

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

AND

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

STATUS ON APPEAL APPELLANTS
STATUS ON APPLICATION APPLICANTS

DOCUMENT **FACTUM OF THE APPELLANTS**

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Appeal from the Reasons for Decision of the
Honourable Justice B .E.C. Romaine
Date Pronounced April 19, 2021
Not Yet Entered

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FACTUM OF THE APPELLANTS

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2. *Amended Statement of Claim in Graybriar Investor Action*
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9. *January 29, 2015 Reasons for Judgment in Graybriar Investor Action*
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13. *October 11, 2017 First Report of the Receiver (without Appendices)*
14. *Transcript of June 4, 2018 court proceedings*
15. *June 4, 2018 Order (Directing Release of the Graybriar Funds and the Court Funds and Confirming Receivership Order)*
16. *June 4, 2018 Order (Graybriar Funds Claims Process Order)*
17. *December 20, 2018 Order (Dismissal of Terrapin Claim)*
18. *December 20, 2018 Order (Dismissal of Related Parties Claim)*
19. *Fourth Report of the Receiver dated August 8, 2018*
20. *August 13, 2019 Order (Distribution of Graybriar Funds)*
21. *August 13, 2019 Order (Fee and Conduct Approval)*
22. *Email thread ending October 23, 2019*

INTRODUCTION

1. The Appellants successfully sued Arres Capital Inc. (“Arres”), obtaining summary judgment against Arres in July 2013.
2. Arres was put into receivership and bankruptcy in July 2017 with the appointment of a receiver and trustee (the “Receiver”).
3. This appeal involves the court disallowing, in favour of Arres’ Receiver, the Appellants’ claim to funds paid into court by Arres in 2014 to their credit in satisfaction of their summary judgment against Arres, which payment was more than 3 years before receivership and bankruptcy orders were implemented against Arres in 2017.
4. The Appellants’ ability to have the funds paid by Arres into court released to them in 2014 was delayed due to a competing third party (not Arres) claim to those funds which claim was intertwined with other ongoing litigation. The third party asserted its claim to the court funds alleging Arres had improperly obtained from it those funds to pay the Appellants’ judgment. Therefore, because the third party’s claim to the court funds was intertwined with other protracted litigation, the Appellants were precluded by court order from having those funds released to them pending determinations to be made in that other intertwined litigation.
5. The Appellants submit that by mid-2014 Arres had lost any claim to the court funds (Arres’ appeal of the Appellants’ summary judgment having been denied) and so the funds were “earmarked” for the Appellants and were no longer exigible property of Arres. The entitlement to those funds thereafter was only between the Appellants and the third party.
6. Case law states “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”. The Appellants appeal the Court’s determination that the funds paid by Arres in 2014 into court to satisfy their judgment remained exigible property of Arres into 2017 simply because the funds had not yet been paid out to the Appellants (due to the third party claim to those funds freezing them under court order).

PART I -- STATEMENT OF FACTS

7. The facts relevant to this matter derive mainly from a transcript of court proceedings, the Reports of the Receiver filed in Arres' receivership and bankruptcy, and court-filed documents in the Appellants' lawsuit against Arres and the intertwining litigation which entangled the Appellants' right to release of the funds paid into court by Arres with the claim of a third party. A short affidavit supporting the Appellants' application set out some of these various documents.

8. Arres was a licensed "mortgage broker" under, and subject to, the Real Estate Act, until November 1, 2013 when the Real Estate Council of Alberta ("RECA") terminated Arres' mortgage brokerage license. Wesley Serra ("Serra") is the sole shareholder and director, and thus sole directing mind, of Arres.

9. Arres arranged syndicated loans funded by investors, secured such loans through land mortgages and other security, collected loan payments from borrowers, and distributed those loan payments amongst the investors, less Arres' expenses in administering the loans, all in accordance with standard-form written trust agreements between Arres and the investors, designating Arres as bare trustee for the investors

- Y-K Investor Loan Administration Agreement - Appellant's Extracts of Key Evidence ("EKE"), Tab 1

10. In 2008, Arres arranged a \$9,000,000 syndicated loan for a 1-year term secured by a mortgage to fund the subdivision of lands and the construction of a 48-unit condominium complex located in or near the Town of Stony Plain, Alberta. The borrowers were two related corporations referred to collectively as "Graybriar". The Graybriar mortgage went into default in 2009 resulting in Arres commencing foreclosure proceedings on the investors' behalf (the "Graybriar Foreclosure"). Arres misappropriated a significant portion of the investors' trust funds realized in the foreclosure proceedings and the investors commenced an action against Arres (the "Graybriar Investor Action").

- Amended Statement of Claim in Graybriar Investor Action – EKE, Tab 2

11. In 2010, Arres arranged with the Appellants, as their bare trustee, for them to fund a syndicated loan and mortgage in the amount of \$3,500,000 to Y-K Projects Inc. ("Y-K") for the development of Y-K's lands located in British Columbia. When Y-K paid out the mortgage in 2012, Arres misappropriated a significant portion of the Appellants' trust funds resulting in the Appellants suing Arres (the "Y-K Investor Action").

- Statement of Claim in Y-K Investor Action – EKE, Tab 3

12. By July 2013, the Appellants applied for summary judgment and were partially successful. 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 judgment and the parties agreed to a Consent Order requiring Arres to pay \$235,000 into court (the "Court Funds") to halt the judgment collection activities of the Appellants pending determination of Arres' appeal.

- July 17, 2013 Amended Order pronounced in Y-K Investor Action – EKE, Tab 4
- February 11, 2014 Consent Order pronounced in Y-K Investor Action – EKE, Tab 5
- Money Paid Into Court filed February 14, 2014 – EKE, Tab 6

13. Arres' appeal was dismissed in April 2014 and no further appeal was pursued. Before the Court Funds could be paid out to the Appellants in satisfaction of their summary judgment (the delay due to passage of the appeal period and costs still having to be settled), in June 2014 a third party, Terrapin Mortgage Investment Corp. ("Terrapin"), made a claim to those funds on the basis Arres had potentially obtained those funds improperly from Terrapin.

- April 16, 2014 Order pronounced in Y-K Investor Action dismissing Arres' appeal – EKE, Tab 7

14. Terrapin successfully applied in the Y-K Investor Action for intervener status and to effectively prevent the release to the Appellants of the Court Funds pending determination of Terrapin's potential claim to those funds. The court adjourned sine die the Appellants' application for release of the Court Funds pending determinations to be made in the Graybriar Foreclosure. From that point, the Court Funds were frozen from the Appellants.

- July 23, 2014 Order pronounced in Y-K Investor Action freezing \$235,000 paid into court – EKE, Tab 8

15. Therefore, by mid-2014 there was a contest between only the Appellants and Terrapin as to entitlement to the Court Funds. That contest was complicated by Terrapin also claiming entitlement to Graybriar trust funds in the Graybriar Foreclosure. Terrapin was claiming that it either had an interest in the investors' trust funds realized from the Graybriar mortgage or in the Court Funds. If Terrapin's claim was sustained against the Graybriar trust funds, then it could not maintain its claim to the Court Funds. Alternatively, if Terrapin's claim to Graybriar trust funds was denied, it then could pursue its claim to the Court Funds.

16. Terrapin's claim to the Graybriar trust funds was disputed by the investors in the Graybriar Investor Action, which resulted in protracted litigation spanning several years, during which the Appellants' entitlement to the Court Funds over Terrapin's claim remained unresolved. The Appellants were left to wait out the result of Terrapin's claim to a portion of the Graybriar trust funds.

- January 29, 2015 Reasons for Judgment in Graybriar Investor Action regarding stay application – EKE, Tab 9
- December 16, 2015 Memorandum for Judgment in Graybriar Investor Action – EKE, Tab 10

17. Terrapin's claims intertwined the Graybriar Foreclosure with the Y-K Investor Action as follows:

- a. In 2013, Arres, purportedly as the bare trustee for the Graybriar Investors, was prosecuting the Graybriar Foreclosure, while at the same time Arres was defending the Graybriar Investor Action in which the investors were asserting that Arres had been terminated as their bare trustee and alleging misappropriation of substantial trust funds by Arres.
- b. Arres secretly proceeded to obtain an ex parte court order in Masters' Chambers on February 3, 2014 in the Graybriar Foreclosure transferring the last 7 unsold Graybriar condominium units into Arres' name or such other transferee as may be directed by Arres' counsel. Arres obtained the Ex Parte Order without notice to the Graybriar investors or their counsel.
 - February 3, 2014 Ex Parte Order pronounced in Graybriar foreclosure litigation – EKE, Tab 11

- c. According to undisputed affidavit evidence the following arrangements were made by Serra in advance of the Ex Parte Order:
- i. Arres would transfer 4 Graybriar condominium units to 1798582 Alberta Ltd. (“179 Ltd.”), a company owned and controlled by Serra’s spouse.
 - ii. 179 Ltd. obtained a loan in the amount of \$425,000 from Terrapin to be secured by a mortgage registered against the 4 Graybriar condominium units.
 - iii. Terrapin, relying on title insurance, provided the \$425,000 loan and mortgage proceeds for unconditional release to 179 Ltd. before the Ex Parte Order could be implemented enabling Arres to transfer the 4 Graybriar condominium units to 179 Ltd. and register Terrapin’s mortgage.
 - iv. From Terrapin’s mortgage advance of \$425,000 to 179 Ltd., \$235,000 was provided by 179 Ltd. to Arres which Arres then paid into court pursuant to the February 11, 2014 Consent Order pronounced in the Y-K Investor Action (the Court Funds) [EKE, Tab 5].
 - v. The Graybriar investors fortuitously learned of the Ex Parte Order before it could be implemented, and so they successfully applied on an emergency basis to stay the Ex Parte Order preventing the transfer of 4 Graybriar condominium units to 179 Ltd., thereby preventing the registration of Terrapin’s mortgage against those units (the “Stay Order”).
 - February 14, 2014 Order pronounced in Graybriar foreclosure litigation – EKE, Tab 12
 - vi. The Stay Order granted in the Graybriar Foreclosure stayed the Ex Parte Order pending a more fulsome judicial consideration of the matter to be conducted before the courts in Calgary. After prolonged legal wrangling the Stay Order was upheld on appeal to the Court of Appeal of Alberta [EKE – Tab 10]
 - vii. With the Stay Order upheld, the transfer of 4 Graybriar condominium units to 179 Ltd. was permanently halted, and so Terrapin’s mortgage could not be registered against those 4 units thereby denying Terrapin its security on the Graybriar trust funds.

- d. As a result of the Stay Order, Terrapin's loan to 179 Ltd. was not secured by a mortgage against any of the Graybriar condominium units. Consequently, Terrapin advanced claims in the Graybriar Foreclosure that it was entitled to an equitable mortgage in the amount of \$425,000 on 4 of the 7 last Graybriar condominium units, and as such was entitled to security over the trust funds realized from the later sale of those units.
- e. If unsuccessful in its equitable mortgage claim against the Graybriar assets, Terrapin claimed in the Y-K Investor Action entitlement to the \$235,000 Court Funds which Arres received from 179 Ltd. that came from the \$425,000 Terrapin had released to 179 Ltd. to be secured by a mortgage on 4 Graybriar condominium units.

18. Before Terrapin's claims vis-à-vis the Graybriar trust funds or Court Funds were determined, on February 13, 2015 Receivership and Bankruptcy Orders were pronounced against Arres. However, neither of these Orders were entered until July 26, 2017 and so no receiver or trustee was appointed to implement those Orders until that date. Moreover, upon the appointment of the Receiver for Arres in July 2017, Arres made no claim to the Court Funds nor alleged any amount owing from the Appellants. The Court Funds were not listed as an exigible asset of Arres.

- October 11, 2017 First Report of the Receiver (without Appendices) at para. 19 – 22 – EKE, Tab 13

19. On June 4, 2018, the Receiver successfully applied to take possession of the Graybriar trust funds and the Court Funds. The Appellants submit that during those court proceedings counsel for the Receiver agreed and undertook that those funds would be segregated from the general exigible property of Arres while the Receiver assisted in the determination of Terrapin's priority claim with respect to the Graybriar trust funds first and then later if necessary Terrapin's claim to the Court Funds.

- Transcript of June 4, 2018 court proceedings (highlighted where relevant) – EKE, Tab 14
- June 4, 2018 Order (Directing Release of the Graybriar Funds and the Court Funds and Confirming Receivership Order) – EKE, Tab 15
- June 4, 2018 Order (Graybriar Funds Claims Process Order) – EKE, Tab 16

20. The Court made the following “decision” on June 4, 2018 after which a discussion amongst counsel ensued leading to the agreement or undertaking to segregate the Court Funds from Arres’ general exigible property:

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.

21. A major aspect of the June 4, 2018 application was to have the Receiver essentially take carriage of the process to determine the validity of all claims relating to the Graybriar trust funds. This approach was proposed to be more cost-effective and timely than having the priority claims to those trust funds determined in the normal course of litigation. Because the Appellants or Terrapin’s entitlement to the Court Funds was tied to the Graybriar litigation, it made some sense to have the Receiver also take carriage of and determine that entitlement issue as well. This led to counsel discussions following the Court’s “decision” above.

22. The relevant discussion during the June 4, 2018 court proceedings giving rise to the Receiver’s agreement and undertaking to segregate and handle the Court Funds separately from the general administration of Arres’ estate occurred after the court made the “decision”, which for the sake or convenience and ease of reference is set forth below:

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.

MR. MACLEOD: That's no problem at all, My Lady.

THE COURT: Okay.

MR. MACLEOD: And just so you understand, the claims process is only in relation to the Graybriar funds. They can't be funds --

THE COURT: Right. Did I include the others?

MR. MACLEOD: Yeah.

THE COURT: I am sorry.

MR. MACLEOD: You might have, but I think it speaks to your point, because this how we are -- you want things segregated and --

THE COURT: Right.

MR. MACLEOD: -- we are proposing to segregate, so the Kenzie funds will then fall into the general administration of the estate and the parties can make claims through them through the bankruptcy process. We don't need an independent process on them.

...

MR. HALYN: Yeah. Again, I don't want to interrupt my friend Mr. Walker, but his comment that he just made seems to be a little different than I understood what you were saying and that is that if I am understanding him correctly, he's taking the position that Kenzie Financial 235 in court, just gets paid into general administration of the receiver trustee.

MR. MACLEOD: Yeah.

MR. HALYN: And I am -- my position was, I think it 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.

THE COURT: Okay. Mr. MacLeod.

MR. MACLEOD: So the Graybriar funds we say they are trust funds for the benefit of his investors, subject to, you know, determination of the competing claims quantification and all that.

THE COURT: Right.

MR. MACLEOD: They are segregated.

The 235 was posted by Arres Capital. No trust relationship with it whatsoever. It just took the money and put it into court --

THE COURT: Right.

MR. MACLEOD: -- as in relation to an unsecured judgment, so that's why it falls back not into the trust pot of Graybriar, but just the general administration of the estate.

THE COURT: However, 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?

MR. MACLEOD: Yeah, can I consult with Mr. Konowalchuk on that?

THE COURT: Yes, of course. Yes, in other words -- I know you have to -- okay.

MR. MACLEOD: Yes, so there is a significant portion of the fees that are outstanding, and you will see in your order that you are, you know, saying that we have first charge on the 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. I suspect we are going to see a bunch of property claims in the bankruptcy estate and so we will have to then deal with that.

THE COURT: Okay.

MR. MACLEOD: So that is where the focus is going to be.

THE COURT: I am assuming, and I can't -- I don't see any evidence to the contrary that those fees outstanding were incurred with respect to the determination of the claims with respect to these two pots of money.

MR. MACLEOD: Yeah.

THE COURT: Yes, okay.

MR. MACLEOD: The vast -- I couldn't say it is everything, My Lady, because there is just the usual general administration.

THE COURT: Yes.

MR. MACLEOD: But the vast majority certainly fit in that pot.

THE COURT: Okay.

MR. MACLEOD: Either one. Either one of them.

THE COURT: Okay.

MR. MACLEOD: And we will be cognizant at this point forward.

At some point we are going to have to come back and justify the fees and that's one point. We are doing an interim fee equivalent a day.

THE COURT: Yes.

MR. MACLEOD: So at some point this is all going to be such to final court supervision. I don't want to be entirely hamstrung with the 235 in the general estate is I think what I am saying, My Lady.

THE COURT: Okay. I think on that basis, Mr. Halyn, I am –

MR. HALYN: Well, again, not being difficult, My Lady, but it would seem to me that what is being proposed is that for the fees and expenses of the trustee or receiver up to this point in time, they are saying, Well, we've worked on all of these different matters, including the Graybriar matters, but we'd like to pay all of that from the Kenzie Financial funds that are being paid into their hands if I understand what he is saying.

If I am misunderstanding, then please correct me.

MR. MACLEOD: I –

THE COURT: Can you segregate the outstanding fees between the Graybriar matter and the Kenzie matter?

MR. MACLEOD: Yeah, we -- we can do that for sure, My Lady.

THE COURT: Okay.

MR. HALYN: And then so long as we can see that segregation both looking back and going forward, I guess then that would be fine.

THE COURT: Yes. Okay.

MR. HALYN: Okay.

MR. MACLEOD: We will -- when we go back to do the fees next, we will break it down a little bit more, My Lady.

THE COURT: Okay.

...

MS. OKITA: Similar to Mr. Halyn, not to be difficult, but we are looking just to keep those Kenzie funds segregated to preserve any trust claims that we have, and so we are wondering if that can be written into the Court -- into this, so that these will be -- they won't be comingled. And is that what we've already established?

MR. MACLEOD: Yes. As long as the charge ranks in priority on them, we will be able to deal with allocation at the end of the piece.

THE COURT: Right.

MR. MACLEOD: I think we are happy to have them in two separate accounts at Alvarez.

THE COURT: Okay. Okay, thank you.

MS. OKITA: Thank you.

[emphasis throughout added]

23. Both the Appellants and Terrapin opposed the Receiver's Application regarding the Court Funds on the basis the funds were not exigible property of Arres. With the Court's initial decision, counsel for both the Appellants and Terrapin made clear their position that the Court Funds would be segregated along with segregation of the Receiver's fees relating to its handling of the Graybriar trust funds and Court Funds. Such that the funds would "be used to determine the priority of claims against the Graybriar funds and the Kenzie funds **only**" (to use the Court's words with **emphasis** added). Terrapin's counsel's concluding request to write this into the court order is wholly inconsistent with any other reasonable interpretation except that the Receiver agreed and undertook to comply with those segregation requirements.

24. The overall purport of this agreement was that the Receiver would have priority for its fees and expenses associated **only** with determining the priority of claims to the Court Funds, which fees and expenses would be segregated to enable them to be properly charged against

those funds in priority to the distribution of those funds later in accordance with a determination of which party had entitlement to the Court Funds. The agreement did not give the Receiver an unlimited right to priority for payment of its charges for general administration of Arres' state from the Court Funds.

25. Thereafter, while the Graybriar Fund Claims Process unfolded, no work by the Receiver relating to the Court Funds was undertaken. The primary impediment to finalizing the Graybriar Funds Claims Process was the determination of priority claims by Terrapin and by several parties related to Arres (the "Related Parties") regarding those trust funds. These priority claims were dismissed on December 20, 2018.

- December 20, 2018 Order (Dismissal of Terrapin Claim) – EKE, Tab 17
- December 20, 2018 Order (Dismissal of Related Parties Claim) – EKE, Tab 18

26. With the priority claims to the Graybriar trust funds dismissed, the Receiver applied to finalize the Graybriar Funds Claims Process, filing the Fourth Report of the Receiver.

- Fourth Report of the Receiver dated August 8, 2018 – EKE, Tab 19

27. The Graybriar Funds Claims Process was concluded with the Graybriar trust funds distributed to the Graybriar investors after deducting:

- a. the Receiver's charges incurred specifically in connection with resolving the competing priority claims of Terrapin and the Related Parties and administering the Graybriar Claims Process; and
- b. the solicitor-client fees and disbursements incurred by the plaintiffs in the Graybriar Investor Action relating to obtaining and litigating the propriety of the Stay Order which preserved the Graybriar trust assets from misappropriation by Arres.

- August 13, 2019 Order (Distribution of Graybriar Funds) – EKE, Tab 20
- August 13, 2019 Order (Fee and Conduct Approval) – EKE, Tab 21

28. Following dismissal of the priority claims by Terrapin and Related Parties to the Graybriar trust funds, Terrapin waived its claim against the Court Funds. Accordingly, with

no competing claim from Terrapin, the Appellants applied for release of the Court Funds (which were to be segregated from Arres' general exigible assets), subject to any Receiver charges relating to its handling of those funds up to that point in time.

29. The Receiver opposed the Appellants' application, contending that it was entitled to recover from the Court Funds all of its charges for the general administration of Arres estate which exceeded the amount of those funds, leaving nothing for the Appellants.

30. The Receiver was not without recourse for its charges for general administration of Arres' estate if the Court Funds were paid over to the Appellants, as Access Mortgage Investment Corporation (2004) Ltd., had agreed to fund the Receiver. The principal of Access Mortgage acting as Inspector in Arres bankruptcy also acknowledged its position that it did not consider the Court Funds as part of Arres estate.

- Email thread ending October 23, 2019 – EKE, Tab 22

31. In Reasons for Decision dated April 19, 2021, the Court determined that the Court Funds were exigible property of Arres to which the Appellants had no priority claim, dismissing the Appellants' argument that these funds were sufficiently "earmarked" to their credit so as to be effectively the property of the Appellants, and not Arres, in the receivership and bankruptcy. It is this decision the Appellants appeal.

32. A detailed analysis of this Decision will be undertaken below in the Argument portion of this Factum.

PART II -- GROUNDS OF APPEAL

33. The Appellants respectfully submit the Learned Chambers Judge erred in concluding there was no agreement by the Receiver to segregate the Court Funds from the general exigible assets of Arres and to handle those funds separately from the general administration of Arres' estate, with Receiver's charges against those funds limited to it dealing with the competing claims of the Appellants and Terrapin to those funds.

PART III – POINTS OF LAW

STANDARD OF REVIEW

34. Whether an agreement exists is a question of mixed fact and law.
35. Whether the Appellants are entitled to the Court Funds in priority to the Receiver, with no relevant facts in dispute regarding that entitlement, is a question of law.
36. *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 [Tab 1 of the Appellants' Book of Authorities] sets out the applicable standard of review:

Standards of Review

[11] The standards of review are summarized in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235:

- (a) conclusions on issues of law are reviewed for correctness: *Housen* para. 8,
- (b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: *Housen* paras. 10, 23; *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and
- (c) findings on questions of mixed fact and law call for a “higher standard” of review, because “matters of mixed law and fact fall along a spectrum of particularity”: *Housen* para. 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* paras. 33, 36.

PART IV - ARGUMENT

37. The Appellants advance two arguments:
- a. The Court Funds were not exigible assets of Arres at the time of its receivership and bankruptcy. Rather, those funds were “earmarked” for the Appellants trumping the Receiver’s claim over them; and
 - b. The Receiver agreed and undertook to segregate its fees in connection with determining entitlement to the Court Funds and to keep those funds in an

account separate from the general administration of the estate. The segregation discussions and ultimate agreement amongst counsel and the Court cannot be logically reconciled with the Court having determined in June 4, 2018 that the Court Funds were simply exigible property of Arres.

The law regarding court funds “earmarked” for a creditor

38. Upon the dismissal of Arres’ appeal of the summary judgment granted in favour of the Appellants, they had the right to seek release of the Court Funds as constituting payment of the amount owing to them under that judgment.

39. Whether the Court Funds are exigible property of Arres to be brought into the bankrupt’s estate, or are funds that should be fairly considered property of the Appellants, requires application of the principals set forth in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, 2008 ABQB 575, upheld on appeal 2009 ABCA 125, [Tab 2 of the Appellants’ Book of Authorities]:

[11] There are a number of authorities concerning priority disputes over monies paid into court that, although not directly on point, nevertheless are instructive. The following principles can be distilled from these cases:

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 (*T.L. Cleary Drilling Co. (Trustee of) v. Beaver Trucking Ltd.*, [1959] S.C.R. 311, 38 C.B.R. 1; *Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.* (1993), 33 C.B.R. (3d) 244 (Ont. Ct. Gen. Div.), aff’d (1997), 43 C.B.R. (3d) 135 (OCA))
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 (*T.L. Cleary Drilling Co.*).
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 (*T.L. Cleary Drilling Co.*; *Tradmor Investments Ltd.*; and *Laker (Trustee of) v. Colby* (1987), 66 C.B.R. (N.S.) 71 (Que. Sup. Ct.)).
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), 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 (*BIA*, s. 70; (*T.L. Cleary Drilling Co.; McCurdy Supply Company Limited v. Doyle* (1957), 64 Man. R. 289 (Q.B.), aff'd without reasons (1957), 64 Man. R. 365n (C.A.)).

40. The Court Funds were paid by Arres pursuant to a Consent Order to satisfy the Appellants' judgment if Arres' appeal was dismissed. The principals from Stone Sapphire indicate that unless the Court Funds are subject to further court order (such that entitlement to the funds requires further judicial determination), or are the subject of valid security claimed by a secured creditor, then if the funds are otherwise sufficiently "earmarked" for the creditors who have done all they can to access those funds, the Receiver's priority to those funds is trumped. This is the Appellants' position in this appeal.

41. Nothing discussed in the Stone Sapphire case indicates the 5 principals above are not good law. In fact, the Court's referenced to the decision of *Doctor v. People's Trust Co.* (2013) 14 D.L.R. 451 (B.C.S.C.) supports the 4th principal regarding earmarked funds:

[26] *Doctor* concerned a pre-bankruptcy payment into court to secure a new trial. A plaintiff obtained judgment for \$3,650 and a costs award. The defendant got an order permitting a re-trial on condition that it pay \$4,000 into court to answer any judgment the plaintiff might obtain. It paid the money into court, had the re-trial, lost the re-trial, and then made an assignment into bankruptcy. The court gave the plaintiff priority to the \$4,000, expressing the view (at paras. 5-6) that the money had been paid in as against the happening of the contingency that judgment would be secured in favour of the plaintiff, which contingency had occurred before the assignment. The court indicated that the money paid in was appropriated or earmarked and when the second judgment was given, it became the plaintiff's. The short delay in applying for payment out did not change the character of the situation. [emphasis added]

Analysis

Court Funds were earmarked for the Appellants

42. In the Y-K Investor Action, the Court Funds were paid into court under the Consent Order that upon “a final judicial determination of the Appeal, including any further appeal by either party, the Secured Funds shall be released in accordance with such final judicial determination”. Therefore, upon the dismissal of the Arres appeal for which no further appeal was taken, the Court Funds were to be released in accordance with that final judicial determination, to wit: to the Appellants. What was still to be determined following dismissal of Arres’ appeal was only the amount of the Appellants’ costs in the proceedings, not the Appellants’ entitlement to payment of their judgment plus costs and interest from the Court Funds (which in total exceeds the amount of the Court Funds).

43. The Court Funds are not subject to any security (or trust) claim of a third party. When the Court rendered its Decision under appeal, the Appellants were the last parties standing with an entitlement claim to the Court Funds. The Receiver sought to recover all of its charges for general administration of Arres’ estate from those funds effectively consuming the entire amount of the Court Funds. The Appellants submit the Receiver’s charges recoverable from the Court Funds should be governed and limited by the agreement amongst counsel reflected in the transcript of the June 4, 2018 court proceedings.

44. The Court found the Receiver had agreed to segregate its fees associated with handling the Court Funds and resolving any competing claims to those funds, but then illogically found no agreement to segregate the Court Funds in an account separate from the general administration of Arres’ estate. Why segregate the Receiver’s fees vis-à-vis the Court Funds if the Court Funds are exigible property of Arres? The Appellants respectfully disagree with the Court as the agreement appears self-evident in the transcript of the June 4, 2018 court proceedings.

45. The Court Funds paid into court, to stave off the Appellants’ judgment collection efforts pending the determination of Arres’ appeal, unquestionably was earmarked for the Appellants to satisfy their judgment if the appeal was dismissed. Arres had no claim for the return of the Court Funds after its appeal was dismissed.

46. Finally, once Arres' appeal was dismissed, the Appellants initiated timely steps to settle the matter of their costs and then applied to the court for the release of the funds to satisfy their judgment, only to be thwarted in that effort by Terrapin asserting a trust claim against those funds. As a result, the court ordered the Court Funds to remain in court pending the determination of the Stay Order in the Graybriar Foreclosure. The Court of Appeal allowed the Stay Order to remain in place. Consequently, the Appellants did all that they could do to access the Court Funds prior to the receivership and bankruptcy of Arres 3+ years later.

Segregation Agreement regarding the Court Funds

45. The Court confirmed in the Decision that the Receiver's involvement regarding the Graybriar trust funds was to "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"" [at para. 11]. The Court then confirmed the agreement of the Receiver to segregate its fees as between the Graybriar matter and Kenzie (Appellants') matter and maintain the Graybriar trust funds and Court Funds in two separate accounts:

[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**".

...

[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.**

[emphasis added]

47. Respectfully, it was clear in those discussions that keeping both the Graybriar trust funds and Court Funds in “two separate accounts” meant accounts separate from the general administration of Arres’ estate so as to prevent comingling. Any other interpretation is illogical, even absurd, in the context of the discussions that took place. For the Court to conclude that “two separate accounts” meant “the Graybriar funds were held in an account separate from the Court Funds which were held in the general account” [at para. 34] is respectfully a palpable and overriding error.

48. Even if the Receiver did not agree to keep the Court Funds in an account separate from the general administration of the estate, the Court specifically inquired of the Receiver that “However, 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?” to which the Receiver’s counsel answered in the affirmative - twice. Thus, the Receiver agreed to **only** apply its segregated fees and expenses associated with investigating priority claims to the Court Funds (as between the Appellants and Terrapin) as a priority charge against those funds.

49. It was not agreed by the Appellants or Terrapin that the Receiver had priority for all of its charges for general administration of the estate against the Court Funds. The Court’s inquiry and the Receiver’s response would be pointless if the Court Funds were considered an exigible asset of Arres such that all of the Receiver’s fee and expenses for general administration of the estate would constitute a priority charge against the Court Funds.

50. The Court then indicates that in the Receiver’s Fourth Report “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”.

51. Nowhere in the Receiver's Fourth Report does it disclose the Court Funds have been "deposited" into the Receiver's general account for administration of the estate. The Fourth Report only includes the Court Funds as a portion of the Receiver's overall "receipts", and confirms that its general cash on hands, including the Court Funds of \$241,000, is \$252,009. Therefore, even if the Court Funds were not deposited into an account separate from its general account, the Receiver's cash on hand remained sufficient at that time that it could (and was presumed by Appellants' counsel to) comply with its agreement to segregate the Court Funds in a separate account to be dealt with in accordance with the counsel agreement and undertakings of June 4, 2018.

52. The Court then remarks 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"" [at para, 36] but then fails to note that the Receiver specifically followed that statement by indicating "The Receiver understands that certain creditors of the Debtor may dispute this view", which of course was a reference to the Appellants as Terrapin had waived its claim to the Court Funds at about this time.

53. The Court's further reference to the Receiver's Fourth Report indicating that it "has been careful to segregate professional charges and disbursements between separate classes of assets", it is important to recognize that the Receiver had not reported incurring any professional charges and disbursements whatsoever in connection with determining entitlement to the Court Funds at that point in time, and so the Receiver only reporting on its charges associated with the Graybriar Funds and general administration of Arres' estate was not indicative that the Receiver was not honouring its agreement to segregate its charges regarding the Court Funds from the general administration of the estate. The Appellants continued to believe the Receiver was complying with its agreement to segregate its fees regarding the Court Funds and was not utilizing the Court Funds for general administration of the estate.

54. Finally, the conclusion of the Court at para 40 is perplexing:

[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.

The reference to a claw-back of distributions from the Graybriar investors is nonsensical. In accordance with the Receiver's agreement to segregate its fees in connection with the Graybriar Funds Claims Process, the Receiver's charges relating to that process were fully recovered and paid from the Graybriar trust funds before those funds were distributed to investors. After all, the Graybriar funds were trust funds of the Graybriar investors, and so were never exigible property of Arres, so how could the Receiver ever legitimately charge any amount relating to the general administration of Arres' estate against those funds. It was never contemplated the Receiver could recover from the Graybriar trust funds any Receiver charges not associated with the Graybriar Funds Claims Process. The Appellants entitlement claim to the Court Funds does not change this result.

55. Finally even if Appellants' counsel failed to question whether the Receiver was not complying with its segregation agreement regarding the Court Funds following submission of its Fourth Report, this non-compliance was quickly brought to the attention of the Receiver thereafter when it held more funds in the general administration of Arres' estate than the amount of the Court Funds. The submission of the Fourth Report should not constitute an absolution of the Receiver's breach of the Court Funds segregation agreement.

Conclusion

56. It is submitted there was a clear agreement and undertaking on the part of the Receiver to segregate its charges in connection with determining entitlement to the Court Funds with those funds to then be used to pay those charges, and that the Receiver would keep the Court Funds in an account separate from the general administration of the estate. Again, segregation of the Court Funds and/or Receiver's fees in connection therewith is illogical and inconsistent with the Court Funds being Arres' exigible property. Respectfully, the contrary conclusion of the Court should be reversed as either a palpable and overriding error or it does not warrant deference as involving an analysis of mixed facts and law where the Court misconstrued the evidence and misunderstood the law regarding "earmarked" court funds.

57. Regardless of any judicial reticence to the concept of “earmarked funds” generally discussed by the Court (at para. 45 and 46 of the Decision) relating to the *Stone Sapphire* case, it is difficult to conceive a more unfair, unpalatable, unjust result than what has befallen the Appellants through the misguided claim of a third party later abandoned, which claim was given credence by the court in denying the Appellants their entitlement to the Court Funds, and then using the delay caused by this situation through no fault of the Appellants to later deny them the Court Funds because 3+ years later Arres is put into receivership and bankruptcy.

PART V -- NATURE OF ORDER REQUESTED

58. The Appellants respectfully submit their appeal should be allowed, the Decision of The Honourable Madam Justice B.E.C. Romaine of April 19, 2021 set aside and the Court Funds be paid over to the Appellants, subject to any Receiver’s segregated fees and expenses chargeable against those funds in priority to distribution of the funds to the Appellants, and any costs to be awarded in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF JULY, 2021.

Estimate time of argument: 45 minutes.

SUGIMOTO & COMPANY

Per: 

LORAN V. HALYN

Lawyers for the Appellants

APPELLENT'S BOOK OF AUTHORITIES

- Tab 1 *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123
<https://www.canlii.org/en/ab/abca/doc/2016/2016abca123/2016abca123.html?autocompleteStr=ro-dar%20contracting%20ltd&autocompletePos=1#document>
- Tab 2 *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, 2008 ABQB 575, upheld on appeal 2009 ABCA 125
<https://www.canlii.org/en/ab/abca/doc/2009/2009abca125/2009abca125.html?autocompleteStr=stone%20sa&autocompletePos=7>