COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NO.	2101-0117AC
TRIAL COURT FILE NUMBER	1401-12431
REGISTRY OFFICE	CALGARY
APPLICANT	**ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED**
STATUS ON APPEAL	NOT A PARTY TO THE APPEAL
STATUS ON APPLICATION	NOT A PARTY TO THE APPLICATION
RESPONDENT	**ARRES CAPITAL INC.**
STATUS ON APPEAL	RESPONDENT
STATUS ON APPLICATION	RESPONDENT

Registrar's Stamp

REGISTRAR
FILED
19 May 2021
KL
Court of Appeal of Alberta

AND

NONPARTY APPLICANTS	**KENZIE FINANCIAL INVESTMENTS LTD. and others, see attached Schedule A**
STATUS ON APPEAL	APPELLANTS
STATUS ON APPLICATION	APPLICANTS
DOCUMENT	**APPEAL RECORD**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File: 15,054 LVH

Appeal from the Decision of
The Honourable Madam Justice B.E. Romaine
Dated the 19th day of April, 2021
Filed the 19th day of April, 2021

APPEAL RECORD
Part 1 – Pleadings
Part 2 – Final Documents
Part 3 - Transcripts

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The Appeal Record has been prepared in Electronic Format
CVQ20ACCESS

SCHEDULE A

COURT OF APPEAL FILE NO.	2101-0117AC
TRIAL COURT FILE NUMBER	1401-12431
REGISTRY OFFICE	CALGARY
APPLICANT	**ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED**
STATUS ON APPEAL	NOT A PARTY TO THE APPEAL
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RESPONDENT	**ARRES CAPITAL INC.**
STATUS ON APPEAL	RESPONDENT
STATUS ON APPLICATION	RESPONDENT

AND

NON-PARTY APPLICANTS	**KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK**
STATUS ON APPEAL	APPELLANTS
STATUS ON APPLICATION	APPLICANTS

TABLE OF CONTENTS

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Form 27
[Rules 6.3 and 10.52(1)]

JUDICIAL CENTRE OF CALGARY
FILED
Aug 25, 2020
by Email
CLERK OF THE COURT

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Sept 1 2020
Justice Romaine

COURT FILE NUMBER	1401-12431
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED**
DEFENDANT	**ARRES CAPITAL INC.**
DOCUMENT	**APPLICATION OF KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED AND CLARA MAE WOROSCHUK**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	SUGIMOTO & COMPANY Barristers & Solicitors 204, 2635 – 37th Avenue NE Calgary, Alberta, T1Y 5Z6 Solicitor of Record: Loran V. Halyn Direct: 403-219-4213 Fax: 403-291-4099 Email: lhalyn@sugimotolaw.com File: 15,054 LVH

NOTICE TO RESPONDENTS:

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Master/Judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	Tuesday, September 1, 2020
Time:	10:00 am
Where:	Calgary Courts Centre, 601 - 5 Street S.W., Calgary, Alberta, T2P 5P7

Before Whom: The Honourable Justice Romaine

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. A procedural order regarding funds in the amount of $235,000.00 initially paid into court to the credit of the Applicants as Plaintiffs in the matter of *Kenzie Financial Investments Ltd. v. Arres Capital Inc.*, Court File Number 1201-16440 in this Court (the "Kenzie Action"), pursuant to the Order of The Honourable Mr. Justice Wilkins pronounced February 11, 2014 (the "Wilkins Order" attached as Schedule "A"), which funds were then paid over to the Receiver and Trustee of Arres Capital Inc. pursuant to the Order of The Honourable Madam Justice B.E.C. Romaine pronounced June 4, 2018 in this and other litigation (attached as Schedule "B"), and which funds the Applicants now seek to be paid to them.

2. Such other relief as this Court may determine appropriate, including solicitor-client, full indemnity costs or party-party costs for this application payable forthwith in any event of the cause; and

3. Such further and other relief as this Honourable Court deems just.

Grounds for making this application:

4. Arres Capital Inc. ("Arres") was a licensed "mortgage broker" under the *Real Estate Act* (Alberta) and bare trustee of the Applicants, in connection with a syndicated loan and mortgage administered by Arres on behalf of the Applicants as investors pursuant to a standard-form "Loan Administration Agreement" signed by each investor.

5. Arres deducted and retained certain amounts from trust monies otherwise received on behalf of, and payable to, the Applicants. The Applicant claimed these deductions by Arres were wrongful and in breach of trust and fiduciary duties, such that the deductions should be repaid back to them.

6. Partial summary judgment in the Kenzie Action was granted in favour of the Applicants by Amended Order granted on July 17, 2013 disallowing certain deductions made by Arres from the Applicants' trust funds, and directing Arres to repay these deductions.

7. Under a Consent Order granted February 11, 2014, Arres paid $235,000 (the "Secured Funds") into court to the credit of the Kenzie Action to effect a stay of enforcement of the Applicants' judgment under the Amended Order, which funds were to be held pending the final determination of an appeal of that judgment taken out by Arres. The Secured Funds were thereafter to be released in accordance with the final judicial determination of the appeal.

8. By Order of The Honourable Madam Justice C.L. Kenny pronounced on April 16, 2014, Arres' appeal was dismissed with costs awarded to the Applicants.

However, this Order did not direct the release of the Secured Funds to the Applicants at that time.

9. No further appeal was taken out by Arres contesting the Applicants' judgment against it, and the time for any further appeal has long passed.

10. As of July 23, 2015, post-judgment interest on the Applicants' judgment against Arres totalled $2,791.90 and costs that had been determined in the amount of $5,196.63. Further post-judgment interest continues to accrue from that date.

11. An application by the Applicants to have the Secured Funds paid out to them to satisfy their judgment was heard on July 23, 2014. Terrapin Mortgage Investment Corp. ("Terrapin") applied for intervenor status in the Kenzie Action and in the matters of *Arres Capital Inc. v. Graybriar Land Company Ltd. and Graybriar Greens Inc.*, court file numbers 0903-17684 and 0903-17685 (the "Graybriar Foreclosure Actions"), opposed the Applicants' application and applied to have the Secured Funds paid out to Terrapin or otherwise held in Court until the Graybriar Foreclosure Actions were resolved with the determination of issues regarding the entitlement to 4 Graybriar condominium units and the registration of Terrapin's mortgage against those units

12. The result of the Applicants' and Terrapin's applications regarding the Secured Funds was that the Court decided to leave the Secured Funds in court in the Kenzie Action pending a determination of Graybriar Foreclosure Actions.

13. While the Graybriar Foreclosure Actions were unfolding on a number of fronts, by Order of The Honourable Madam Justice Eidsvik pronounced July 26, 2017, Arres was adjudged bankrupt with Alvarez & Marshal Canada Inc. appointed as trustee and receiver of the estate of Arres.

14. By Order of The Honourable Madam Justice B.E.C. Romaine pronounced June 4, 2018 the Secured Funds were paid to the trustee for Arres. Madam Justice Romaine ordered that the Secured Funds be held by the Trustee and made the following direction in connection with granting her Order:

> And I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds only, and not with respect to the other projects that might be in the receivership. If the receiver determines that it wishes to proceed with those other projects, it must give notice to the parties here today so that there can be some determination of whether that is appropriate.

15. The trustee for Arres agreed to segregate the Kenzie Action funds from the general revenues of Arres realized during the course of the bankruptcy and receivership of Arres, and to only utilize those funds to deal with any competing claims of creditors (presumably Terrapin) against those funds but not otherwise for the general expenses of the bankruptcy and receivership of Arres.

16. The trustee for Arres has now taken the position the Secured Funds are general assets for the benefit of all creditors of Arres and for the general expenses of Arres' bankruptcy and receivership, rather than funds earmarked for the Applicants in satisfaction of their judgment against Arres, contrary to the direction of Madam Justice Romaine accepted by the trustee.

17. Terrapin is no longer making any claim against the Secured Fund, leaving only the Applicants with a claim against those funds.

18. The Applicants' claim for the Secured Funds trump a trustee's priority to funds paid into court if the funds are sufficiently "earmarked" for the benefit of the Applicants and the Applicants have done all that they reasonable could to access those funds, which was complicated by the involvement of Terrapin as an intervenor and the factual and legal implications arising from the Graybriar Foreclosure Actions.

Material or evidence to be relied on:

19. Affidavit of Gaye Saruwatari, filed.

Applicable rules:

20. Rules 5.3, 5.9, 6.2 of the Alberta *Rules of Court*.

Applicable Acts and regulations:

21. None applicable.

Any irregularity complained of or objection relied on:

22. None applicable.

How the application is proposed to be heard or considered:

23. Oral submissions before the presiding Master in Chambers.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Court of Queen's Bench of Alberta

Citation: Access Mortgage Investment Corporation v Arres Capital Inc, 2021 ABQB 307

Date:
Docket: 1401 12431
Registry: Calgary

Between:

Access Mortgage Investment Corporation

Applicant

- and -

Arres Capital Inc.

Respondent

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The Receiver for Arres Capital Inc. applies for a distribution order of the remaining funds in this receivership. In a related application, investors in Kenzie Financial Investments Ltd., supported by Arres Capital's Inspector in bankruptcy, take the position that certain funds that had originally been paid into court pursuant to earlier litigation, and were later released to the Receiver, should not be construed as part of the Arres Capital estate. The Kenzie investors submit that they are entitled to the funds, subject only to deduction for the Receiver's expenses actually incurred in respect of dealing with any competing claims to them.

II. Facts

[2] Bankruptcy proceedings in this matter were commenced in 2011. After protracted litigation, which is not necessary to describe in detail for the purpose of this application, the Court granted a bankruptcy order with respect to the estate of Arres Capital Inc. on July 29, 2017. On the same date, Alvarez and Marsal Canada Inc., the trustee in bankruptcy, was appointed Receiver of Arres Capital pursuant to the *Civil Enforcement Act*, R.S.A. 2000, c. C-15. That order was amended and restated on October 23, 2017.

[3] The bankruptcy and receivership proceedings are in their final stages. This application involves priority to a fund of approximately $235,000.

[4] The Kenzie investors claim this fund, which was originally paid into court pursuant to a partial summary judgment that they obtained against Arres Capital in July, 2013.

[5] The amount of the judgment was $228,965.45, inclusive of costs. As Arres Capital appealed the judgment, the sum of $235,000 was paid into court in the summary judgment matter pursuant to a consent order dated February 11, 2014.

[6] The appeal was dismissed on April 16, 2014. Before the Kenzie investors were able to access the funds paid into court, Terrapin Mortgage Corporation made a successful application to be granted intervenor status in the litigation between Arres Capital and the Kenzie investors, and in litigation between Arres Capital and Graybriar Land Company Ltd. and Graybriar Greens Inc., a foreclosure action.

[7] The Kenzie investors applied to have the funds paid out of court to them. Terrapin opposed the application on the basis of a mortgage that it had obtained against four condominiums units that were part of the foreclosure proceedings involving the Graybriar companies. Registration of the mortgage had been stayed by order obtained by the Kenzie investors, who submitted that this was an attempt to mortgage trust property of Graybriar, and that the funds from the mortgage had been advanced before registration.

[8] Terrapin claimed an equitable mortgage over the Graybriar assets, or alternatively, an interest in the funds paid into court by Arres Capital on the basis that Terrapin was essentially the party that provided the funds.

[9] The Kenzie investors took the position at the time, and continue to take the position, that Arres Capital had no further claim over those funds going forward as the issue was between the Kenzie investors and Terrapin.

[10] In July, 2014, Strekaf, J (as she then was) directed that the Kenzie application to access the funds be adjourned sine die pending a determination of a stay order in the Graybriar actions. The Court of Appeal allowed the Graybriar stay order to remain in place.

[11] On July 26, 2017, while the Graybriar foreclosure matters were continuing to unfold, Arres Capital was placed into receivership. On June 4, 2018, I heard an application by the Receiver for an order directing that funds held in court from the Graybriar sales and funds held in court arising from the Kenzie investors' action be paid to the Receiver to enable the Receiver to conduct a claims process and be subject to the Receiver's Charge and the Receiver's Borrowing Charge. I identified the issue in that application as being whether the Receiver's Charge was able to be prioritized over property subject to the trust claims. I found that the Court may impose such a charge where it is satisfied that the Receiver's Charge would secure the

administration of a claims process that represents the only method "of breaking out of the current quagmire in respect to the Graybriar funds".

[12] I directed that the funds paid into court in the Kenzie litigation (the "Court Funds") were to be paid to the Receiver, together with the funds derived from the sale of six Graybriar condominium units.

[13] The June 4, 2018 Order arising from the application provides that the sales proceeds and the funds that had been paid into court are subject to the Receiver's Charge and the Receiver's Borrowing Charge as a first charge in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise, subject to certain sections of the *Bankruptcy and Insolvency Act*, and that the Receiver was authorized "to apply the Funds against current or future indebtedness owing on either the Receiver's Charge or the Receiver's Borrowing Charge."

[14] I made the following comment during the hearing of the application:

> I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds only, and not with respect to the other projects that might be in the receivership. If the Receiver determines that it wishes to proceed with those other projects, it must give notices to the parties here today so that there can be some determination of whether that is appropriate.

[15] Counsel for the Receiver immediately reminded the Court after this comment that the claims process "is only in relation to the Graybriar funds". I apologized for the error. Counsel for the Receiver then indicated that:

> ...I think it speaks to your point because this is how we are ... - you want things segregated and - ... we are proposing to segregate, so the Kenzie funds will fall into the general administration of the estate and the parties can make claims [to] them through the bankruptcy process. We don't need an independent process on them.

[16] Counsel for Kenzie investors questioned that comment. He submitted that his position was that use of the Court Funds:

> ...should be limited only to investigations and determinations of priority of competing claims, vis-à-vis those funds and that if the Receiver determines that there is no other competing claims that would disrupt the judgment creditors' otherwise entitlement to those funds, then those investors, those judgment creditors can make an application or can otherwise come back to the court to have those funds released back to that group, rather than being just general money in the receivership to the benefit of all potential creditors, so I want to make sure we are clear on that.

[17] After discussion among counsel and the Court, during which counsel for the Receiver indicated his view that the Court Funds were not trust funds, I noted that "even if it is in the general administration of the estate, you are only going to use it to investigate claims and priority with respect to that amount, is that correct?". The Receiver through counsel indicated that there was a significant portion of the fees outstanding, and that:

> ... you will see in your order that you are, you know, saying that we have first charge on both the Graybriar funds and the Court Funds. With that understanding, and we will have to come back and get fees approved at a later date and that's part of what we are doing today. That's fine to the Receiver. As long as we have the priority, we are happy then to adjudicate claims to the 235 based on entitlement...

[18] I questioned whether the fees of the Receiver outstanding at the time were incurred with respect to the determination of the claims with respect to the two funds of money. Counsel for the Receiver confirmed that the vast majority of the fees incurred fit that description but there was also “the usual general administration”. He later indicated that he did "not want to be entirely hamstrung with the [$235,000] in the general estate" with respect to fees.

[19] Again, counsel for the Kenzie investors questioned this. After discussion, the Receiver agreed to segregate the outstanding fees between the Graybriar matter and the Kenzie matter, which was acceptable to counsel for the Kenzie investors “as long as we can see that segregation both looking back and going forward”.

[20] Finally, counsel for Terrapin submitted that her client wanted the Court Funds segregated "to preserve any trust claims that we have", and asked that the funds not be commingled. Counsel for the Receiver responded that "[a]s long as the charge ranks in priority on them, we will be able to deal with allocation at the end of the piece", and that "... we are happy to have them in two separate accounts at Alvarez".

[21] As a result of this order, the Court Funds in the amount of $241,800 were released to the Receiver.

[22] The Kenzie investors take the position that this indicates that the Receiver agreed to segregate the Court Funds from the general assets of Arres Capital realized during the course of the bankruptcy and receivership, and to utilize those funds only for the Receiver's expenses incurred to deal with any competing claims of creditors (essentially Terrapin) against those funds but that the Court Funds were not otherwise to be available for the general expenses of the bankruptcy and receivership of Arres Capital.

[23] Subsequently, Jones, J. dismissed Terrapin's claim of an equitable mortgage with respect to the four Graybriar condominium units in the receivership proceedings of Arres Capital. Terrapin has confirmed that it is no longer making any claim against the Court Funds, and takes no position on the current application.

[24] Entitlement to the Graybriar funds referred to in the June 4, 2018 hearing has now been resolved by order of August 13, 2019. On that date, the Court authorized distribution of the Graybriar funds to various investors, authorized the payment of certain professional fees incurred by the investors who had been represented in the Graybriar litigation and approved the fees of the Receiver and its counsel to that date.

[25] As of August 21, 2020, the receivership maintained a cash balance of approximately $210,000.00, with an expected GST refund of approximately $11,500 to come. Exigible assets which the Receiver had not been able to monetize, mainly in the form of litigation assets, remain in the receivership, and the Receiver is of the view that, for a number of reasons, it is in the best interest of Arres Capital, its creditors and other stakeholders that it be discharged. Any interest in the remaining exigible assets would vest in the Trustee in bankruptcy.

[26] Receipts and disbursements to discharge are estimated at approximately $113,000, leaving approximately $109,000 in available funds.

[27] The Receiver takes the position that:

a) the Court Funds are not trust property, and are available for distribution to general creditors of the debtors;
b) the Court funds are subject to the priority claims of the Receiver's Charge and the Receiver's Borrowing Charge; and
c) whether or not claim to the Court Funds is a trust claim, the Receiver's professional fees and the fees of its counsel for the period from appointment to June 30, 2019 have been approved by the order of the Court on August 13, 2019.

[28] As there will remain a shortfall on the Receiver's Borrowing Charge, the Receiver does not view it necessary to determine any claims, trust or otherwise, to the Court Funds.

III. Position of the Parties

[29] The Receiver seeks court approval for its fees and disbursements and those of its counsel for the period from July 1, 2019 to July 31, 2020 in the amount of $15,542, and estimated fees and costs to complete the receivership of $50,000, which includes fees and costs incurred but not paid.

[30] The Kenzie investors submit that the Court Funds were to be segregated from other assets of Arres Capital and were only to be used to cover the Receiver's costs and expenses to sort out any contest to entitlement to those funds between the Kenzie plaintiffs and Terrapin. Since Terrapin no longer has a claim against the funds, and therefore the Receiver does not have to incur costs to determine such a claim, the funds should be paid to the Kenzie investors.

[31] The Kenzie investors submit that this was agreed among counsel for the Receiver, counsel for Terrapin and counsel for both Graybriar and the Kenzie investors, despite the provisions of the June 4, 2018 order. They do not rely on, or give evidence of, anything but the record of the June, 2018 hearing with respect to this submission.

IV. Analysis

[32] As noted previously, the transcript of the discussions at the hearing, and the provisions of the June 4, 2018 Order do not support either a direction of the Court or an agreement of counsel as described by the Kenzie investors. While I initially commented that the understanding was that the funds would only be used to determine the priority of claims against the two funds, I was swiftly corrected by counsel for the Receiver, who made it plain that the Kenzie funds would fall into general administration and that the Receiver's application was to obtain priority for the Receiver's Charge and the Receiver's Borrowing Charge over the Court Funds. This priority was reflected in the Order, and confirmed in the Fourth Report of the Receiver in 2019.

[33] In response to my further comment with respect to the use of the funds, counsel for the Receiver indicated that there was already a significant amount of fees outstanding and that "[a]s long as we have the priority, we are happy then to adjudicate claims to the [$235,000] based on entitlement". The Receiver agreed to segregate outstanding fees between the Graybriar matter and the Kenzie matter. It was counsel for Terrapin that wanted assurance that the Kenzie Court

Funds be segregated, to which counsel for the Receiver replied that, as long as the Receiver's charges had priority over them, the Receiver would be able to deal with allocation at the end of the piece, and that the funds would be held in two separate accounts by the Receiver.

[34] That is essentially what the Receiver did: the Graybriar funds were held in an account separate from the Court Funds which were held in the general account.

[35] If there was any misunderstanding about what the Receiver had agreed to do with respect to segregation, that misunderstanding should have been cleared up at the time of the Receiver's Fourth Report dated August 2, 2019. Under the heading "Interim Receipts and Disbursements - July 26, 2012 [the commencement of the receivership] to August 2, 2019", the Receiver discloses that the Court Funds were deposited in the general account and were included with other "receipts" of the receivership, subject to disbursements for professional fees and general and administrative costs.

[36] The Fourth Report also indicates that, in the Receiver's view, the Court Funds "are not trust property for the benefit of any Persons and therefore are available for distribution to general creditors of the Debtor". Ultimately, any distribution to general creditors is unlikely, and in fact there will be a shortfall to cover the Receiver's Borrowing Charge. The Fourth Report indicates that persons who wish to assert a trust or other claim to the assets "are able to do so in the receivership proceedings".

[37] The Fourth Report discloses specifically that:

> Because the Receiver is administering separate classes of assets that will be distributed for the benefit of separate classes of creditors, the Receiver has been careful to segregate professional fee charges and disbursements between the separate asset classes. Since May 2018, the Receiver and its legal counsel have separately recorded and charged their fees and disbursements to "Graybriar" (when performing work related to the Graybriar Funds) and to "General" (when performing work related to the general assets) so as to ensure that allocation of cost is fair and accurate.

[38] While the August, 2019 hearing dealt with distribution to the Graybriar investors and payment of their legal costs, the Court also approved the conduct of the Receiver as reported in the Fourth Report, the payment of the Receiver's general fees and expenses for the period from the inception of the receivership to June 30, 2019, and the payment of the Receiver's fees and expenses specific to the Graybriar issue.

[39] As noted by the Receiver, the interests of the Graybriar investors and those of the Kenzie investors were adverse at the time of the August, 2019 hearing. However, the Kenzie investors had notice of and were represented at the hearing by the same counsel as the Graybriar investors, and the order was not appealed.

[40] In the result, nothing can be done to claw-back distributions from the Graybriar investors, or the payment of their litigation costs. While there may have been a misunderstanding arising from the June, 2018, hearing, there was no breach by the Receiver of the June 4, 2018 Order or what was discussed and agreed to at the hearing.

[41] Although the Kenzie investors do not formally allege a trust with respect to the Court Funds, they submit that the funds were "earmarked" for them, and cite ***Stone Sapphire Ltd. v***

Transglobal Communications Group Inc., 2008 ABQB 575, upheld on appeal, 2009 ABCA 125.

[42] However, the claimant in that case, in similar circumstances as the Kenzie investors, was not able to establish priority over a secured creditor's claim. Topolniski, J. distilled principles relating to priority disputes over money paid into court at para. 11 of that decision:

1. To trump a trustee's priority to funds paid into court under a garnishee or as a condition of opening up a default judgment, the judgment creditor must have completed execution.
2. An order permitting payment out of monies paid into court on obtaining a further order is insufficient to trump the trustee's priority to the funds.
3. A judgment creditor is not elevated to the status of secured creditor by virtue of a payment into court, whether that payment is to advance an appeal or as security for costs.
4. A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds. (***Careen Estate v Quinlan Brothers Ltd.*** (2004), 2004 NLSCTD 132 (CanLII), 2 C.B.R. (5th) 102 (Nfld. S.C.)).
5. A secured creditor trumps a trustee's priority to funds paid into court if the monies are the subject of valid security.

[43] The Court in ***Stone Sapphire*** noted the unusual facts of the ***Careen Estate*** case: money had been paid into court by Careen Estate pending disposition of a trial.

[44] When judgment was awarded against it, counsel for Careen Estate informed the trial judge that his client intended to make an assignment into bankruptcy that day. The trial judge ordered immediate payment out of the funds in court to the plaintiff, but when the defendant's counsel sought payment of the funds, courthouse staff informed him that the court needed to confirm the payment and issue a certificate in accordance with the *Rules of Court*, which could not be accomplished by the close of business that day. Within an hour of that happening, Careen Estate made an assignment into bankruptcy. Thus, only a bureaucratic error prevented the plaintiff from completing execution.

[45] With respect to the concept of "earmarked funds" generally, Topolniski, J. indicated at para 36 that the proposition offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among creditors, and the specific language of section 70 of the *BIA*. She noted that she was not satisfied that a 2013 decision that found otherwise remained good law in light of the Supreme Court's decision in ***T.E. Cleary Drilling Co. (Trustee of) v Beaver Trucking Ltd***., [1939] S.C.R. 317.

[46] I agree with the Court's reasoning in ***Stone Sapphire***, and find that the Kenzie investors have not established entitlement to priority over the Receiver's charges by reason of the funds being earmarked.

[47] The Kenzie investors submit that there was no basis going forward from the July, 2014 order of Strekaf, J. pursuant to which Arres Capital could have applied back to court to have the Court Funds paid out to it. However, that is essentially what the Receiver did in the July, 2018 application, and was successful.

[48] Finally, the Kenzie investors submit that it is unfair that they are unable to claim the Court Funds, since they have been working since 2014 to execute on their judgment, but were side-lined by the Terrapin claim.

[49] Their frustration is understandable, but the Court Funds have not been paid to another creditor in this case, but have been, and will be, subsumed by the Receiver's Charge and the Receiver's Borrowing Charge in this complex and litigious matter.

V. Conclusion

[50] I allow the Receiver's applications, and dismiss the application of the Kenzie investors for payment of the Court Funds.

[51] If the parties are unable to agree on costs, they may make written submissions.

Dated at Calgary, Alberta this 19th day of April, 2021.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Walker W. MacLeod and Pantelis Kyriakakis
for the Receiver, Alvarez & Marsal Canada Inc.

Jeffrey L. Oliver
for Access Mortgage Corporation (2004) Limited

Loran V. Halyn
for the Kenzie Investors

COURT OF APPEAL OF ALBERTA

Form AP-1
[Rule 14.8 and 14.12]

Registrar's Stamp

REGISTRAR
FILED
06 May 2021
DK
Court of Appeal of Alberta

COURT OF APPEAL FILE NO.	2101-0117AC
TRIAL COURT FILE NUMBER	1401-12431
REGISTRY OFFICE	CALGARY
APPLICANT	**ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED**
STATUS ON APPEAL STATUS ON APPLICATION	NOT A PARTY TO THE APPEAL NOT A PARTY TO THE APPLICATION
RESPONDENT	**ARRES CAPITAL INC.**
STATUS ON APPEAL STATUS ON APPLICATION	RESPONDENT RESPONDENT
AND	
NONPARTY APPLICANTS	**KENZIE FINANCIAL INVESTMENTS LTD. and others, see attached Schedule A**
STATUS ON APPEAL STATUS ON APPLICATION	APPELLANTS APPLICANTS
DOCUMENT	**CIVIL NOTICE OF APPEAL**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**SUGIMOTO & COMPANY** Barristers and Solicitors 204, 2635 – 37 Avenue NE Calgary, Alberta, T1Y 5Z6 Solicitor of Record: Loran V. Halyn Direct: 403-219-4213 Fax: 403-291-4099 Email: lhalyn@sugimotolaw.com File: 15,054 LVH

WARNING

To the Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. Particulars of Judgment, Order or Decision Appealed From:

Date pronounced: April 19, 2021

Date entered: Not yet entered.

Date served: Not yet served

Official neutral citation of reasons for decision, if any:
(do not attach copy) *Access Mortgage Investment Corporation v Arres Capital Inc*, 2021 ABQB 307

(Attach a copy of order or judgment: Rule 14.12(3). If a copy if not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated:

X **Court of Queen's Bench**

Judicial Centre: Calgary

Justice: The Honourable Justice B.E. Romaine

On appeal from a Queen's Bench Master or Provincial Court Judge?:

Yes X No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge: (do not attach copy) N/A

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required: Rule 14.18(1)(c).)

3. Details of Permission to Appeal, if required (Rules 14.5 and 14.12(3)(a)).

X Permission not required, or Granted:

Date: N/A

Justice: N.A
(Attach a copy of order, but not reasons for decision.)

4. Portion being appealed (Rule 14.12(2)(c)):

X Whole, or

Only specific parts (if specific part, indicate which part):

(Where parts only of a family law order are appealed, describe the issues being appealed, e.g. property, child support, parenting, etc.)

5. Provide a brief description of the issues:

The factual backdrop for this appeal is particularly convoluted.

The Appellants are investors who participated in a syndicated loan totalling $2,542,105.05 secured by a mortgage that was arranged and administered by Arres Capital Inc. ("Arres"), a licensed mortgage broker, as bare trustee for the investors relating to a land development project in British Columbia. In 2012, the Appellants commenced an action against Arres when Arres misappropriated a portion of the funds paid by the land owner to payout the syndicated loan and mortgage, which funds were received by Arres as trust funds of the Appellants. By July 2013, the Appellants applied for summary judgment and were partially successful. Summary judgment was granted in the amount of $223,768.79 plus costs and interest, with the balance of the Appellants' misappropriation claims against Arres directed to trial.

Arres appealed the summary judgment order granted in favour of the Appellants. To stave off the Appellants' collection efforts, on February 14, 2014 Arres paid $235,000 into court pursuant to a Consent Order (the "Court Funds") to halt the collection activities of the Appellants pending a decision on Arres' appeal.

On April 16, 2014, Arres' appeal was dismissed with costs to the Appellants.

On July 23, 2014, the Appellants applied to have the Court Funds released to them in satisfaction of their partial summary judgment upheld on appeal. By this time, the Appellants learned that the Court Funds were provided to Arres from Terrapin Mortgage Investment Corp. ("Terrapin") pursuant to a purported mortgage arranged by Arres that was problematic, such that Terrapin was making a claim to the Court Funds in the event its mortgage proved unenforceable. Consequently, the Court adjourned the Appellants' application for release of the Court Funds *sine die*, pending determination of Terrapin's entitlement to its mortgage security, or in the alternative, its claim to the Court Funds. If Terrapin's mortgage proved to be enforceable, Terrapin could not maintain a claim against the Court Funds with the expectation those funds would then be released to the Appellants.

Before Terrapin's entitlement to its mortgage security (which ended up being a very protracted issue unresolved into 2017), or alternatively its claim to the Court Funds, could be determined, Arres was forced into receivership and bankruptcy by order

granted on July 29, 2017. At the time of Arres' receivership and bankruptcy, the contest to the Court Funds was between the Appellants and Terrapin. Nevertheless, the Court Funds were paid over to the Receiver/Trustee of Arres to be held pending the determination of Terrapin's entitlement to its mortgage security which the Court concluded was best determined through Arres' receivership and bankruptcy.

Following the Court dismissing Terrapin's entitlement to its mortgage security, Terrapin declined and waived any claim to the Court Funds, at which time the Receiver/Trustee for Arres asserted the Court Funds were assets of Arres against which its receivership and bankruptcy fees and expenses, including legal fees, were chargeable against the Court Funds. The Appellants disputed this position, but the Court sided with the Receiver/Trustee deciding the Court Funds are assets of Arres available to cover the general costs of the Receiver/Trustee. The Appellants appeal that decision.

This appeal asserts the Court Funds should be construed not as the property of Arres, but that of the Appellants, insofar as those funds were paid into court in 2013 by Arres in satisfaction of the summary judgment granted in favour of the Appellants in the event Arres appeal of the summary judgment was dismissed, which appeal was dismissed on April 14, 2014. The Court Funds were then ordered to remain in court pending the delayed determination of whether Terrapin otherwise had a valid claim to those funds, which Court Funds were then directed to Arres' receivership and bankruptcy to be held by the Receiver/Trustee pursuant to conditions that are in dispute.

6. Provide a brief description of the relief claimed:

Setting aside the decision under appeal and directing the release to the Appellants of Court Funds held by the Receiver/Trustee for Arress Capital Inc. for the benefit of the Appellants.

7. Is this appeal required to be dealt with as a fast track appeal? (Rule 14.14)

Yes X No

8. Does this appeal involve the custody, access, parenting or support of a child? (Rule 14.14(2)(b))

Yes X No

9. Will an application be made to expedite this appeal?

Yes X No

10. Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate? (Rule 14.60)

Yes X No

11. Could this matter be decided without oral argument? (Rule 14.32(2))

Yes X No

12. Are there any restricted access orders or statutory provisions that affect the privacy of this file? (Rules 6.29, 14.12(2)(e),14.83)

Yes X No

If yes, provide details: N/A
(Attach a copy of any order.)

13. List respondent(s) or counsel for the respondent(s), with contact information:

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If specified constitutional issues are raised, service on the Attorney General is required under s. 24 of the Judicature Act: Rule 14.18(1)(c)(viii).

14. Attachments (check as applicable)

Order or judgment under appeal if available (not reasons for decision) (Rule 14.12(3))

Earlier order of Master, etc. (Rule 14.18(1)(c))

Order granting permission to appeal (Rule 14.12(3)(a))

Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

SCHEDULE A

COURT OF APPEAL FILE NO.	
TRIAL COURT FILE NUMBER	1401-12431
REGISTRY OFFICE	CALGARY
APPLICANT	**ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED**
STATUS ON APPEAL STATUS ON APPLICATION	NOT A PARTY TO THE APPEAL NOT A PARTY TO THE APPLICATION
RESPONDENT	**ARRES CAPITAL INC.**
STATUS ON APPEAL STATUS ON APPLICATION	RESPONDENT RESPONDENT

AND

NON-PARTY APPLICANTS	**KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK**
STATUS ON APPEAL STATUS ON APPLICATION	APPELLANTS APPLICANTS

Action No.: 1401-12431
E-File No.: CVQ20ACCESS
Appeal No.: 2101-0117AC

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

ACCESS MORTGAGE CORPORATION (2004) LIMITED

Applicant

and

ARRES CAPITAL INC.

Respondent

P R O C E E D I N G S

Calgary, Alberta
November 12, 2020

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

November 12, 2020	Morning Session
The Honourable Madam Justice Romaine	Court of Queen's Bench of Alberta
J.L. Oliver	For Access Mortgage Corporation (2004) Limited
(No Appearance)	For Arres Capital Inc.
W.W. MacLeod	For Alvarez & Marsal Canada Inc.
L.V. Halyn	For the Graybriar and Kenzie Investors
M. Khedri	Court Clerk

THE COURT: Thank you. Good morning. Okay, Mr. MacLeod?

MR. MACLEOD: Good morning, My Lady.

THE COURT: I --

MR. MACLEOD: How are you?

THE COURT: I'm good. How are you?

MR. MACLEOD: Very good, thanks. Very good.

THE COURT: Okay. Good. It's your application?

MR. MACLEOD: It is, My Lady. I'll just do -- do introductions, and then -- and then set the table as to where we are. Mr. Halyn is present. Mr. Halyn --

THE COURT: Right.

MR. MACLEOD: -- acts for two different groups of clients, one who is called the Graybriar investors and one who we'll term the Kenzie investors.

THE COURT: Okay.

MR. MACLEOD: Mr. Oliver is present, My Lady. Mr. Oliver acts for the DIP lender in this proceedings. And Mr. Konowalchuk, the representative of the

receiver, is also present, My Lady. It is -- it is my application, though I think process wise, we should just be clear what's happening because it is a bit of a continuation of the previous application. And there is a cross-application by Mr. Halyn.

Where we had gotten to last time, My Lady, my recollection is Mr. Halyn has effectively concluded. The receiver had made its submissions. Mr. Halyn had made submissions. And then we were effectively out of time. And we had the additional complicating factor of you didn't have the materials, which --

THE COURT: Right.

MR. MACLEOD: -- which doesn't ever make things easy. I'm in your hands as to how you would like to proceed, My Lady, though I would suggest that the receiver does wish to make, I don't know if you'd term it reply submissions or responding submissions to Mr. Halyn. And I think that will be beneficial. And I'm happy -- I'm happy for -- for Mr. Halyn to have a right of sur-reply or a right of response or -- or whatever you wish to call it, but the -- the receive does wish to address the submissions of Mr. Halyn.

THE COURT: Okay. So, Mr. Halyn, I guess then you are starting.

MR. HALYN: My Lady, I don't know if you want me to sort of recap on what I'd made in the previous proceedings vis-a-vis submissions. It's probably helpful for me to do so.

THE COURT: Yeah, I think it would be. Go ahead.

Submissions by Mr. Halyn

MR. HALYN: You may recall, My Lady, that the issue of concern to the clients I represent which we refer to as the Kenzie plaintiffs relates to a fund of money that was paid into court pursuant to a summary judgment they had securities to Arres Capital for a total of about $228,000 plus costs which I've added up, and with the cost awarded, totals $228,965.42.

And in order to proceed with an appeal of the original summary judgment, counsel for Arres Capital at that time, which was back in 2013, applied to appeal that ruling in an order to stave off execution efforts on behalf of my clients, secured an order from Justice Wilkins with my consent to pay $235,000 into court.

And then the appeal proceeded in the normal course. It was ultimately dismissed by

Madam Justice Kenny in April of 2014, and no further appeal was taken out at that time.

So, the -- the funds at that point in time, in April of 2014, were essentially available to the -- my clients, the -- the Kenzie plaintiffs, to apply to have paid out to them. Now, the complication that arose that led to you having to consider this issue back in June of 2018 was that there was another party that arose that made a claim over those funds on the basis of an (INDISCERNIBLE) trust. That was Terrapin Mortgage Corporation.

And you may recall as well that they got involved because they in fact were drawn into the -- or the Graybriar matter because they had advanced a mortgage against four condominium units that were part of the Graybriar trust assets. And that registration of that mortgage was disrupted by a stay order that our offices obtained because it was essentially putting a mortgage against trust property, which funds from that mortgage that had been advanced before registration under title insurance was utilized by Arres Capital to pay into court, the 235.

So, Terrapin was making a claim either to the equitable mortgage over the Graybriar assets pursuant to its claim that it advanced moneys to be secured against the Graybriar units. But if that claim failed, then Terrapin was alternatively claiming an interest in the $235,000 that had been paid into court by Arres Capital because it was essentially the party that provided those funds in the first instance.

So, before my clients could access those funds from court, in mid-2014 Terrapin made an intervener application and -- and was successful in that regard to take -- take part in and make a claim to the $235,000 that's been paid into court that was otherwise available to my clients because Arres Capital appeal had been dismissed.

So, from that point in time, my submission has always been that Arres Capital had no further claim over those funds going forward. And it was a contest between my clients, the Kenzie plaintiffs, and Terrapin Mortgage Corporation vis-a-vis its claim that, if it -- it failed to advance a successful claim against the Graybriar assets, then it would be seeking to make a claim against the $235,000 in the Kenzie action.

So, my clients were caught between a rock and a hard place at that point. And so, Justice Strekaf granted an order which is in the affidavit that I filed in support of the application back in -- in August that I hope you've seen that included the applications of both my clients and Terrapin that were heard by Justice Strekaf on July 23rd, 2014, in which she essentially put our application to access those funds on hold and adjourned it sine die pending the determination of the stay order in the other actions, which were the Graybriar actions.

So, essentially, Justice Strekaf said the money in court that is otherwise payable to the

Kenzie plaintiffs was to be -- continue to be held in court while Terrapin pursued its claim to the Graybriar assets. And then only if that claim did not succeed was Terrapin then indicating an intention to go after the $235,000. And so, the court essentially put a hold on it so my clients couldn't get it out.

And then circumstances developed which ultimately resulted in the receivership and bankruptcy of Arres Capital. And then we came to court before you in June of 2018. They had been a number of matters before Justice Strekaf in relation to the Graybriar matter and Terrapin's claim over those Graybriar assets, My Lady.

And it ultimately was resolved in part with a matter in front -- an application and appeal before the Court of Appeal where the Court of Appeal essentially allowed the stay orders to remain in place so that the Graybriar funds were not paid over to Terrapin or any other party, so they were also put on hold.

So, both my clients in the Kenzie matter and my clients in the Graybriar matter couldn't access any of the funds that they claimed entitlement to because, in part, Terrapin was claiming against both of those tranches of assets.

So, when it was before you in June of 2018 I made submissions on behalf of my clients. Ms. Okita made applications on behalf of Terrapin; you may recall. And, ultimately, our position was that, based on the case of *Stone Sapphire* 2008 which I think you've also seen, we asserted that the claim of my clients to those funds in court should take priority over the bankruptcy and receivership's claim because they were essentially earmarked for my clients back in 2014, in fact, as a result of being successful in the summary judgment application and being paid into court to satisfy that judgment.

And my clients have done everything within their power to access those funds, but they were held up in doing so because of the involvement of Terrapin and its alternate claims against either the Graybriar assets or the Terrapin assets -- or sorry, the Kenzie assets.

And so, we argued that those funds should not form part of the bankruptcy and receivership assets. But in any event, at the end of the day, you made a determination, which is referenced in the transcript that I sent and highlighted, and -- and it's referenced in the affidavit Ms. Sara Terry (phonetic) that's also filed, where you essentially directed that the Kenzie funds could be paid over to the Arres receiver and trustee but under the condition that those funds would be segregated.

So, essentially, the trustee receiver was supposed to take the Graybriar assets and funds, put them in a segregated account, take the Kenzie funds that were in court, put them in a separate segregated account. And those funds were only to be utilized to sort out the

competing claims against those funds vis-a-vis the Graybriar investors and the Kenzie plaintiffs versus Terrapin's claim against both those funds and that there was also a claim by a numbered company owned by the owner of Arres Capital's wife, a numbered company, that also was claiming an interest over the Graybriar funds.

So, there was this preliminary step that needed to be determined as to who was entitled to the Graybriar funds. And then, once that determination was made, there was the potential for Terrapin to also then make a claim against the Kenzie funds if it was unsuccessful in its claim against the Graybriar funds.

And so, I understood -- and I think the discussion between counsel that ensued after you made your direction was consistent with the expectation that both funds, the Graybriar funds and the Kenzie funds that were paid into court, would be remain segregated from other assets of Arres that were realized in the receivership and bankruptcy and that those two pots of money that were to be segregated were -- only be utilized and to pay the receiver's fees and expenses associated with determining entitlement to those funds vis-a-vis the parties, the Graybriar investors, and my clients, the Kenzie plaintiffs, and the competing claims of Terrapin and the numbered company.

Now, ultimately, Justice Jones heard an application with respect to the claims against the Graybriar funds of Terrapin and the numbered company and dismissed both of those claims. So, Terrapin now was out of luck with respect to making a claim over the Graybriar funds.

Meanwhile, there had been no steps taken in relation to anything to deal with the Kenzie funds because we were still waiting to see what happened with Graybriar. And, as I said, my clients were left just sitting and waiting to see what happened because Terrapin may not have made a claim against those funds going forward if it was successful against its claim against the Graybriar funds, so my clients sit and wait. They've been waiting since 2014 when they got their judgment and had the money paid into court.

Once Justice Jones made his determination, then we explored with Terrapin whether or not they were intending to still proceed with an application, because it had been first advanced before Justice Strekaf back in July of 2014, whether they win a claim against the Kenzie funds on the basis of some sort of equitable trust because they were the genesis of those funds in the first instance.

Counsel for Terrapin eventually confirmed in writing, which is also in the affidavit of Ms. Sara Terry as an email exchange with -- that Ms. Okita confirmed that Terrapin was no longer going to make a claim against the Kenzie funds that had been paid to the receiver which were to be segregated.

The difficulty that arose in that -- it was our expectation then that those segregated funds would be paid over to my clients because there was no competing claim against them and the receiver hadn't incurred any substantial cost in connection with resolving the dispute between Terrapin and my clients because, at the end of the day, Terrapin withdrew its claim and conceded that those funds could -- would otherwise go.

At least that's my understanding of -- of Terrapin's position. And Terrapin obviously is no longer taking part in these proceedings. The difficulty arose that then it was revealed that those funds hadn't been segregated. They were treated as general assets of Arres Capital in the overall receivership. And a claim was being made against those funds to fund the general activities of the receiver, vis-a-vis, all of the other issues. And they weren't being segregated to be utilized only for the purposes of determining the entitlements of those funds, vis-a-vis, the Kenzie plaintiffs and Terrapin Mortgage.

So, that's why we're here, My Lady, is that my reading and understanding of the proceedings back on June 14th was notwithstanding you grant an order that those funds, the Kenzie funds, would be treated as court funds generally subject to the receiver's charges and expenses in dealing with the Arres Capital receivership and bankruptcy.

It was on the basis that there was an understanding addressed by all counsel and agreed by the receiver that, notwithstanding the order had been granted, the understanding was that the Kenzie funds were to be segregated and they were only to be used to cover the receiver expenses and costs to sort out the contest to entitlement of those funds as between Kenzie plaintiffs and Terrapin.

Now we see that the receiver's taking the position that the funds weren't segregated at any point in time, apparently, and that it wants to utilize those funds to pay the receiver's general expenses, which, at this point in time, based on what I understand is being submitted in the fifth report of the receiver, that it will essentially chew up and consume all of those funds so that there'll be nothing left to the Kenzie parties who secured their judgment, were entitled to those funds in April or May of 2014, when no appeal was taken out.

But before they could get those funds paid out, Terrapin stepped in, made an application and essentially caused them to be frozen. But the order of Justice Strekaf back in July of 2014 only adjourned the application of my clients to get those (INDISCERNIBLE). And it's clear, I think, that there would be -- there was no basis going forward from July of 2014 in which Arres ever could have applied back to court to have those funds paid out to it and that, essentially, then it has lost its interest in those funds.

Therefore, the *Stone Sapphire* case seems to clearly apply, that those funds were earmarked

for my client. And they did what they could to try to get those funds released, but because of the complications of Terrapin's involvement and its competing claims to both the Graybriar funds and the Kenzie funds, that my clients were left in a holding pattern until the Kenzie -- or until the Graybriar matter got sorted out, which was only recently by Justice Jones, to have those funds fall into the general receivership after the parties had essentially agreed in the course of your proceedings in June of 2018 that they would be segregated and only utilized for a limited purpose.

To now have them fall into the general receivership runs (INDISCERNIBLE) of both what counsel, I submit, agreed to back in June of 2018 in keeping with your order that they be segregated. And even Ms. Okita asked it to be written into the order. And it was generally conceded that it wasn't necessary because counsel understood that they would be proceeding on the basis of your instructions.

To have that now essentially reversed and -- and turned around so that those -- the status of those funds have been essentially converted from segregated protected funds to general receivership funds warps (phonetic) a significant and extreme injustice to my clients who were stuck in the middle of a dispute that they had no involvement in making, but they were drawn into it, as I said, because of this complication with the Graybriar funds which was only resolved recently by Justice Jones.

So, that was essentially my pitch to the court which was consistent with what I argued, I think, in June of 2018. And I don't see any basis upon which the receiver now can assert a claim over those funds paid into court on the understanding that was expressed by counsel in June of 2018 to have them treated as general assets of their -- of Arres Capital to be generally utilized for all of its expenses that are utterly disconnected and uninvolved and unrelated to the contest between Terrapin and my clients that originally arose back in 2014, that it's no longer required any involvement of the receiver to determine.

I know my friend relies on a subsequent report and order of Justice Eidsvik. And I'll just say in that regard that my involvement in that application and that -- at that point in time was to settle off the issue with respect to the Graybriar funds in which we were arguing that my client's costs, from a legal perspective, that they had incurred substantial amounts of fees to preserve those funds from otherwise being misappropriated and ultimately being successful all the way up to the Court of Appeal should -- should form a priority charge against those funds.

And my clients should have been reimbursed for those funds before the balance of the Graybriar funds would be distributed to all of the investors. The receiver disputed us on that point. We were successful for -- before Justice Eidsvik. And the only indication in the report that I could see that might be somewhat impactful in this analysis, My Lady, is

that there was an indication in that report that the funds being held by the receiver, which included the Kenzie funds, was around still about $241,000 -- or sorry, 200 and -- over $250,000 or so, 241,000 and change, I guess, that was being held at that time, which was still more than the 235 paid into court, and that the receiver was submitted two -- two forms of fees, fees associated with the Graybriar matter, which were a charge against those funds which were segregated, and then a separate amount of fees being charged to general administration.

Well, there was no indication that any of those fees were related to the Kenzie matter. And so, I looked at it. And from my perspective, it wasn't a charge against the Kenzie funds and -- and the receiver still had more than the Kenzie funds in its hands.

So, from my perspective, that Justice Eidsvik order, to the extent that it didn't address the Kenzie funds in any material respects doesn't convert and change what counsel agreed to back in 2018 before you, My Lady, that those funds were to be treated separately. And so, I submit that they should still be treated separately and all of those funds should be released to my clients.

So, that's essentially where we stand, My Lady. And, quite frankly, for the receiver to take a contract position now that it wasn't to segregate those funds, and they could -- could treat them as general assets of the estate based on your order without also taking into account the general understanding that was expressed after you granted your order to me is simply unfair to my clients, who have done nothing wrong and -- and exercised every opportunity and availed themselves of every change to secure those funds long before Arres Capital ever went into receivership, which didn't happen until 2017 and 2018.

So, to -- to suggest that they were funds of Arres Capital, they should go into receivership and be treated as general assets because they were frozen because of Terrapin back in 2014, as I said, is -- is, in my submission, grossly unfair. So, those are my remarks, My Lady, unless you --

THE COURT: Okay.

MR. HALYN: -- have any questions.

THE COURT: Okay. Thank you. Okay.

MR. HALYN: Thank you.

THE COURT: Mr. MacLeod?

Submissions by Mr. MacLeod

MR. MACLEOD: Thank you, My Lady. Just we're going to do this unlike last time when you didn't have the documents. We're going to do this with reference to the evidence this time because I think it's going to help.

THE COURT: Good.

MR. MACLEOD: And I'm going to bring you the -- the -- I think I can do everything based on the fifth report --

THE COURT: Okay.

MR. MACLEOD: -- including the references to the appendixes.

THE COURT: Yeah.

MR. MACLEOD: I've -- just so if you have that document, My Lady, it'll be useful.

THE COURT: I do. Thank you.

MR. MACLEOD: Okay. Thank you. I've become a bit of a case line snob, My Lady, on other cases and -- and -- but -- but we can do it this way, as well, so.

THE COURT: Okay.

MR. MACLEOD: I want to start with the submission that Mr. Halyn made, and he said a similar -- similar -- had a similar comment last time, but that it was revealed that this application -- when I say this application, I mean the -- you know, this application that was filed in August of 2020, as to how the receiver was accounting for these funds.

And he said last time something to the effect that they never told us about the non-segregation. And he's made the same point again, okay. And there's two problems with that submission, just so -- just so you understand it. The first all -- first of all, it's wrong, okay. And on that score, I want to go to the fifth report, but it is at appendix -- appendix -- and I'll get it for you, My Lady, I'm sorry, appendix A --

THE COURT: Yeah.

MR. MACLEOD: -- to the fifth report.

THE COURT: yes.

MR. MACLEOD: And so, this is an excerpt from the fourth report. So, this is -- this is August of 2019, how the receiver is reporting on matters.

THE COURT: Okay.

MR. MACLEOD: And this is the 'R' and 'B' (phonetic) in respect of the -- what we term the general funds.

THE COURT: Okay.

MR. MACLEOD: And there's 505 -- do you see a table there, My Lady, with $505,000 identified?

THE COURT: Right.

MR. MACLEOD: Okay. So, if you go to 34(a), at the bottom of that page, you'll see there's the reference to the $241,800 which relates to the court funds. And those are the funds that we're talking about.

So, just to set the table here, the way that these funds have been accounted for has always been reported. And it was reported 14 months ago, okay. So, the submission that this was revealed in August of 2020 is simply wrong. It was reported on to the court in August of 2019, and it's just completely wrong to suggest otherwise.

But the bigger problem is actually it's clear to me that Mr. Halyn has misunderstand the -- the difference between segregation of funds and allocation of funds within an insolvency proceeding. And it really doesn't matter if the funds are segregated or not segregated, as long as the receiver can account for the funds, and, of course, they always can, that's what court officers do, and then before they go to make a prefiling distribution to prefiling creditors, they allocate the funds properly.

And the reason you have to do that, as Your Ladyship knows, is you can't actually get the money back once you write the cheques, right. And that's why we came back in August of 2019. But I'm going to just give you an example of this, how this would have worked in August of 2019 had Mr. Halyn brought the application that he's now brought.

So, let's say in August of 2019 Mr. Halyn brought the application that he brought today, which is for a procedural order in relation to funds, but is effectively for a release of the funds. And let's say that Madam Justice Eidsvik in August of 2019 agreed with him and directed the receiver to forthwith receive the $241,800 that we've held to Mr. Halyn's client. Then the receive would have immediately paid that money in accordance with the -- with the court direction, right. That's -- that's what we would have done. And it would have been very easy to do because we have the money and we've got it identified.

And -- and this is the problem that apparently seems to be misunderstood by my friend, is that the interests of the Kenzie investors and the interest of the Graybriar investors or directly adverse, as they are in any instance of cost allocation. Giving money to the Kenzie investors necessarily means taking money away from the Graybriar investors. It's just --= there's just no other way of doing it, okay.

So -- and that's not what was brought, obviously, by Mr. Halyn in August of 2019. What he brought was an application for a payment of his Graybriar -- Graybriar funds. And he got paid his fees out of that, okay. So -- so, that's the status in August of 2019 as to how the receiver has reported on this. And I just -- I just want you to understand that.

And then let's go and talk about what the application in August of 2019 was about. Mr. Halyn said to you at the last application -- and he didn't say it directly this time, but he effectively said the same thing in what he was dealing with on the Graybriar investors and the recovery of the fees in August of 2019.

What the August 2019 application was about was both the Graybriar investors, the release of fund to the Graybriar investors, but also the second order that the receiver pleaded for in its notice of application that was served on the service list and that was ultimately granted. And that second order sought three separate heads of relief.

And I'll go -- go then in reverse order of importance. Cost allocation was 1. Fee approval was 2. And approval of the receiver's conduct was -- was 3. And in the course of his submissions, Mr. Halyn made, you know, no or very limited reference to that August 2019 order. And I want to go there now because it's -- it's important that you understand what Madam Justice Eidsvik ordered in August of 2019.

So, you -- you just -- just so you -- I think I'll make reference to the accounting. Before I take you there, My Lady, you can see we have $505,000 total in deposit in the general funds, and that includes the court funds, right?

THE COURT: Right.

MR. MACLEOD: And we're report -- we're reported them -- them being there.

THE COURT: Right. Okay.

MR. MACLEOD: The order that I want to take -- take you to now is appendix C to the fourth report.

THE COURT: 'C'?

MR. MACLEOD: To the -- excuse me, to the fifth -- yeah, appendix C to the fifth report. I'm sorry, My Lady.

THE COURT: To the fifth report. Okay.

MR. MACLEOD: The fifth report. Appendix C to the fifth report.

THE COURT: Okay.

MR. MACLEOD: It's an order fee and conduct approval.

THE COURT: Okay.

MR. MACLEOD: And we'll start -- we'll start at paragraph 8 under the heading, "Cost allocation approval."

THE COURT: Yeah.

MR. MACLEOD: Okay. So, this is the allocation of accounts issued by the receiver and its legal counsel for fees and disbursements in respect to the debtor in the period July 26, 2017, and that's the start of the receivership --

THE COURT: M-hm.

MR. MACLEOD: -- up to the period June 30th, 2019.

THE COURT: Right.

MR. MACLEOD: Okay. So -- so, that is the entirety of the fee piece that is allocated as of August -- as -- as of August 2019. And the court approves that, My Lady. I can't stress that fact enough. The court approves that, right. And, as you can see,

what we've done here is we've gone back and we've allocated between Graybriar and we've allocated between general. And we have had those fees approved, right.

And it's never an exact science as to what we are able to do; it involves students sort of reviewing accounts and -- and whatnot. But as you always do in a -- in a cost allocation, we've proposed it to the interested stakeholders group. No one objected to it. And it's been court approved 14 months ago now, 15 months ago now, I guess, My Lady, okay.

The paragraph above, paragraphs 3 through 7, those are the approval of the accounts of the receiver and its legal counsel, okay, again, for the entirety of the period. From the commencement of the receivership until paragraph -- up until June 30th, those accounts were also approved, right.

And the reason we had to do this, the reason we had to do this was because we were prepared to make distribution to the -- to the Graybriar investors and we had to have the fees and the allocation approved because we couldn't be in a circumstance like Mr. Halyn wishes to put us in now where we'd be trying to claw back the money.

So, all of this is court approved, not just on notice to Mr. Halyn, My Lady, but in an application where he's actually present in the courtroom. And I just -- I have to say I just don't understand the position whatsoever that's now taken on the application because there's nothing that anyone can do about this order. There's nothing that anyone can do to get -- to get the money back from the Graybriar investors and there's nothing that anyone can do to -- to challenge the fees of the estates. This is court approved. This order has not been -- not been appealed.

To bring this full circle to the events of June of 2018, right, you'll recall, My Lady, that the receiver's primary concern in taking both the Graybriar funds and the court funds was ensuring that the receivership charges had priority over any claims to them, and that includes trust claims in accordance with the standard language. That was always the receiver's primary concern.

So, where we found ourselves in August of 2019 was we're now in a position where we are prepared to make distribution to the Graybriar investors. The Kenzies have always asserted their trust claim to the funds, but they've never actually brought it, but they've always asserted it. And so, we're ready to go with Graybriars (sic).

And we rank in priority to the Kenzie's trust claim, in any event. And we now know we're going to have a shortfall, so we applied for the allocation for the purposes of making distribution to Mr. Halyn's other claims. And all of that is court approved.

And -- and the simple point, My Lady, I call it mootness, I think it is mootness within the requirement, within the test of -- of Morganthaller (phonetic), but regardless, there's nothing that anyone can do about this at this stage because this is a court-approved -- court-approved order, court-approved freeze, court-approved allocation and, ultimately, court-approved distribution.

And -- and I just -- I struggle with the submission that they didn't appreciate what was happening because they've been actively involved in this case well before the receiver got involved, but that's their highest and best case, My Lady. And if that's the case, it's unfortunate, but there's absolutely nothing anyone can do about it.

So, that feeds to the point that the receiver's application should be granted for discharge and the form sought by the receiver in the cross-application by Mr. Halyn should be dismissed. There's just no basis for this court to do anything further in respect of their application, My Lady.

THE COURT: Okay.

MR. MACLEOD: Those are, I think, my -- my reply submissions, My Lady, responding submissions. I'm happy to -- to -- for Mr. Halyn to have a chance to -- to respond.

THE COURT: Okay. Before we do that, Mr. Oliver, do you have anything that you want to add?

MR. OLIVER: No, My Lady. As I indicated at the last hearing, within our client group are clients that both are within Mr. Halyn's group as well as others, so we are --

THE COURT: Okay.

MR. OLIVER: -- not taking a position on the application.

THE COURT: Okay.

MR. OLIVER: Thank you.

THE COURT: Okay. Thank you. Okay, Mr. Halyn?

Submissions by Mr. Halyn

MR. HALYN: My Lady, just a few additional remarks. First, if we go back to the appendix A to the receiver's fifth report that my friend referred to --

THE COURT: I'm sorry, Mr. Halyn, I'm having trouble hearing you, sir.

MR. HALYN: Sorry. I said, if we go back to the appendix A that Mr. Walker was referring you to earlier --

THE COURT: Yes.

MR. HALYN: -- he suggested that, if I had taken a position on that application with respect to the Kenzie funds, that there would have been the ability to the extent that there was additional charges and -- and expenses of the receiver, that they would conceivably be a charge against the Graybriar funds, I think that's not correct.

And that is because the original understanding expressed by you and agreed to by counsel in June of 2018 is that the only expenses of the receiver, including legal expenses, that would form a charge against the Graybriar assets was expenditures related to determining entitlement to those funds and that they were not to be utilized for a general administration of the estate.

So, all of the amounts of money and expenses and legal costs associated with the receiver dealing with the contest between the Graybriar funds formed a charge against the Graybriar funds and were paid by the Graybriar funds, which is what the Eidsvik order determined. It didn't give and it was never intended to give the receiver a general charge against all those other expenses of the receivership against the Graybriar assets.

The same situation was supposed to exist with the Kenzie funds. So, when they're applying for approval of their general expenses, I don't have any basis to contest those general expenses because they're not related otherwise to the Graybriar funds or the Kenzie funds; they're general expenses of the receivership.

And meanwhile, the amount that's confirmed to be held by the receiver after paying all of its fees and expenses, including professional fees up to August 2nd, 2019, has already been paid, still leaving $252,009 left in the hands of the receiver, which is more than the Kenzie funds that were initially paid to be held and segregated.

So, they got more money than they were supposed to hold in segregated accounts. I look at that and go, oh, and they still got the -- the full 235 in their hands. And they haven't made any claim against those funds as a cost because they -- they haven't incurred any

expenses to determine entitlement to those funds as between my clients and Terrapin Mortgage, who ultimately, as I said, withdrew its claim.

There's no indication anywhere that they haven't segregated those funds or they've desegrated those funds, so I'm going on the basis of what I understand was -- was agreed to in June of 2018.

So, when I look at their fourth report and I see that they're looking to have their general expenses paid from over $502,000 or $505,000 that they recovered, that becomes an expense against the 505 which still leaves more than the $241,800 that was paid over as their moneys in court because at the end of that application and the end of that order, they -- the receiver's still holding $252,000.

So, unless there's something in there that says, by the way, we have desegrated these funds and going forward now, we're going to make a claim against those funds for general administration, then I've got something to object to, but by the fourth report, I don't see that.

And, quite frankly, for my friend to suggest that Justice Eidsvik gave them carte blanche right to go forward on the basis that now all of those funds were to be utilized for the general expenses of the receivership going forward when they agreed in June of 2018 not to do that is to suggest that they are -- are taking a benefit from my slip to the extent there was one, which I say there wasn't.

But even if there was, in August of 2019 they're still holding more than the court funds that were originally paid to them that they were to segregate. So, they shouldn't be excused from continuing to conduct themselves in accordance with what was agreed back in June of 2018 before you.

It's only now that they see there's going to be a shortfall in their fifth report, which is new to me, that they're seeking to access those funds to pay off additional expenses and future anticipated expenses which will ultimately consume the entire amount of those funds.

So, from my perspective, My Lady, there's nothing from the -- the proceedings before Justice Eidsvik that was really directed mainly to determining how to disperse the Graybriar funds, from my perspective, that would lead me to conclude that the agreement that was reached in June of 2018 was being somehow stepped away from at that point in time. They still got more than those funds in their hands.

They acknowledged that their general expenses that they're seeking approval on is less than what they required to access those funds. And so, I'm looking at this going the -- the funds

are still preserved and protected. Going forward, that's a different issue. And that's why we're here to talk about it today.

So, those are my additional submissions, My Lady, unless you have any questions of me at this time.

THE COURT: Okay. Thank you.

MR. HALYN: Thank you.

Decision Reserved

THE COURT: I am going to have to reserve on this. And I'll get you a short written endorsement after I've had an opportunity to go through -- go through the -- the materials again. Thank you very much for your submissions this morning. Is there anything else that can be done, Mr. Walker?

MR. MACLEOD: No, I don't think, My -- thank you -- I don't think so, My Lady. Thank you very much. And our apologies for the -- you know, the scheduling. We were on the wrong day. We didn't have materials. But we appreciate you -- you giving us the time today, My Lady.

THE COURT: Yeah. Okay, great. Thank you. Okay, madam clerk.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Mursal Khedri, certify this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 1204 on November 12th, 2020, and I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Sandi Wagner, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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