



SUPERIOR COURT OF JUSTICE

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-22-00692309-00CL

DATE: February 22, 2024

NO. ON LIST: 3

**TITLE OF PROCEEDING: PRICEWATERHOUSECOOPERS INC. IN ITS CAPACITY AS COURT-APPOINTED RECEIVER AND MANAGER OF BRIDGING FINANCE INC. ET AL v. SKYMARK FINANCE CORPORATION et al**  
**BEFORE: JUSTICE STEELE**

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**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
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**For Defendant, Respondent, Responding Party:**

<b>Name of Person Appearing</b>	<b>Name of Party</b>	<b>Contact Info</b>
<b>Shaun Laubman</b>	<b>2305145 ONTARIO INC. and MERK INVESTMENTS LTD.</b>	<b>slaubman@lolg.ca</b>
	<b>Paul Millar</b>	

**For Other, Self-Represented:**

<b>Name of Person Appearing</b>	<b>Name of Party</b>	<b>Contact Info</b>
<b>Greg Karpel (Receiver)</b>	<b>Alvarez &amp; Marsal Canada Inc. as Court- appointed Receiver</b>	<b>gkarpel@alvarezandmarsal.com</b>
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**ENDORSEMENT OF JUSTICE STEELE:**

**Overview**

- [1] The Court heard two motions together on February 22, 2024.
- [2] First, the court-appointed receiver of the assets of 2305145 Ontario Inc. (formerly Skymark Corporation) (“230”) and Merk Investments Ltd. (“Merk”, and together with 230, the “Companies”), Alvarez & Marsal Canada Inc., brings a motion seeking the approval of three settlements, approval the Receiver’s third report and statement of receipts and disbursements, a sealing order for confidential appendices, and approval of the fees and disbursements of the Receiver and its counsel.
- [3] There is no opposition to the Receiver’s motion. The Bridging Receiver, the senior secured lender of 230, supports and has consented to each of the settlement agreements.
- [4] Each of the settlements is conditional upon Court approval.
- [5] Second, the Orr Plaintiffs bring a motion for the production of certain documents by the estate. The Receiver consents to the production of the documents, however, there is an issue as to who should bear the costs of producing them.

## **Background**

- [6] A&M was appointed as receiver of the Companies' property by Court order dated March 6, 2023.
- [7] Before these proceedings, 230's primary business was providing financing and leasing to consumer borrowers for home renovations, water systems, and other home improvements. Further to an AVO, the primary business portfolio of 230 has been sold.
- [8] 230's remaining assets include certain "non-core" loans that were made to third parties outside of the primary business, including the Industrial Road Loan and the 258 Loan.
- [9] The Companies are also defendants in two actions, the Orr Action and the Related Action (collectively, the "Orr Claim"), in which the Orr Plaintiffs assert claims against the Companies (and others) in respect of a number of mortgages that were purportedly held in trust by the Companies for the Orr Plaintiffs. One of the Orr Plaintiffs has also asserted a priority claim in another receivership proceedings over 230 (the "Priority Claim").
- [10] The 3 settlements, which are each conditional on Court approval, will substantially resolve the Orr Claim and Orr Priority Claim, the Industrial Road Loan, and the 258 Loan.

## **Analysis**

*Should the Court approve the three settlements?*

- [11] The Receiver seeks an order:
  - 1. Approving the Orr Settlement as agreed to in minutes of settlement dated January 24, 2024 and the accompanying mutual full and final release;
  - 2. Approving the Industrial Road Loan Settlement as agreed to in minutes of settlement dated February 14, 2024 and the accompanying mutual full and final release;
  - 3. Approving the Bridging Assignment as agreed to in an assignment and assumption agreement pursuant to which the Receiver has agreed to assign to the Bridging Receiver its interest in a loan made by 230 to 2581150 Ontario Inc. ("258") in consideration of a release from the Bridging Receiver of all claims it has against 230 in respect of a substantially similar loan that the Bridging Receiver advanced to 230.

[12] As noted by the Receiver, public interest favours the settlement of disputes. The settlement of a dispute by the parties saves public expense and Court time. Courts encourage and facilitate the settlement of disputes because it is sound judicial policy: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at paras. 11-12.

[13] The Court will consider the following factors in determining whether to approve a settlement agreement in the context of an insolvency proceeding:

1. Whether the settlement is fair and reasonable;
2. Whether it provides substantial benefits to other stakeholders; and
3. Whether it is consistent with the purpose and spirit of the relevant insolvency legislation.

*Maple Bank GmbH (Re)*, 2016 ONSC 7218, at para. 8

[14] The Receiver submits that the Court should approve the Settlement Agreements for the following reasons:

1. The Settlement Agreements are commercially reasonable and reflect the merits of each underlying claim and the risks and costs associated with litigating those claims;
2. The Settlement Agreements resolve complex issues regarding the Orr Claim, the Orr Priority Claim, and the Industrial Road Loan. Absent settlement, these matters would require protracted litigation and the use of significant Court time and resources;
3. The Settlement Agreements will substantially advance these proceedings and will save resources to benefit the estate;
4. The Orr Settlement and Industrial Roads Settlement each result in material realizations for the estate;
5. The Bridging Assignment will formalize the original assignment that was made by 230 and Bridging before the receivership of either entity;
6. The Bridging Assignment is a desirable outcome in any event because it will consolidate the interests of 230 and the Bridging

Receiver in the 258 Loan and Additional Loan, effectively removing 230 as an intermediary;

7. The Bridging Assignment has no economic impact on the estate;
8. The Bridging Receiver, the senior secured lender of the Companies, supports and has consented to the Settlement Agreements; and
9. The Receiver is of the view that the Settlement Agreements are fair and reasonable and are for the estate's general benefit.

[15] I agree with the Receiver's submissions in paragraph 36 of its factum that the criteria set out in *Maple Bank and IWHL Inc. (Re)*, 2011 ONSC 5672, citing *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) have been met:

1. Sufficient effort was made to get the best price: The Settlement Agreements were negotiated by sophisticated parties who were represented by legal counsel.
2. The interests of all parties have been served: The Receiver states that the Settlement Agreements provide the best possible outcome in the circumstances for all parties that have an economic interest in the proceedings. The settlements are expected to result in material realizations for the benefit of 230's creditors.
3. The settlement negotiations were conducted with integrity: The Receiver received only one concern with the Settlement Agreements that was raised by the non-settling defendants in the Orr Claim regarding the Orr Settlement. The Receiver worked with counsel to address the issue consensually and made some minor amendments to the proposed order. The settlement negotiations were conducted with integrity and due diligence and in good faith.
4. There was no unfairness: The Receiver is of the view that there has been no unfairness in the conduct of the settlement negotiations.

[16] I am satisfied that the settlement agreements should be approved.

*Should the requested sealing order be granted?*

- [17] The Receiver seeks an order sealing Confidential Appendices B and C to the Third Report. These appendices contain the Orr Settlement and Orr Release, and the FIJ Settlement and FIJ Release.
- [18] Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.
- [19] The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 38, emphasized the importance of the openness of Court proceedings. The Supreme Court indicated that if the Court is being asked to limit this openness presumption, the following must be established:
1. court openness poses a serious risk to an important public interest;
  2. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
  3. as a matter of proportionality, the benefits of the order outweigh its negative effects.
- [20] The Courts have acknowledged that there is a public interest in the “general commercial interest of preserving confidential information” and in maximizing recoveries in an insolvency: *Sherman Estate*, at para. 41; *Danier Leather Inc. (Re)*, 2016 ONSC 1044, 33 C.B.R. (6th) 221, at para. 84.
- [21] Both the Orr Settlement Agreement and the FIJ Settlement Agreement contain a confidentiality clause that requires the Receiver to hold the terms of each agreement in strict confidence.
- [22] If the sealing order is not granted this would likely compromise the settlements that were reached with the Orr Plaintiffs and Damages Counsel. This would undermine the public interest in promoting settlements.
- [23] The Receiver states that it is not aware of any party that will be prejudiced if the sealing orders are granted.
- [24] I agree with the Receiver’s submission that the sealing order will preserve the integrity of the confidentiality provisions negotiated in the settlement agreements and will support the public interest of favouring settlements. This certainly outweighs any negative effects from limiting public access to the two confidential appendices.
- [25] I am satisfied that the limited scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, requirements, as modified in *Sherman Estate*.

*Who should bear the cost of production of the documents sought by the Orr Plaintiffs?*

- [26] The Orr Plaintiffs bring a motion for the production of certain documents that are subject to the control of the Receiver. The Receiver consents to the production of the documents but takes the position that the Orr Plaintiffs ought to bear the cost of producing the documents.
- [27] The Receiver submits that the Orr Plaintiffs ought to be responsible for the costs because the Responding Production Order and any expense related to it are only for the benefit of the Orr Plaintiffs. No other stakeholder will benefit.
- [28] In the Orr Action, the Orr Plaintiffs claim that Mr. Slattery, as CEO and director of Merk and Skymark, caused Merk and Skymark to act in breach of trust and misappropriated the principal amounts of loans advanced by the Orr Plaintiffs that were to be secured by mortgages registered in the names of, and held in trust by, Merk and Skymark.
- [29] The Orr Plaintiffs submit that the cost of production of the documents should be borne by the estate. The Orr Plaintiffs point to the endorsement of Justice Osborne, dated December 2, 2022 (pre-receivership). Justice Osborne ordered the production of the documents. In doing so, he recognized that the Orr Plaintiffs had a proprietary right to the documents. Justice Osborne also noted that all parties agreed that there were trust relationships (at para. 24). With regard to the obligation to produce the documents, Osborne J. stated, at paras. 13,14, and 15:

13. I agree with the Plaintiffs that trustees have an obligation to provide “full explanations of all of their dealings, and the causes why outstanding assets were not collected or property of the estate has disappeared”, and also that beneficiaries have a right in the nature of a proprietary right to records necessary to understand “the mode in which the trust property or their share of it has been invested or otherwise dealt with, and as to where it is and full accounts respecting” (see *Maintemp Heating & Air Conditioning Inc. v. Momat Developments Inc.*, 59 O.R. (3d) 270 and *Ballard Estate, Re*, 1994 CanLII 7307, quoting with approval from *O’Rourke v. Darbishire*, [1920] A.C. 581 at pp. 626-7).

14. To be clear, the right of a beneficiary to such production by a trustee is a proprietary right separate and apart from the right of any plaintiff to production of relevant and otherwise properly producible documents in the course of a proceeding and as provided for in the *Rules*. The proprietary right flows from the beneficial ownership of the beneficiary in the trust property and the derivative right to records relevant to the accounting for such property.

15. Accordingly, it is not an answer to a request for such documents to say that they will be produced in the ordinary course of litigation. A beneficiary is entitled to such documents when requested, and whether or not the documents might otherwise be producible in the course of litigation by another party. Those documents might be more limited in scope or indeed might be documents of a defendant over which a plaintiff had no proprietary right flowing from a trust.

- [30] The Receiver relies on *Thomson Kernaghan & Co. (Re)*, (2003) 42 C.B.R. (4th) 317 (Ont. S.C.). In that case, Lederman J. ordered plaintiffs to actions that were started in the United States to indemnify the trustee-in-bankruptcy of Thomson Kernaghan in respect of costs incurred by the trustee by continuing with the process of production and discovery in the U.S. litigation.
- [31] The Orr Plaintiffs submit that *Thomson* is distinguishable on the facts. As noted above, in the instant case, Justice Osborne held that the Orr Plaintiffs' right to production is a proprietary right. The Orr Plaintiffs submit that because the Orr Plaintiffs' right is proprietary, unlike the U.S. plaintiffs' right in *Thomson*, the Orr Plaintiffs should not be required to pay for the production of documents that belong to them.
- [32] I agree that *Thomson* is factually distinguishable. However, I am of the view that the same outcome is appropriate in the instant case. As noted above, there was a trust relationship between Merk and Skymark as trustees, and the Orr Plaintiffs as beneficiaries. The trustee holds property for the benefit of the beneficiaries in accordance with the applicable trust terms. "The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary:" *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at pp. 626-27.
- [33] In the instant case, the trustee did not produce the documents when ordered to do so by Osborne J. Now, Merk and Skymark are in receivership. The Receiver submits that the costs of producing these documents should not be imposed on the many stakeholders in the estate. The Receiver takes the position that the Orr Plaintiffs should cover the reasonable costs of obtaining the documents to be produced and claim those costs against the non-settling defendants if they are successful in advancing those claims.
- [34] The Orr Plaintiffs have a proprietary right to the documents. However, this does not mean that all the many stakeholders ought to pay the costs of producing the documents when no other stakeholder in the estate will benefit.
- [35] The Orr Plaintiffs shall cover the reasonable costs of obtaining the documents and may claim those costs against the non-settling defendants if they are successful.

#### *Approval of Fees and Disbursements*



[36] The Court has already approved the Receiver's and its counsel's fees for the period ending August 31, 2023. The Receiver now seeks the Court's approval of fees and disbursements for the period from September 1, 2023, to January 31, 2024.

[37] Fee affidavits were filed. I agree with the Receiver that the fees and disbursements of the Receiver and its counsel are reasonable and appropriate in the circumstances having regard to the scope of activity undertaken in the period.

[38] Orders attached.

A handwritten signature in blue ink, appearing to be "J. H. H.", is located to the right of the text in paragraph [38].

Date of Release: February 28, 2024