

COURT OF APPEAL OF ALBERTA

Form AP-1

[Rule 14.8 and 14.12]

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

AND

NONPARTY APPLICANTS **KENZIE FINANCIAL INVESTMENTS LTD. and others, see attached Schedule A**

STATUS ON APPEAL APPELLANTS
STATUS ON APPLICATION 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
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File: 15,054 LVH

Registrar's Stamp



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 is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated:

☒ **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 ☐ 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)).

☒ 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)):

☒ 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 Arres 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 ☒ No

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

Yes ☒ No

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

Yes ☒ No

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

Yes ☒ 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 ☒ 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:

MCCARTHY TÉTRAULT LLP
SUITE 4000, 421-7TH AVENUE S.W.
CALGARY AB T2P 4K9
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DIRECT FAX: (403) 260-3501
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Lawyers for the Receiver and Trustee of Arres Capital Inc.

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

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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**

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