposit paid to the previous landlord in respect of the residential premises.
>
> (2) A person who acquires the interest of a landlord in residential premises shall, within a reasonable time after acquiring the interest and without cost to the tenant, serve on the tenant
>
> (a) a notice of landlord that meets the requirements of section 18, and
>
> (b) a statement setting out the amount of the security deposit and interest, calculated in accordance with the regulations, standing to the tenant's credit as of the date the person acquired the interest in the residential premises.

[37] Under the distribution scheme of the *BIA*, trust property in the hands of the bankrupt is exempt from distribution to creditors:

> 67 (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.

[38] The issue is whether the security deposits of either or both groups of tenants fall within s 67(1)(a) of the *BIA*, and therefore are exempt from distribution to Imor.

Analysis

Jurisprudence on *BIA* and Provincial Legislation

[39] An analysis of the interplay between provincial legislation deeming or creating a trust and the distribution scheme created by the *BIA* begins with the Supreme Court of Canada's decision in ***British Columbia v Henfrey Samson Belair Ltd***, [1989] 2 SCR 24, 59 DLR (4th) 726 [***Henfrey Samson***], which considered s 47(a) of the *Bankruptcy Act*, the predecessor to s 67(1)(a) of the *BIA*.

[40] In that case, the Supreme Court examined whether the *Social Service Tax Act*, RSBC 1979, c. 388, which created a statutory deemed trust for monies collected, gave the province priority over all other creditors. The applicable section of the *Social Service Tax Act* deemed the merchant collecting the sales tax to hold it in trust for the provincial Crown and deemed it to be held separate and apart from the merchant's own money or assets. Further, the legislation purported to create a lien and charge on the *entire* assets of the bankrupt merchant, as if it were a secured claim.

[41] Noting that bankruptcy and insolvency are matters of exclusive federal jurisdiction, the majority of the Supreme Court held that a statutory trust created through provincial legislation, without more, cannot re-order priorities and supersede the provisions of the *BIA* to defeat the distribution scheme outlined in the *BIA*. The mischief avoided is permitting different schemes of distribution between provinces through the creation of provincial statutory trusts.

[42] Although some authority exists suggesting a provincial statutory trust can never be exempt under s 67(1)(a) of the *BIA*, that suggestion was expressly rejected by Slatter JA in ***Iona Contractors Ltd v Guarantee Company of North America***, 2015 ABCA 240 [***Iona***], leave to appeal refused [2015] SCCA No 404. Referring to ***Henfrey Samson*** and the Court of Appeal's earlier decision in ***Bassano Growers Ltd. v Price Waterhouse Ltd***, 1998 ABCA 198, Slatter JA concluded, at paras 34-36, that statutory trusts can fall within s 67(1)(1) of the *BIA* and be exempt from distribution if the trust qualifies as a trust under the general principles of law. General principles require three certainties: certainty of intention, certainty of objects, and certainty of subject matter.

[43] In ***Husky Oil Operations Ltd v Minister of National Revenue***, [1995] 3 SCR 453, 26 OR (3d) 81, the Supreme Court reviewed the effect of provincial legislation intruding into the federal domain of bankruptcy and insolvency. The majority of the Court held that the doctrine of paramountcy, which arises where there is clear operational conflict between valid federal and provincial legislation, requires that the provincial legislation be declared inoperable to the extent of the conflict. The Court summarized the principles arising from the Court's quartet of decisions in the area, including ***Henfrey Samson*** (at paras 32 and 39):

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces would create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;

(4) the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*...

...

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

[44] With those principles in mind, I turn to the first issue.

Does Co-Mingling of Funds Destroy the Trust?

[45] In ***Henfrey Samson***, as in most such cases involving statutory trusts, certainty of intention and certainty of objects were not in dispute. In the case before me, Imor fairly concedes that certainty of intention and certainty of objects have likely been satisfied. Indeed this is correct, as the provisions of the *RTA* identify certainty of intention (that security deposits paid by tenants be held in trust) and certainty of objects (the students who have paid the deposits).

[46] The dispute usually centers on whether certainty of subject matter exists. That is the case here. Imor argues there is no certainty of subject matter because the deposits cannot be identified or traced through Horizon's ATB account at the time of the Receiver's appointment. Imor therefore argues the funds are not exempt from distribution and both groups of tenants are unsecured creditors within the meaning of the *BIA.*

[47] Imor's argument suggests that co-mingling of funds precludes both the identification and tracing of trust funds, relying on the Ontario Court of Appeal decision in ***GMAC Commercial Credit Corporation – Canada v TCT Logistics Inc*** (2005), 74 OR (3d) 382, 7 CBR (5th) 202 (CA) [***GMAC***].

[48] In ***GMAC***, TCT Logistics operated a freight brokerage and warehouse business in Canada and the US. A regulation under the *Truck Transportation Act*, RSO 1990, c T 22 mandated that TCT place that portion of accounts receivable relating to the charges of the carrier

into a separate trust account. TCT did not do so, depositing the funds into its operating account. The motion judge found TCT's computer accounting program identified the funds collected on behalf of the carriers and held the trust funds were sufficiently identified.

[49] The Court of Appeal allowed the appeal, concluding that once purported trust funds were co-mingled with other funds, they lost their character as trust funds. The Court stated at para 20:

> In my view, the facts in this case regarding how the funds were held and accounted for are not distinguishable from the ***Henfrey Samson Belair*** case, and consequently, the legal result must also be the same. The funds relating to the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds **when they were not segregated and were co-mingled with other TCT funds** [emphasis added].

[50] A literal interpretation of this passage suggests that once trust funds are co-mingled, the trust ceases to exist and it is unnecessary to examine whether the funds are otherwise traceable or identifiable. In my view, this interpretation is neither correct in law nor consistent with subsequent jurisprudence.

[51] First, the Court in ***GMAC*** concluded that the facts in that case were not distinguishable from the facts in ***Henfrey Samson*** and the same legal result must follow. But key factual differences did exist. The legislation in ***Henfrey Samsen*** deemed the taxes collected to be held in trust and deemed the funds collected to be held separate and apart from the assets of the collector. The legislation went further to provide that the unpaid tax formed a lien and charge on all assets of the collector, in the nature of a secured debt.

[52] In ***GMAC***, as in the case before me, the legislation did not deem the funds to be held in trust, but rather, mandated that the funds be placed in a separate trust account. The intention of the legislation was to avoid any issue of co-mingling. Further, the regulation in ***GMAC*** did not attempt to expand the reach of the trust beyond those amounts collected on behalf of the carriers. These are key factual differences that, in my respectful view, may properly lead to a different result.

[53] Second, despite the fact TCT's computer accounting program identified the funds collected on behalf of the carriers, the Court, relying on ***Henfrey Samson***, declined to find a trust for their benefit, concluding the co-mingling of funds served to destroy the fund's character as trust funds.

[54] But ***Henfrey Samson*** is not authority for the proposition that co-mingling destroys a trust. The trust in ***Henfrey Samson*** did not fail because the funds were co-mingled but because, on the facts before the Court, tracing or identification of the trust funds was not possible. As McLachlin J stated at p 35:

> If the money collected for **tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust"** and the money is exempt from distribution to creditors by reason of s. 47(a). If, on the other hand, the money has been converted to other property **and cannot be traced**, there is no "property held...in trust" under s.47(a) [emphasis added].

[55] On the heels of ***GMAC***, the Ontario Court of Appeal decided ***Graphicshoppe Ltd, Re*** (2005), 78 OR (3d) 401, 260 DLR (4th) 713 (CA). Although the Court was split on whether a trust existed, the Court unanimously agreed that co-mingling, by itself, is not fatal to the

application of s 67(1)(a) of the *BIA* (at para 65 per Juriansz JA in dissent; at para 123 per Moldaver JA for the majority).

[56] The conflict involved the pension contributions deducted from the paycheques of Graphicshoppe employees. It did not involve legislation creating a deemed trust. Graphicshoppe created a defined pension plan with London Life and was supposed to remit the employee contributions to the plan administrator, but in the months preceding bankruptcy, did not.

[57] The majority decision held the employees' claims under s 67(1)(a) must fail. In so concluding, they were not concerned with the co-mingling of funds, but rather, that the trust funds could not be traced. Notably, it was clear on the evidence that the employees' pension contributions were totally dissipated before the bankruptcy, and therefore, tracing was not possible (at para 132).

[58] Accordingly, Horizon's co-mingling of trust funds with its own is not fatal to the trust. It must be determined whether, despite the co-mingling, the trust funds can be identified or traced.

Can the Funds be Traced?

The Post-Receivership Tenants

[59] Tracing is a proprietary remedy at common law. The Saskatchewan Court of Appeal in ***Agricultural Credit Corp of Saskatchewan v Pettyjohn*** (1991), 90 Sask R 206;79 DLR (4th) 22 (CA) defined tracing in the following terms, at para 55:

> Tracing at common law and equity is a proprietary remedy. It involves following an item of property either as it is transformed into other forms of property or, as it passes into other hands, so that the rights of a person in the original property may extend the new property. In establishing that one piece of property may be traced into another, it is necessary to establish a close and substantial connection between the two pieces of property, so that it is appropriate to allow the rights in the original property to flow through to the new property. The question has most often arisen in the context of a trust, when the trustee has improperly disposed of the trust assets.

[60] It is unknown what Horizon did with the security deposits of these tenants, where they were deposited, and what use was made of the money. The trust funds cannot be either identified or traced.

[61] There may be compelling policy reasons why a distinction should be made between statutory trusts where the legislation permits co-mingling of funds, and statutory trusts where the legislation mandates that the trust funds be placed in a separate trust account. After all, had Imor done what it should have done, no issue would arise. No one suggests that the *RTA*, if complied with, would not create a legitimate trust, both statutorily and under general law. This is evidenced by the Receiver acknowledging and honoring those deposits received in the interim period before its own accounts were established.

[62] This fact did not sway the Court in ***GMAC***, which declined to find a trust, even though the regulation in question compelled the bankrupt to place the carriers' fees in a separate trust account. I am unaware of any authority that exempts such trusts from the requirement that they constitute a trust under general law, and satisfy the three certainties. The Post-Receivership Tenants cannot establish certainty of subject matter and accordingly, the security deposits of

these tenants are not valid trusts under general law. The claims of the Post-Receivership Tenants must fail.

The Pre-Receivership Tenants

[63] Imor points out that Horizon's account held only $12,000 at the date the Receiver was appointed, and therefore, the bulk of the security deposits had been dissipated or converted to other property that cannot be traced. The foundation to Imor's argument is that the trust monies, if they are to be exempt under s 67(1)(a) of the *BIA*, must be traceable *through* Horizon's operating account at the time of the Receiver's appointment.

[64] I reject that argument.

[65] It is indisputable that a complete and valid trust existed before the receivership for the benefit of the Pre-Receivership Tenants.

[66] The provisions of the *RTA* were in place before the receivership. The security deposits were paid by the tenants and held in trust by CLC before the receivership. Cheques were issued payable to the tenants before the receivership. In every sense, the trust existed at the time of Horizon's receivership. Had CLC retained possession of those cheques at the time of the receivership, the Receiver could lay no claim to those funds.

[67] The intervening events were the fraudulent acts of Horizon, leading to co-mingling of the funds. There is no principled reason why these funds should accrue to the benefit of the secured creditor, Imor, rather than the Pre-Receivership Tenants, the beneficiaries of the trust. To be sure, equity lies with these tenants and to hold that these funds form part of Horizon's estate would be a perverse result that cannot be justified. It has been said that the application of law to life should actually produce justice. Why should a creditor with no expectation of attaching these funds, end up receiving them through bankruptcy distribution because of the fraudulent acts of the bankrupt?

Can the Trust Fund for the Pre-Receivership Tenants be Replenished?

[68] But in any event, the trust funds were replenished when ATB returned the sum of $78,898.64 to the trust account of RBC. The trust funds were identifiable and traceable and had all the hallmarks of a trust under general law: there was certainty of intent (security deposits paid by the tenants); certainty of objects (the individual payees who had paid them) and certainty of subject matter.

[69] A trust fund *can* be replenished when there is a clear intention to do so: ***Brookfield Bridge Lending Fund v Vanquish Oil & Gas Corp***, 2009 ABCA 99 at paras 15-16.

[70] I am satisfied that when ATB returned the sum of $78,898.64 to CLC's trust account at RBC, it did so with the intention of replacing the fraudulently negotiated trust funds and returning those funds for the benefit of the intended beneficiaries - the Pre-Receivership Tenants. This is the only logical inference to draw as the amount returned was the exact total of the 87 cheques that had been fraudulently endorsed by Horizon. Had that not been the case, ATB would have issued the payment directly to the Receiver.

[71] Imor suggests that the $78,898.64 paid by ATB back to RBC are not trust funds misappropriated by Horizon, but rather, an amount comprised of the following:

a. the $7,498.19 in the ATB account as at August 10, 2017;

b. the sum of $31,987.39 (funds with no connection to the Pre-Receivership Tenants but rather deposit cheques collected by the Receiver in the intervening period before it set up its own accounts); and

c. $35,413.06 taken from overdraft.

[72] There is nothing in the evidence to support either this breakdown or the assertion that this was ATB's intention. While the Receiver may not have anticipated that ATB would have charged back these amounts to Horizon's operating account after the account had apparently been frozen, that does not change the result. It is curious why in the circumstances, the Receiver requested those funds from CLC. Unfortunately, any exchange of correspondence between ATB, RBC, CLC and the Receiver was not in evidence.

[73] Nor can the trust be defeated on the basis it was replenished *after* the receivership. In my view, there is no authority, nor any principled reason, why the timing should defeat the Pre-Receivership Tenants' claims.

[74] In ***Iona***, Slatter JA considered whether a trust must be in effect prior to the bankruptcy in order to be effective after bankruptcy and concluded there was no binding authority to that effect: at para 44. Noting that s 67(1)(a) of the *BIA* does not impose any temporal limit on when the trust arises, Slatter JA concluded that a requirement that the trust exist at the time of bankruptcy may produce anomalous results: ***Iona*** at para 44.

[75] ***Iona*** dealt with holdback funds under a construction contact. The governing legislation was the *Builders' Lien Act*, which reads that once a certificate of substantial performance is issued, payments made by the owner are held in trust for the benefit of persons (suppliers or subcontractors) who have not been paid.

[76] The contractor, Iona, went bankrupt. At issue was the entitlement to almost a million dollars payable by the airport authority and whether those funds should go to Iona's secured creditor or to the unpaid subcontractors. This amount had not yet been issued to or received by Iona before its bankruptcy, and was held in trust pending resolution of the dispute.

[77] The Court concluded that the funds should go to the subcontractors because nothing about the timing or formation of the trust or the bankruptcy would render the statutory trust inoperative and there was no intent or effect of the legislation to defeat the order of priorities under the *BIA*. As summarized in para 47:

> It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the *Bankruptcy and Insolvency Act*. The trusts under the *Builders Lien Act*, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the date of bankruptcy [citations omitted]. Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.

[78] I find this to be compelling reasoning and applicable to the case before me. The trust created under the *RTA* was valid and operative and remained so after the trust funds were replenished. The trust claims of the Pre-Receivership Tenants do not form part of Horizon's estate.

Conclusion

[79] The claims of the Pre-Receivership Tenants, totalling $78,898.64 fall within s 67(1)(a) of the *BIA* and are exempt from distribution. The trust claims of the Post-Receivership Tenants must fail.

[80] Imor shall publish these Reasons on its dedicated website and take immediate steps to distribute the security deposits to the Pre-Receivership Tenants. It may not release any portion of the remaining funds held in trust until further Court Order. As a pre-requisite to any further application, Imor must file an Affidavit evidencing that the Pre-Receivership Tenants have acknowledged the return of their security deposit.

[81] I remain seized of this matter.

Heard on the 23rd day of November, 2017.
Dated at the City of Edmonton, Alberta this 16th day of January, 2018.

Dawn Pentelechuk
J.C.Q.B.A.

Appearances:

Heather M.B. Ferris
Lawson Lundell LLP
for the Applicant Imor Capital Corp.

TAB 3

In the Court of Appeal of Alberta

Citation: Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd., 2009 ABCA 99

Date: 20090514
Docket: 0801-0255-AC
Registry: Calgary

Between:

Brookfield Bridge Lending Fund Inc.

Appellant
(Plaintiff)

- and -

Vanquish Oil & Gas Corporation and King Energy Inc.

Not Parties To the Appeal
(Defendants)

- and -

Second Wave Petroleum Ltd. and Brookfield Bridge Lending Fund Inc.

Appellants/Purchaser and Secured Creditor

- and -

Karl Oil and Gas Ltd. and Buffalo Resources Corp.

Respondents/Creditors

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment of
The Honourable Mr. Justice Slatter
Concurred in by The Honourable Madam Justice Rowbotham

Dissenting Memorandum of Judgment of
The Honourable Mr. Justice Berger

Appeal from the Order of
The Honourable Mr. Justice J.D.B. McDonald
Dated the 21st day of August, 2008
Filed on the 10th day of September, 2008
(2008 ABQB 444, Docket: 0701-03222)

Memorandum of Judgment of
The Honourable Mr. Justice Slatter

Slatter J.A.:

[1] The issue on this appeal is whether an express trust created by an operating agreement for an oil well gives the owners of that well a claim in priority over a secured creditor of the trustee.

Facts

[2] Vanquish Oil & Gas, which is now in receivership, was the operator of a certain oil well. It was required to remit 45% of the net production revenues to the owner of that proportional interest in the well. Karl Oil and Gas Ltd. and Choice Resources Corporation (now known as Buffalo Resources Corp.) disagree on which of them owns that 45% interest. That does not, however, affect the outcome of this appeal as Karl and Choice take a common position on the issue presently before the court.

[3] The 1990 Canadian Association of Petroleum Landmen Operating Procedure under which the well was operated imposed a trust on the net production revenues generated by the well, but it also permitted Vanquish to intermingle those funds with its own funds:

> 5.07 - COMMINGLING OF FUNDS - The Operator may commingle with its own funds the moneys which it receives from or for the account of the Joint-Operators pursuant to this Operating Procedure. Notwithstanding that moneys of a Joint-Operator have been commingled with the Operator's funds, the moneys of a Joint-Operator advanced or paid to the Operator, whether for the conduct of operations hereunder or as proceeds from the sale of production under this Operating Procedure, shall be deemed to be trust moneys, and shall be applied only to their intended use and shall in no way be deemed to be funds belonging to the Operator, other than in its capacity as the Joint-Operators' trustee.

All revenues received from the well were deposited into, and all expenses relating to its operation were paid out of Vanquish's general bank account at TD Canada Trust. That same account was also used to pay all of Vanquish's general expenses.

[4] On March 14th, 2007 there was only $40,218 left in the general account, the lowest balance the account reached. On March 16th, 2007 a further $40,599 of revenue relating to the oil well was deposited. Further deposits not impressed with the trust were made, and at the date of receivership (March 28th, 2007) the account balance was back up to $417,913 (EKE, p.

A276). It is argued that at the date of receivership Vanquish was in default of remitting as much as $320,539 to Karl or Choice.

[5] The receiver eventually sold all of the assets of Vanquish on behalf of the appellant secured creditor Brookfield Bridge Lending Fund Inc. The issue is whether the trust created by the Operating Procedure attached to the sale proceeds, effectively giving Karl or Choice a proprietary claim to those funds.

[6] The trial judge concluded that the issue was which of two innocent parties should bear the loss resulting from Vanquish's breach of trust: the non-operator working interest owner (i.e. Karl or Choice), or the appellant secured party? He concluded that the appellant secured party "was in a far better position to ensure that its customer conducted its affairs in a fashion so as to honour the obligations clearly imposed upon it": ***Brookfield Bridge Lending Fund Inc. v. Vanquish Oil & Gas Corp.***, 2008 ABQB 444, 96 Alta. L.R. (4th) 329 at para. 53. In this way the trial judge essentially imposed the burden of Vanquish's breach of trust on the appellant.

Standard of Review

[7] Whether a trust exists is a question of law, which will be reviewed for correctness. Whether a party is entitled in law to the imposition of a constructive trust is also a question of law, reviewable for correctness. To the extent that there is an element of discretion or fact-finding involved, some deference would be warranted, unless the imposition of a constructive trust was clearly unreasonable or based on an error of principle: ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217 at paras. 54-5.

Trusts and Trustees

[8] Most trusts are consensual arrangements. They are created by the act of the settlor, who may also be the beneficiary. Sometimes the trustee is a party to the creation of the trust, but in any event the trustee must usually consent to act. The trust binds all those who are involved in its creation.

[9] A trust, however, creates proprietary interests that may affect the rights of third parties who deal with the trust property. In some cases those third parties may not even be aware of the existence of the trust, or that the property they are dealing with is trust property. Since it would be unfair to allow the consensual act of those who created the trust to prejudice the rights of third parties, the courts of equity always studiously protected the interests of the "*bona fide* purchaser for value without notice". Whatever proprietary rights might be created by the trust will be extinguished if the trust property comes into the hands of such a third party. The effect of the *bona fide* third-party rule is that much of the risk of a breach of trust by the trustee will fall on the beneficiaries.

[10] The law also recognizes “constructive trusts” which are often actually a form of equitable remedy. The imposition of a constructive trust can also create proprietary rights, which can also affect the interests of third parties. For that reason the courts will decline to impose a constructive trust where that would prejudice the interests of a *bona fide* purchaser for value without notice. As the Court noted in ***Soulos v. Korkontzilas*** at para. 45, one of the preconditions for imposing a constructive trust is that “There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.”

[11] The law imposes strict duties on trustees. It is certainly a prudent practice for a trustee to keep trust funds separate from its own funds, but in some situations (such as the present) the trustee may be expressly or impliedly authorized to commingle trust funds with other funds. The express or implied right to commingle does not however give the trustee the right to breach the trust. The Operating Procedure provided that the funds could be applied “only to their intended use”. This was not the type of trust where the trustee is effectively allowed to borrow the commingled trust funds and use them for its own private purposes. Whether commingled or not, the trustee may only expend trust funds on purposes authorized by the trust. In this case it is clear that Vanquish was in breach of trust, because it spent trust funds on unauthorized things.

[12] So long as there is a positive balance in the account the analysis is easy. The trust attaches to the trust account and protects the net balance from the claims of any secured creditors: ***Bank of Nova Scotia v. Société Générale (Canada***), [1988] 4 W.W.R. 232, 58 Alta. L.R. (2d) 193 (C.A.).

[13] But once the trust funds are disbursed to *bona fide* third parties for value without notice, the funds are released from the trust. The beneficiaries can no longer follow the funds. The result is the same whether the funds are kept in a segregated trust account, or whether they are commingled. The only difference is that if the trust funds are commingled with non-trust funds, the trustee is generally presumed to have honest intentions, and to have spent the non-trust funds first: ***Re Hallett’s Estate*** (1879), 13 Ch.D. 696. Thus any remaining balance will be presumed to be trust funds. The claim of the beneficiaries is *prima facie* limited to the lowest intermediate balance in the account: ***Re Greymac Securities Commission and Greymac Credit Corp.*** (1986), 55 O.R. (2d) 673 at p. 677 (C.A.), affirmed ***Greymac Trust Co. v. Ontario (Securities Commission)***, [1988] 2 S.C.R. 172; ***Société Générale***; ***In re Goldcorp Exchange Ltd.***, [1995] 1 A.C. 74 at p. 108 (P.C.). It follows that in this case the remaining balance in the general account at its lowest point ($40,218) was still covered by the trust. The additional trust monies that were deposited and never expended in breach of trust ($40,599) were also covered by the trust: ***Neste Oy v. Lloyds Bank PLC***, [1983] 2 Lloyd’s Rep. 658 at p. 667 (Q.B. Div.). Karl or Choice are entitled to their proportionate share of those subsequently deposited funds.

[14] After March 14th and up to the date of the receivership on March 28th, Vanquish deposited further non-trust funds into the account. Are those funds caught by the trust? On the one hand the law could assume that the trustee Vanquish merely “borrowed” the trust funds in breach of trust, and is deemed to have repaid the misappropriated trust funds by the next deposit.

On the other hand the law could take the view that once the trust funds are expended, the loss falls on the beneficiary, and it is not entitled to any proprietary claim to subsequent replenishment of the fund.

[15] The law is summarized in Goff & Jones, *The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007) at para. 2-038 with this example:

> A trustee mixes his own money with trust money; he withdraws money from the mixed fund, dissipates some of it and then deposits more money into the mixed fund. Subsequent deposits of the fiduciary into the mixed fund are not presumed to be impressed with the trusts in favour of the beneficiary. [Citing *Roscoe v. Winder*, [1915] 1 Ch. 62, 69, *per* Sargant J.; *Bishopsgate Investment Management Ltd. v. Homan*, [1995] 1 All E.R. 347, 354, *per* Dillon L.J.] Consequently if the trustee is insolvent, that part of the mixed fund, equal to the amount paid in, will normally pass to the trustee's general creditors. The beneficiary will be entitled to additions to the mixed fund only if he can prove that thereby the trustee intended to make restitution to the trust. It follows that the trust is entitled only to the lowest intermediate balance of the mixed fund. So, if the fund is wholly dissipated before any additions are made to it, the interest of the trust in the mixed fund is extinguished. Professor Scott has justified this result on the ground that "the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; but there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant." [*Scott on Trusts* § 518.1]

Thus the further deposits to the account are not presumed to have the effect of replenishing the trust fund: ***Ontario (Real Estate and Business Brokers Act, Director) v. NRS Mississauga Inc.*** (2003), 64 O.R. (3d) 97, 226 D.L.R. (4th) 361 at para. 49 (C.A.); ***Re 1653 Investments Ltd.*** (1981), 129 D.L.R. (3d) 582 at pp. 597-9, 32 B.C.L.R. 71.

[16] If the trust funds were segregated, the outcome would be clearer. If the trustee misappropriated segregated funds, and then deposited non-trust funds into the segregated account, the intent must have been to replenish the trust account. But where the trust funds are commingled with other funds, the intent is not so clear. Since the trustee by definition is using the account for trust and non-trust purposes, the deposits might simply be made to enable further non-trust expenditures. Where the beneficiary has created the risk of this type of expenditure by allowing commingling, it should not be allowed to easily divert funds from the other creditors of the trustee. Absent a clear intention by the trustee to replenish the trust, which is not found on this record, further deposits are not attached by the express trust.

[17] It is not necessary to discuss in this appeal the rules that apply when there is a shortage in a mixed trust account, as happened in ***Law Society of Upper Canada v. Toronto Dominion Bank*** (1998), 42 O.R. (3d) 257 (C.A.), leave to appeal denied [1999] 3 S.C.R. xiii, and ***Re Elliott***, 2002 ABQB 1122, 11 Alta. L.R. (4th) 358.

Constructive Trust

[18] As mentioned, Vanquish was clearly in breach of trust by expending the trust funds in unauthorized ways. As such it was in breach of its fiduciary duties as trustee. While the express trust created by the Operating Procedure no longer attached to the funds, are Karl or Choice entitled to a remedial constructive trust for the clear breach of the fiduciary duty by their trustee? In ***Soulos v. Korkontzilas*** at para. 45 the Court identified four conditions which were generally necessary before a court would impose a constructive trust based on wrongful conduct:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

The second and fourth preconditions are absent on this record.

[19] There was no satisfactory evidence on this record of what, if any, specific assets Vanquish purchased with trust funds. The ability to trace the trust funds into specific assets has always been central to the imposition of a constructive trust in circumstances like this. The only evidence came from the Receiver. He deposed (EKE A190):

> 16. Vanquish wrote numerous cheques on the Main Operating Account including operating expenses, payroll, royalties, rental and other business expenses incurred by Vanquish.
>
> 17. In addition to production revenues, Vanquish also deposited into the Main Operating Account other sums including advances by Brookfield Bridge Lending Fund Inc. (“Brookfield”) as its secured lender, and other sales proceeds or equity proceeds raised by Vanquish.

During cross-examination the receiver was asked about purchases of assets. He noted a deposit of $7.45 million in April 2006, which was an advance from the appellant Brookfield and clearly not the proceeds of production from this oil well. He then noted a series of large cheques shortly after this deposit which he said "I would be speculating, those are paying for capital expenditures . . . it's my belief that capital items also went through this account " (EKE A295-6). The receiver did not know how the funds had actually been spent, and merely expressed the bare opinion that the amounts were large enough to be consistent with capital expenditures. He could not depose to any specific assets that were purchased with trust funds, or any specific assets that still remained in Vanquish's hands that had been purchased with trust funds, as opposed to Vanquish's own funds. There is no evidence that the account balance was reduced by these expenditures below the amount of funds needed for Vanquish to satisfy its fiduciary obligations, and it was not a breach of trust for Vanquish to spend the loan advance from Brookfield. These transactions took place about one year before the receivership. To the extent that the trial reasons involve a finding of fact respecting the tracing of the funds, they reflect palpable and overriding error.

[20] It therefore cannot be shown that the trust proceeds were expended on any of Vanquish's assets that formed a part of the eventual realization by the receiver, so as to satisfy the second precondition. Since Vanquish's wrongdoing cannot be traced into any asset, that precludes the imposition of a constructive trust: ***Bassano Growers Ltd. v. Diamond S. Produce Ltd. (Trustee of)***, 1998 ABCA 198, 66 Alta. L.R. (3d) 296 at para. 13. The trust funds were apparently used for Vanquish's general ongoing operations. As said in ***NRS Mississauga Inc***. at para. 37, it is insufficient "that some unspecified amount of trust funds were used at some unspecified time in some unspecified way to assist to some unspecified degree in maintaining the operation of the business."

[21] The fourth precondition in ***Soulos v. Korkontzilas*** is also missing. The appellant had a perfected prior secured interest. The decision under appeal essentially assumes that a secured creditor has a positive duty to monitor the fiduciary activities of its borrowers. On the assumption that the secured creditor has a "better opportunity" to prevent breaches of trust, it essentially becomes a guarantor for any such breaches of trust. This analysis discounts the fact that the underlying risk of misappropriation was created by the respondents allowing the commingling of the trust funds, and transfers the duty of monitoring that risk to the appellant. This is contrary to the principle stated in ***Soulos v. Korkontzilas*** that "the interests of intervening creditors must be protected": ***Barnabe v. Touhey*** (1995), 26 O.R. (3d) 477 (C.A.).

[22] The contention that the appellant had a better opportunity to prevent breaches of trust is, in any event, unconvincing. The respondent had agreed that its trustee could mingle the trust funds with its own funds. There was accordingly no realistic way that the appellant could challenge any expenditure from the mixed account; the fact that funds were being spent from the mixed account on non-trust purposes was not objectionable. In order to monitor the trust, the appellant would have had to keep precise records of the amount of trust money coming into the account at TD Canada Trust, and then monitor each and every expenditure from the account to determine that the balance of the account was never reduced below the net trust balance. This

would require the appellant to monitor the trustee's business on a daily basis. It is unreasonable to allow the respondent to foist that duty on the appellant by operation of law.

[23] The analysis in the reasons under appeal also overlooks the fact that the imposition of the constructive trust gave the respondents a priority over not only the appellant secured creditor, but also potentially the unsecured creditors of Vanquish. Even if the appellant had a "better opportunity" to prevent the breach of trust, the unsecured creditors had no such opportunity. While the unsecured creditors in particular cases may not receive anything anyway, it would be anomalous if the entitlement to a constructive trust against the secured creditor depended on whether and to what extent the unsecured creditors were affected.

[24] The respondents argue that it should be assumed the appellant knew Vanquish dealt with trust funds, and so the appellant is not a party "without notice" and would not be protected in equity. This argument also overlooks the effect of the imposition of a constructive trust on the unsecured creditors. But in any event, the mere knowledge that Vanquish dealt with trust funds from time to time is not sufficient. Without knowledge that the funds it received were being paid in breach of trust or were trust assets, the appellant would not lose its protection under the rule in ***Soulos v. Korkontzilas***. This is just another way of saying that the appellant had a duty to police Vanquish's management of the trust funds.

[25] This appeal demonstrates the shortcomings of a practice, which is apparently an industry-wide practice, of letting oil well operators commingle trust funds with non-trust funds, while purporting to limit the ability of the operator to use those funds only for operation of the specific well. It must be remembered that it is the respondents who created the risk of these circumstances arising by agreeing that trust and non-trust money could be commingled. Where the conduct of one party creates the problem, that is a relevant consideration in deciding whether a constructive trust should be imposed: D.M. Paciocco, *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors* (1989), 68 Can. Bar Rev. 315 at pp. 348-9. It was a reviewable error to impose a constructive trust in this situation.

Conclusion

[26] In conclusion, it was an error of principle to impose a constructive trust in the circumstances of this case. The express trust agreed to by the parties only attached to the lowest balance of the account on March 14th, 2007, plus the respondents' proportion of the additional trust funds deposited on March 16th, 2007. The appeal is allowed.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 14th day of May, 2009

Slatter J.A.

I concur:

Rowbotham J.A.

Berger J.A. (Dissenting):

[27] I have had the advantage of reading in draft form the Reasons for Judgment of the majority. Mindful that the standard of appellate review requires deference to fact-finding, I am unable to agree that the imposition of a constructive trust in the circumstances of this case was clearly unreasonable or based on an error of principle. Two wrongful acts on the part of Vanquish Oil & Gas Corporation ("Vanquish") are made out: breach of trust and breach of fiduciary duty. The breaches occurred when Vanquish failed to remit the proportionate share of the net production revenues to the non-operator as required by s. 507 of the 1990 Canadian Association of Petroleum Landmen Operating Procedure ("CAPL Operating Procedure"). It is trite law that an operator is in a fiduciary position with respect to receipts and revenues held on behalf of non-operators. See ***Bank of Nova Scotia v. Societe General (Canada)*** (1988), 87 A.R. 133 ("***Sorrel***").

[28] In ***Sorrel***, the operator's bank sought to enforce a security interest held on the operator's bank account. The relationship between the operator and the non-operator was governed by the earlier 1981 CAPL Operating Procedure. The bank account contained excess funds advanced by the non-operators for operating expenses and production revenues. Stratton J.A. held that the 1981 CAPL Operating Procedure created a fiduciary duty and an express trust in relation to excess funds and joint operator production revenues. The funds in the operator's account were impressed with a trust in favour of Sorrel and as such Sorrel's creditors had no claim to them: at para. 19.

[29] A remedial constructive trust creates property rights and remedies, wrongful acts or unjust enrichment. See ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574.

[30] The leading decision on the test to impose a constructive trust to remedy a wrongful act is ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217. In ***Soulos***, McLachlin J. (as she then was) recognized that a constructive trust may be imposed not only as a remedy for unjust enrichment, but to condemn wrongful acts and maintain the integrity of relationships of trust that underlie industries and institutions: at para. 14. From ***Soulos*** emerges a doctrine of constructive trust that may be imposed where good conscience so requires. Doing justice in the case, the Court held, prevails over simplistic factual restrictions. McLachlin J. sets out the four conditions that must be generally satisfied in order to impose a constructive trust for a wrongful act (at para. 45):

> "(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of

> equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g. the interests of intervening creditors must be protected."

[31] The obligation created by the 1990 CAPL Operating Procedure satisfies the first condition. Section 507 of the 1990 CAPL Operating Procedure was intended to create an express trust for non-operators over excess funds advanced by the non-operators and over joint operator production revenues. Section 507 reads as follows:

> "COMMINGLING OF FUNDS - The Operator may commingle with its own funds the moneys which it receives from or for the account of the Joint-Operators pursuant to this Operating Procedure. Notwithstanding that moneys of a Joint-Operator have been commingled with the Operator's funds, the moneys of a Joint- Operator advanced or paid to the Operator, whether for the conduct of operations hereunder or as proceeds from the sale of production under this Operating Procedure, shall be deemed to be trust moneys, and shall be applied only to their intended use and shall in no way be deemed to be funds belonging to the Operator, other than in its capacity as the Joint-Operators' trustee." [emphasis added]

[32] The central issue in this appeal is whether the second condition precedent is met. This being a commercial context, there must be a factual connection between the constructive trust property and the breach: ***Ontario (Real Estate and Business Brokers Act, Director) v. NRS Mississauga Inc***. (2003), 64 O.R. (3d) 97 (C.A.). What degree of connection is required? Does the evidence in this case satisfy that requirement? Doherty J.A. held that general connections between trust funds and accounts receivable were an insufficient basis to satisfy the ***Soulos*** test where the evidence only showed that trust monies were used for general business purposes. He

concluded that he would not impose a constructive trust "given the absence of any clear connection between the misappropriation of trust funds and the accounts receivable ..." (at para. 40) [emphasis added].

[33] While I agree that a "factual connection" is required, I question whether the presence or absence of a "factual" or "clear connection" - a question of fact - is reviewable on appeal. I acknowledge the admonition that it may be necessary and appropriate to scrutinize closely the contributions of business partners to the acquisition of property (per Dickson C.J. in ***Sorochan v. Sorochan***, [1986] 2 S.C.R. 38 at para. 22). It does not follow, however, that something more than a factual connection (or, as Dickson C.J. put it, "some reasonable connection) between the breach and the assets in question made out to the satisfaction of the trier of fact is required.

[34] The Appellants submit that the chambers judge could only impose a constructive trust over specific, identifiable money and not over all of Vanquish's money. Were that argument to prevail, evidentiary certainty becomes determinative rather than equitable outcome. I accept the Respondents' submission that whether conceived of as institutional or remedial, the constructive trust is best understood as an equitable rectification of a situation gone wrong. It prescribes accountability on the part of certain individuals and in appropriate circumstances confers personal or proprietary rights on others when, in the discretion of the trial judge, the dictates of justice require it.

[35] In the instant case, the evidence before the chambers judge concerned, in part, the nature and source of the Vanquish assets that were to be distributed as a result of the receivership. The cross-examination of the Receiver on his affidavit disclosed:

> (a) that all of Vanquish's revenues, including production revenues from Simonette, went into one bank account and all of its expenses were paid from that same bank account.
> (Key Evidence, Vol. 2, A291/3-13)
>
> (b) The Receiver confirmed that Vanquish received 100% of the production revenues from the Simonette Well but never paid out any money to the holder of the 45% interest (either Karl or Choice Resources Corporation).
> (Key Evidence, Vol. 2, A300/9-A301/14)
>
> (c) in addition to paying ordinary operating expenses, the Receiver believed, based upon his review of Vanquish's bank account information, that Vanquish used large amounts of its production revenues to purchase other assets. The Receiver did not know for sure what Vanquish had actually purchased, but he was reasonably certain, by reference to a single month only from the relevant period

(April 2006), that Vanquish was using moneys paid into its bank account to pay capital expenditures or buy assets.
(Key Evidence, Vol. 2, A294/22-A296/15)

(d) the bank statement for April 2006 references the following amounts, which the Receiver thought were sizeable enough that they probably represented payments for the purchase of assets (Key Evidence, Vol. 2, Affidavit of Receiver A211-216):

$330,712; $495,009; $287,123; $346,737; $253,337; $188,188; $207,960; $133,822; $300,000; $389,972; $2,244,267; $285,266; $254,716; $131,821; $136,948; $129,234; $2,000,080; $111,860.

The cross-examination in respect of some of those payments is set out at Key Evidence, Vol. 2, A296/11-25.

(e) All of the assets purchased by the payments of cash out of Vanquish's bank account, including (as a partial subset only) those listed above, were then sold by the Receiver and the proceeds received.
(Key Evidence, Vol. 2, A299/19-27)

(f) From the proceeds of the sale of those assets, the reserve fund was created. The Receiver agreed that, but for the sale of all of Vanquish's assets, there would not be a reserve fund. (Key Evidence, Vol. 2, A300/1-8)

[36] I accept the Respondents' submission that strict adherence to the evidentiary underpinning of the timing and source of various deposits and withdrawals, and a strict view of the proprietary nature of the beneficiary's claim, often neglect both the equities and the realities of the situation before the Court. That is precisely the remedial problem that the decision of the Supreme Court of Canada in ***Soulos*** corrects. See also ***Re Elliott*** (2002), 11 Alta. L.R. (4th) 358 and ***Law Society of Upper Canada v. Toronto Dominion Bank*** (1998), 42 O.R. (3d) 257 (C.A.), leave to appeal dismissed (1999), 130 O.A.C. 199 (S.C.C.).

[37] In ***Elliott***, Sulatycky A.C.J. (as he then was) preferred the most just result rather than a mathematical or mechanistic approach. He selected a remedy which he found in all of the circumstances to be "the most just, convenient equitable and workable" (at p. 370). In his opinion, the case law conferred upon him a discretion to choose the most equitable solution.

[38] Similarly, in ***Law Society of Upper Canada***, the Ontario Court of Appeal, having analysed the competing approaches previously employed in the historical jurisprudence, observed (at p. 269):

> "... There seems to be no binding authority compelling the application of one approach or the other to circumstances such as those in this case. The court should therefore seek to apply the method which is the more just, convenient and equitable in the circumstances."

[39] The Ontario Court of Appeal added that, on the appropriate facts, a number of remedies are available, including the constructive trust (at p. 273):

> "It is noteworthy that both the 'fund as amalgam' and the 'fund as a blend' approaches enable equity to offer the remedy of a charge, lien or constructive trust *vis-à-vis* the remaining balance in the fund. The former has the effect, however, of limiting the reach of these proprietary remedies. To my mind such a restriction is not necessary. While 'proprietary tracing' may serve as the equitable vehicle which enables a claimant to have recourse to a mixed trust fund in the first place, equity can move beyond the strictures of that doctrine to provide a remedy to the claimant once the connection to the fund has been made. The nexus is to be found in the concept of the equitable charge, lien or constructive trust. These concepts need not, in my view, be confined to any part of the fund because, by their very nature, they have always been applied against *the whole* of the fund."
>
> [emphasis in original]

[40] In ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, ***supra***, La Forest J. rejected the arbitrary notion that the absence of an identifiable property right precluded the imposition of a constructive trust. The Court held that the remedy could be used to create a property right in the defendant's property. La Forest J. said (at para. 194):

> "Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. When a constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable

which the Court is doing. Goff and Jones, The Law of Restitution (3rd ed. 1986), at p. 78, take the position that:

> ... the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.
>
> It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted; the extent of that claim is a different matter, which should be dependent upon the defendant's knowledge of the true facts. ..."

[41] On the facts of this case, I agree with the Respondents' contention that a "dead end" tracing rule does not provide an appropriate, just or equitable remedy for the breach of trust suffered by Karl or Choice. On this record there was ample evidence to support the chambers judge's conclusion that Vanquish's "blatant breach of trust" (A.B. Digest, F30, para. 45) was sufficient "to engage the conscience of this Court in support of finding a constructive trust ..." (A.B. Digest, F31, para. 55).

[42] I agree with my colleagues that the third pre-condition is satisfied on this record.

[43] As to the fourth condition, the Appellant contends that "Brookfield did not participate in any wrongdoing and cannot be classified as a 'wrongdoer' who will benefit from their wrongful acts if a constructive trust is not imposed. Brookfield was not contacted by Choice or Karl prior to the receivership to inform them that they had a trust claim and the amounts should be segregated." (A.B. Digest, F30, para. 47)

[44] The chambers judge appreciated that he had to decide which of the two innocent parties (i.e. Vanquish's secured lender on the one hand, or the non-operator working interest owner on the other) should bear the loss of Vanquish's breach of trust. He was alive to the Appellant's argument that it is an innocent, *bona fide* purchaser for value. But Brookfield is not a *bona fide* purchaser for value without notice. It is not, in my view, the type of third party to whom equity provides exceptions. Brookfield is a sophisticated entity. Although it is not party to CAPL Operating Procedure Clause 507, the chambers judge would most surely have understood that, in the exercise of Brookfield's due diligence, Brookfield would have knowledge of Clause 507 and would have been aware that it governed the operations of the Simonette Well and was the basis of the trust relationship with the non-operator. That is not denied. With the foregoing in mind, he reasoned as follows:

> "... [W]hat is key here in my view is that Vanquish's secured lender was in a far better position to ensure that its customer conducted its affairs in a fashion so as to honour the obligations clearly imposed upon it by the 1990 CAPL Operating Procedure in general, and in particular Section 507 thereof. As matters presently stand, Vanquish's secured lender has arguably benefited from Vanquish's breach of trust in that had the production revenues remained in the Main Operating Account as at the date of the receivership, then based upon the authority in ***Société Générale***, those funds would clearly have belonged to the non-operator working interest owner and not the secured creditor."
>
> (A.B. Digest, F31, para. 53)

[45] The chambers judge was seized with the Vanquish Receivership from the beginning. He was intimately familiar with the factual underpinnings and the content of the Court file. His impugned conclusions, in my opinion, are premised upon unassailable findings of fact which informed his exercise of discretion and which are entitled to deference on the palpable and overriding error standard. Having properly instructed himself on the law, having dutifully assessed and weighed the evidence, and having exercised his discretion reasonably and without reliance on erroneous principle, the appeal must be dismissed.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 14th day of May, 2009

Berger J.A.

Appearances:

H.A. Gorman and L. Mason
for the Appellant Brookfield Bridge Lending Fund Inc.

W.E.B. Code and J. Lambert
for the Respondent Karl Oil and Gas Ltd.

R.C. Steele
for the Respondent Buffalo Resources Corp.