Court File No. CV-16-11409-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

URBANCORP (LESLIEVILLE) DEVELOPMENTS INC., URBANCORP (RIVERDALE) DEVELOPMENTS INC., & URBANCORP (THE BEACH) DEVELOPMENTS INC.

Respondents

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

FACTUM AND AUTHORITIES OF TERRA FIRMA CAPITAL CORPORATION
(Receiver's motion for directions re: park levy adjustments – returnable June 19, 2019)

June 16, 2019

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PART I – OVERVIEW

1. This motion concerns the validity of a part of the amounts charged on the sale of condominium units by the Receiver. The amounts in question relate to a line item in the adjustments at closing for what was referred to as the "Park Levy".

2. Terra Firma Capital Corporation ("Terra Firma") is now the ranking creditor for repayment from estate funds. It supports the position of the Receiver that the Park Levy was properly payable.

3. Whether or not the Park Levy was properly payable will depend on the Court's interpretation of a clause in the agreement of purchase and sale, which provided:

> **Adjustments**
>
> 7 (d) The Purchaser shall, in addition to the Purchase Price, pay the following amounts to the Vendor on the Title Transfer Date:
>
> […]
>
> (iii) the amount of any parks levy or any charges pursuant to a Section 37 Agreement (pursuant to the *Planning Act*), levied, charged or otherwise imposed with respect to the Condominium, the Property or the Unit by any governmental authority, which is equivalent to the common interest allocation attributable to the Unit as set out in Schedule "D:" to the Declaration.

4. In this case, the City of Toronto required that land be conveyed to the City as a condition for approval of the development (rather than a monetary payment), as authorized by the *Planning Act* and the City of *Toronto Municipal Code*. The Receiver accordingly charged amounts equivalent to the value of the land so conveyed as a Park Levy adjustment pursuant to clause 7(d)(iii).

5. The question for the Court therefore whether that scenario falls within the meaning of clause 7(d)(iii) of the contract.

6. The established approach to interpreting contracts indicates that the answer to that question is yes. The plain and ordinary meaning of the term “levy” includes an in-kind taking and the clause contemplates recovery for more than monetary payments.

7. Further, an interpretation of this clause that includes both options for how the City may proceed for a park condition on development approval avoids an absurd result.

PART II – FACTS

Background to the development and the settlement

8. The closings for which the Park Levy was charged were completed by the Receiver. The project in question was on Curzon Street in Leslieville, which was a 55 unit condominium project when the Urbancorp group of companies went into insolvency in May of 2016.

9. The company that owned the Leslieville development (along with two others at Riverdale and in the Beaches, which are not relevant to this motion) was placed into receivership by CIBC as the lead lender.. At the time of the appointment, this project was partly complete.

10. The Receiver finished the development pursuant to a settlement among:

a. CIBC,

b. Tarion as the new home warranty administrator,

c. Travelers Insurance as the deposit insurer and provider of a bond to Tarion,

d. Terra Firma Capital Corporation ("**Terra Firma**") as the subordinate lender,

e. Craft Development Corporation as the completion contractor,

f. several construction trades as lien claimants, and

g. a group of individuals who had pre-receivership agreements of purchase and sale to acquire the condominiums in the development.

11. Among other things, the settlement was a compromise between the interests of Terra Firma as the fulcrum creditor and the persons with agreements of purchase and sale for 54 of the 55 units. The purchasers wanted to keep their ability to purchase units at 2011 and 2012 prices, which were far below market in 2016 and 2017. Terra Firma on the other hand stood little chance of recovering anything on its loan unless the units at the Leslieville project were sold at higher prices.

12. Prior to the settlement, Terra Firma had commenced a motion to seek a declaration that the interest of purchasers were subordinate to its mortgage and to vest the interests of purchasers out under a redemption of the senior debt.

Agreed Statement of Fact, para. 27 and 28; Exhibit "A" to the Ninth Report.

13. Rather than proceed with that motion, the settlement gave pre-receivership purchasers the option to continue with the closing of their units in exchange for a negotiated

"top-up" amount of $255,000 on the purchase price. Purchasers who did not wish to opt-in on those terms would get their deposits back and the units in question would go back to market for sale at the current prices. The $255,000 top-up payment was accordingly a compromise between the zero-sum legal positions as between Terra Firma and the purchasers. Even with that top-up, opt-in purchasers paid between approximately $120,000 to $300,000 less for their units compared to what those units ultimately sold for on the open market under the settlement.

Agreed Statement of Fact, para. 30; Exhibit "A" to the Ninth Report.

Ninth Report, para. 20.

14. Other facets of the settlement included:

a. the commitment by Terra Firma to pay cost overruns for matters not foreseen in the construction contract (latent defects in the existing work) in order to get to completion and unit closings, and

Settlement Approval Order, paras. 41-42; Joint Book of Documents, tab 13.

b. the continuance of the new home warranty from Tarion in conjunction with pre-existing security in Tarion's favour in the amount of $1.1 million to cover any warranty claims.

Settlement Approval Order, paras. 21-22; Joint Book of Documents, tab 13.

15. The former of those two facets was important for continued funding to complete the development, because of concerns that the Receiver would not have sufficient funding to complete the project in the case of cost overruns.

16. The latter of those two facets was important because the vendor was going to be a receiver, and once the development was complete there was not going to be a conventional developer to address defect issues. Instead, only the Tarion warranty would apply, because using any further estate funds would reduce the recoveries to creditors (likely Terra Firma), which was not agreed.

17. Every document in the settlement was highly negotiated. This included the terms of the new agreement of purchase and sale for opt-in purchasers, which was the result of negotiations with a number of parties, including Dickinson Wright LLP on behalf of a group of prospective purchasers representing 44 of the 55 units. Changes to the form of agreement of purchase and sale that had been signed pre-receivership were in some cases accepted and in others not.

Ninth Report, para. 12.

18. The entire settlement was conditional on 40% of the purchasers opting in to complete the purchase of their units.

Settlement Approval Order, para. 2 and Schedule "A" definition of "Opt-In Threshold"; Joint Book of Documents, Tab 13, page 108.

19. Purchasers ended up opting in for 40 units under those terms.

Agreed Statement of Fact, para. 37; Exhibit "A" to the Ninth Report.

Completion of the project

20. The project was completed between June of 2017 and October of 2018.

21. Among other things, Terra Firma funded $1.6 million for cost overruns in order to correct problems with the pre-existing work so that construction could be completed and proper units sold to purchasers.

Eight Report of the Receiver, para. 73(a)(v); Receiver's Motion Record, page 32, tab 2.

22. When combined with other costs incurred in completing the project, the $1.6 million more that Terra Firma spent for cost overruns means that Terra Firma will not be repaid the $6.5 million that the settlement contemplated would be repaid to it. In fact, the Receiver's projections show that unless approximately $250,000 of the $1.1 million of security held by Tarion for warranty claims is unused, Terra Firma will not be repaid the agreed-upon $6.5 million amount.

Projected Waterfall Distribution, Exhibit "D" to the Eighth Report; Receiver's Motion Record,, page 57, tab 2(D)..

23. Notably, that calculation is *exclusive* of any reduction in recoveries if the complaints of purchasers on this motion about the Park Levy are upheld.

The City's development conditions in connection with the Park Levy

24. Subsection 42(1) of the *Planning Act* permits a municipality to impose a condition for development that a portion of the development be conveyed to the municipality for park or public recreational purposes. Subsection 42(6) of that Act permits a municipality to instead require a "payment in lieu, to the value of the land otherwise required to be conveyed."

25. Chapter 415 of the *Toronto Municipal Code* reflects those *Planning Act* provisions.

26. Neither the *Planning Act* nor the *Toronto Municipal Code* actually uses the term "levy" anywhere in connection with these municipal powers to impose conditions on development for parks or payment in lieu.

27. The City of Toronto refers to that term on its website. It notes that when a developer is required to pay money rather than convey land, that is called a "parks levy fee".

> Exhibit "A" to the Affidavit of Inderpreet Suri; Supplementary Motion Record of the Certain Curzon Purchasers, page 185, tab 2(A).

28. The City ultimately decided that its approval for this development would be conditional on the conveyance of land to create a park.

29. The City had also, however, considered during the development approval process to instead require the payment of money equivalent to the value of the land that should have been conveyed.

> January 28, 2013 City of Toronto Memorandum, Tab 2 to the Joint Book of Documents, page 5.

30. The approval that the City granted for the project on January 25, 2016 required that the conditions be met within two years, failing which a new approval or an extension was required. Since this development was not completed in two years, the City was entitled to impose new or different conditions.

> Notice of Approval Conditions dated January 25, 2016, Tab 4 to the Joint Book of Documents, page 9.

31. At the time that the opt-in purchasers signed their agreements of purchase and sale with the Receiver in the Spring of 2017, it was clear that the development was not going to be complete by January of 2018. A Site Plan Agreement with the City, which affirmed the City's choice of an in-kind conveyance of land, was not in place until months later in October of 2017.

> Site Plan Agreement; Joint Book of Documents, tab 5.

32. The City did not change its condition for the conveyance of land for a park rather than a cash payment after the opt-ins, but could have.

The Park Levy adjustment at closing and the subsequent challenge

33. All of the opt-in purchasers had clauses permitting the charge of the Park Levy as set out in paragraph 2, above. That clause was unchanged from what had been in the original agreements signed prior to the receivership.

Agreed Statement of Fact, paras. 33 and 36; Exhibit "A" to the Ninth Report.

34. Of the 15 units where there was not an opt-in (such that the unit went back to market in 2017 and 2018) thirteen units were sold under negotiated terms that capped the amount of adjustments, including for the Park Levy. The closings of those units were accordingly subject to a smaller quantum of adjustments at closing. As noted by the Receiver, however, those units had been sold at market prices that were between approximately $120,000 and $300,000 more than opt-in purchasers paid.

Agreed Statement of Fact, para. 39; Exhibit "A" to the Ninth Report.

Ninth Report, para. 20.

35. The opt-in purchasers had no such cap under the terms negotiated by Dickinson Wright LLP under the settlement.

36. Where the adjustments were not subject to a cap, the Receiver charged an amount at closing for the value of the land that the City required to be conveyed for a park as a term of the development. The value was calculated based on a letter of credit that the City had required be posted until the land was conveyed (rather than on the higher full market value in 2018), and units then paid their proportionate share according to the same formula as is used for condominium common expenses.

Agreed Statement of Fact, para. 46; Exhibit "A" to the Ninth Report.

37. The charge for those amounts is challenged by some, but not all, of the purchasers of the 55 condominium units at the development. Those purchasers opposing that charge are opt-in purchasers, and represent 30 of the 40 units subject to an opt-in. Those opposing purchasers on motion are called the "Certain Curzon Purchasers".

Agreed Statement of Fact, para. 1(b), Exhibit "A" to the Ninth Report.

38. A large number of the Certain Curzon Purchasers who now object to the Park Levy adjustment were among Dickinson Wright LLP's clients in the settlement. The Certain Curzon Purchasers admit that 34 of them were among the 44 Dickinson Wright LLP clients in the settlement. The Receiver believes that this number may in fact be 41.

Agreed Statement of Fact, para. 28, Exhibit "A" to the Ninth Report.

Ninth Report, para. 23-24.

PART III – ISSUES AND THE LAW

39. The main issue on this motion by the Receiver for directions is whether the Park Levy adjustment was properly charged to the Certain Curzon Purchasers, who also bring a motion to the contrary.

40. There are also two subsidiary issues to be determined as well, namely the whether the Park Levy adjustment paid by purchasers other than the Certain Curzon Purchasers was valid, and to deal with an evidentiary objection by the Certain Curzon Purchasers.

41. Those subsidiary issues will be addressed first.

Other purchasers

42. All purchasers have been served with the Receiver's motion record and also with correspondence from the Receiver explaining the relief to be requested. The return of that relief was adjourned by the Court to ensure that service was done properly.

43. It is Terra Firma's position that the payment of adjustments by purchasers who do not appear on the motion should be affirmed.

Evidentiary objection

44. The Certain Curzon Purchasers have objected to the Receiver filing correspondence among Dickinson Wright LLP and the other parties to the settlement negotiating about the very clause of the opt-in agreement of purchase and sale at issue on this motion (7(d)(iii)).

45. The objection is based on an assertion of settlement privilege. It is Terra Firma's position that this privilege is inapplicable for several reasons.

46. Settlement privilege exists to prevent the use of evidence to show weakness in a party's formal legal position as a result of having engaged in settlement discussions. That privilege is not absolute, and instead there are exceptions. A recent decision that discussed a relevant exception explained:

> In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII), [2013] 2 S.C.R. 623, at para. 19, the Supreme Court of Canada stated with respect to settlement privilege:
>
> > There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement." [citation omitted]
>
> [82] Exceptions to the privilege were described by Doherty J. (as he then was) in *Mueller Canada Inc. v. State Contractors Inc.* (1989), 1989 CanLII 4117 (ON SC), 71 O.R. (2d) 397:

> Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production
>
> *Mendlowitz & Associates Inc v. Chiang*, 2014 ONSC 2651 at paras. 81-82; Factum Tab A(1).

47. In this case, the correspondence is relevant to the intentions of the parties when they negotiated the opt-in agreement of purchase and sale with respect to clause 7(d)(iii), and in particular changes that were requested by purchasers but no accepted. It is not going to be used to show that the purchasers had a weak case in Terra Firma's motion. Evidence of negotiations about a document are often admitted into evidence when there is a dispute about the meaning of that document.

48. In addition to the inapplicability of the privilege, however, the Certain Curzon Purchasers have now waived any privilege that could have applied. In their factum, they assert that the agreement of purchase and sale was a contract of adhesion, and from there argue for the doctrine of *contra proferentem*.

> Factum of the Certain Curzon Purchasers, para. 34-37.

49. The evidence of the negotiation of the agreement of purchase and sale is relevant to demonstrate the falsity of that assertion.

50. Leaving aside that the Certain Curzon Purchasers overlap to a great extent with Dickinson Wright LLP's former clients, the Certain Curzon Purchaser were provided with this correspondence (again) by the Receiver in the lead up to this motion.

> Supplement to the Ninth Report, para. 20.

51. The Certain Curzon Purchasers accordingly decided to make the assertion of a contract of adhesion in full knowledge of the facts. They must live with the consequences of that on the evidentiary objection and more.

The Park Levy adjustment was properly payable by the Certain Curzon Purchasers

52. Since the question for the Court is essentially to interpret a contract, it is helpful to start with the governing principles. A recent decision of this Court summarized them as follows:

> (b) a contract is to be interpreted in accordance with the intention of the parties at the time they entered into the agreement, having regard to the words the parties used in the provisions of the contract as a whole (see *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 (S.C.C.), at pp. 899 - 901; *Eli Lilly & Co. v. Novopharm Ltd.,* 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129 (S.C.C.));
>
> (c) where the words under consideration are clear and unambiguous on their face, it is unnecessary to consider any extrinsic evidence in the interpretation exercise. However, in the event there is ambiguity, it is permissible to consider the circumstances in which the agreement was signed in interpreting the words. This is called the "factual matrix";
>
> (d) commercial contracts must be interpreted in accordance with sound commercial principles and good business sense. An interpretation that would result in a commercial absurdity must be avoided (See *Consolidated-Bathurst* at pp. 901 – 902).
>
> *Golfnorth Properties Inc. v. Rebel Land Holdings Inc*., 2019 ONSC 3479 at para. 11; Factum Tab A(2).

53. In this case the plain meaning of the word "levy" is instructive, since none of the applicable legislation in the *Planning Act* or *Toronto Municipal Code* defines what a "parks levy" is (nor even uses that term). The conventional use of that term can refer to the taking of money, but also includes the appropriation of property other than money

54. For example, the *Commercial Tenancies Act* uses the term "levy" to describe what a landlord does when it implements a distraint on the tenant's goods:

> **Exemption of goods from seizure, property of under-tenant, etc. Definition**
>
> 32. (1) In this section,
>
> "under-tenant" means a tenant to whom the premises or some part of the premises in respect of which rent is distrained for have been sub-let with the consent of the superior landlord or in default of such consent under the order of the judge of the Superior Court of Justice as provided by subsection 23 (2). R.S.O. 1990, c. L.7, s. 32 (1); 2006, c. 19, Sched. C, s. 1 (1).
>
> **Declaration by boarder, under-tenant, or lodger that immediate tenant has no property in goods distrained**
>
> (2) If a superior landlord distrains or threatens to distrain any goods or chattels of an under-tenant, boarder or lodger for arrears of rent due to the superior landlord by the superior landlord's immediate tenant, the under-tenant, boarder or lodger may serve the superior landlord, or the bailiff or other person employed by the superior landlord to levy the distress, with a statutory declaration made by the under-tenant, boarder or lodger setting forth that the immediate tenant has no right of property or beneficial interest in such goods or chattels, and that they are the property or in the lawful possession of the under-tenant, boarder or lodger, and also setting forth whether any and what amount by way of rent, board or otherwise is due from the under-tenant, boarder or lodger to the immediate tenant, and to the declaration shall be annexed a correct inventory, subscribed by the under-tenant, boarder or lodger, of the goods and chattels mentioned in the declaration, and the under-tenant, boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by the superior landlord, the amount if any, so due, or so much thereof as is sufficient to discharge the claim of the superior landlord. R.S.O. 1990, c. L.7, s. 32 (2).
>
> **Penalty for improper levy**
>
> (3) If the superior landlord, bailiff or other person, after being served with the declaration and inventory, and after the under-tenant, boarder or lodger has paid or tendered to the person the amount, if any, which by subsection (2) the under-tenant, boarder or lodger is authorized to pay, levies or proceeds with a distress on the goods or chattels of the under-tenant, boarder or lodger, the superior landlord, bailiff or other person is guilty of an illegal distress, and the under-tenant, boarder or lodger may replevy the goods or chattels in any court of competent jurisdiction, and the superior landlord is also liable to an action, at the suit of the under-tenant, boarder or lodger, in which the truth of the declaration and inventory may be inquired into. R.S.O. 1990, c. L.7, s. 32 (3). (emphasis added)

Commercial Tenancies Act, R.S.O. 1990, C. L.7, s. 32.

55. Similarly the *Warehouse Receipts Act* uses the term "levy" for how an execution would apply to goods in order to be seized:

> **Attachment or levy upon goods for which a negotiable receipt has been issued**
>
> **15** Where goods are delivered to a storer by the owner or person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable receipt is issued for them, they cannot thereafter while in the possession of the storer, be levied under an execution, unless the receipt is first surrendered to the storer. R.S.O. 1990, c. W.3, s. 15. (emphasis added)
>
> *Warehouse Receipts Act*, R.S.O. 1990, C. W.3, s. 15.

56. That interpretation of a "parks levy" as including an in-kind taking by the municipality is reinforced by subsequent words in clause 7(d)(iii), which use the terms "levied, charged or otherwise imposed" to refer to the "parks levy". The use of those multiple terms encompasses more than just a monetary payment.

57. Tot the extent that the City of Toronto webpage referred to by the Certain Curzon Purchasers has any relevance to the Court's interpretation of clause 7(d)(iii), it does not assist them. That is because when the City of Toronto described the monetary payment that can be made instead of conveying land as a "parks levy fee." The addition of the word "fee" suggests that the words "parks levy" on their own mean something different. The term "park levy" likely instead refers to the whole set of powers that the City possesses to make development approval conditional on park arrangements – whether in-kind contribution of land or the payment of money.

58. An interpretation of clause 7(d)(iii) as applying to a requirement by the City that land be conveyed, rather than only to the payment of money, also avoids a commercially absurd result. That is a relevant consideration in the event that the Court considers that two competing meanings apply to a contract.

59. Under the interpretation suggested by the Certain Curzon Purchasers that clause 7(d)(iii) can only apply when the City charges money instead of taking land, the economic burden of a cost of the development gets passed on to the purchasers in one case but not in the other. A possibly vast swing like that in the economic results (for purchasers and developers alike) makes even less sense given that it is not always known how the municipality will decide to proceed, and moreover that the municipality can change its mind until final approvals are given. In this case, the City was not going to be bound by its prior condition for the conveyance of land once two years had passed after the original Notice of Approval Conditions on January 25, 2016, and the Site Plan Agreement was not signed until October 23, 2017, which was after opt-ins had taken place in the Spring of 2017.

Other issues raised by the Certain Curzon Purchasers

60. The Certain Curzon Purchasers also include in their materials an affidavit from one (no doubt carefully selected) purchaser to set out difficulties encountered in not being able to close their original agreement with Urbancorp, and also defects that have been discovered since closing.

61. To the extent that such issues are relevant to a motion about how an unrelated clause in the agreement of purchase and sale should be interpreted, there are cogent responses to such issues.

62. Complaints that the original agreement could not be completed ring hollow when the purchasers entered into a settlement on that issue. The time to litigate that point was in the motion by Terra Firma that the settlement pre-empted.

63. Complaints that there are defects in the work also ring hollow when the entire structure of the settlement was that a receiver was going to sell and that the only recourse for defects was going to be through the Tarion warranty.

64. Further, if the issue of defects is going to be discussed, Terra Firma emphasizes that it spend $1.6 million to fix latent defects that were discovered prior to completion. In a meaningful sense, that money went to the benefit of the purchasers.

65. Attempts to invoke equities on this motion may, however, be misplaced. The contractual interpretation principles discussed above are likely of greater assistance to the Court.

PART IV – ORDER REQUESTED

66. Terra Firma accordingly seeks an order:

a) declaring that the Park Levy was properly payable, and

b) awarding its costs of this motion as well as the costs of the Receiver against the Certain Curzon Purchasers jointly and severally.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2019.

R. Brendan Bissell

Lawyers for Terra Firma Capital Corporation

SCHEDULE A
LIST OF AUTHORITIES

1. *Mendlowitz & Associates Inc v. Chiang*, 2014 ONSC 2651.

2. *Golfnorth Properties Inc. v. Rebel Land Holdings Inc*., 2019 ONSC 3479.

Tab 1

See paras. 81-82

CITATION: Mendlowitz & Associates Inc v. Chiang, 2014 ONSC 2651
COURT FILE NO.: 00-CL-3835
DATE: 20140429

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MENDLOWITZ & ASSOCIATES INC. IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF JAY CHIANG AND KOREA DATA SYSTEMS (USA), INC.	Catherine Francis, Mark A. Freake, for the Plaintiff Mendlowitz & Associates Inc.
	Aaron Blumenfeld, for the Plaintiff Korea Data Systems (USA), Inc.
Plaintiffs	
– and –	
JAY TIEN CHIANG AND CHRISTINA CHIANG	J Thomas Curry, for the Defendant Jay Chiang
	Hilary Book, for the Defendant Christina Chiang
Defendants	
	HEARD: March 20, 2014

SANCTION HEARING DISCLOSURE RULING

MARROCCO A.C.J.S.C.:

Introduction

[1] Jay Chiang and Christina Chiang are in contempt of an order dated July 16, 2003 made by Mr. Justice Farley on consent. That order held the Chiangs in contempt of six orders:

1. an order from Justice Ferrier (September 28, 1999) under ss. 163(2) and 167 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, requiring, among other things, that Jay Chiang and Christina Chiang attend for examination, produce documents

relating to the Chiang's property, as well as requiring any financial institution holding accounts in the name of Jay Chiang and other entities to produce bank records;

- the moving parties on this *ex parte* motion were: Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea, Korea Data Systems (USA), Inc., and Mendlowitz & Associates Inc. (Jay Chiang's trustee in bankruptcy)

2. an order from Justice Farley (November 1, 1999) to the same effect but in addition ordering a lawyer from Miller Thomson to be examined and produce documents;

    - the moving parties on this motion were: Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea and Korea Data Systems (USA), Inc.

3. a Mareva injunction and Anton Piller Order from Justice Farley (September 22, 2000) which, among other things, froze all of the assets of Jay Chiang and Christina Chiang and required a detailed disclosure of those assets;

    - the moving parties on this *ex parte* motion, heard in camera, were: Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea, Korea Data Systems (USA), Inc., and Mendlowitz & Associates Inc.

4. an order from Justice Swinton (October 5, 2000) requiring, among other things, that Jay Chiang and Christina Chiang disclose current information about assets and accounts over which they had a power of attorney;

    - the moving parties on this motion were: Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea, Korea Data Systems (USA), Inc., and Mendlowitz & Associates Inc.

5. an order from Justice Farley (May 7, 2003) requiring, among other things, the production by Christina Chiang of all records of transactions greater than $1000 for all accounts at financial institutions which she holds her name or over which she has signing authority in the Republic of China; and

    - this order was made on a motion brought by Christina Chiang seeking an anti-suit injunction and a cross-motion brought by Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea, Korea Data Systems (USA), Inc., and Mendlowitz & Associates Inc. for a stay of Christina Chiang's motion and other relief.

6. an order from Justice Farley (June 24, 2003) requiring among other things that Christina Chiang disclose documents and information regarding the whereabouts of approximately US$520,000 and that Jay Chiang and Christina Chiang be examined and produce documents and provide authorizations.

- this order was made on consent on a motion brought by Korea Data Systems, Co. Ltd., a.k.a. K.D.S. Korea, Korea Data Systems (USA), Inc., and Mendlowitz & Associates Inc.

[2] The July 16, 2003 contempt order contained 17 undertakings that, if complied with, would purge the Chiangs' contempt. Compliance with the undertakings was not mandatory; it was an opportunity afforded to Jay Chiang and Christina Chiang (see: Chiang (Trustee of) vs. Chiang (2007), 31 C.B.R. (5th) 19 (Ont. Sup. Ct.) at para. 47. The Chiangs were determined to have not purged their contempt at two subsequent trials before Justice Lax in 2007[1] and myself in 2010.[2] The original penalty given in 2007 was a one year prison sentence for Jay Chiang and an eight month prison sentence for Christina Chiang; both sentences were reduced to seven days on appeal.[3]

[3] A sanction hearing for Jay Chiang and Christina Chiang from the 2010 finding of contempt is pending. At that hearing this court will have to decide whether further incarceration of Jay Chiang and Christina Chiang is necessary to make them comply with the six court orders.

[4] Korea Data Systems (USA), Inc. is seeking a jail sentence for Jay Chiang in the range of 3 to 5 years and a jail sentence for Christina Chiang in the range of eight months.

[5] Jay Chiang and Christina Chiang move for an order requiring the plaintiffs to produce all information in their possession, power or control that may be relevant to this sanction hearing, notwithstanding claims of privilege. To understand this motion some context is necessary.

Background

[6] John Hui is the operating mind behind Korea Data Systems (USA), Inc. Korea Data Systems (USA), Inc. and John Hui have consistently portrayed themselves and KDS Korea as victims of fraud at the hands of Jay Chiang and his family in the various threads of litigation against the Chiangs. For example, in the Reply submissions of Korea Data Systems (USA), Inc. and Mendlowitz & Associates Inc. filed in April 2012 in the fraudulent conveyances action against the Chiangs, the following appears at paragraph 70:

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[1] 2007 CanLII 12203 (Ont. S.C.)
[2] 2010 ONSC 4804
[3] 2009 ONCA 3, 93 O.R. (3d) 483

> Mr. Chiang has admitted to having been involved in many fraudulent activities, which is a bad thing. It is bad both for the plaintiffs and for society as a whole, and for any honest businessperson who has the misfortune of being caught in his fraudulent activities.

[7] In plain language the claim in the fraudulent conveyances action alleged in part that Jay Chiang defrauded Korea Data Systems (USA), Inc. of millions of dollars by obtaining computer monitors and not paying for them. It alleged that the assets of Jay Chiang and Christina Chiang were derived from that fraud.[4]

[8] Korea Data Systems (USA), Inc. was incorporated in 1992. In May 1994 Korea Data Systems Co. Ltd., Korea Data Systems (USA), Inc., Jung Koh and Dae Soo Koh (the Koh Brothers) commenced the California proceedings, which resulted in the judgment upon which they have been attempting to realize in proceedings before this Court.

[9] John Hui testified in these proceedings. Mr. Hui testified that he was a friend of the Koh brothers; he was also, since 1984, in the business of selling computer monitors in California. He had been selling Korea Data Systems Co. Ltd. monitors since late 1987 or early 1988.

[10] John Hui first met Julius Chiang, the brother of the defendant, Jay Chiang, in 1987. He was introduced to Julius Chiang by a mutual friend. In 1989, John Hui, Julius Chiang and another man formed a company called Amazing Technologies Corp. Their purpose was to create a brand-name computer monitor using monitors manufactured by various monitor manufacturers.

[11] Within one year of starting Amazing Technologies Corp., John Hui heard about a company called Aamazing Technologies Inc. when a supplier of monitors refused to supply to companies with which he was associated. The supplier complained that Amazing Technologies Corp. was not paying, or insisting on paying less, than the contract price. Mr. Hui could find no record of the contentious shipments and subsequent investigation revealed that the monitors had been shipped to Canada to a company variously called "Ajay Amazing Technologies Inc." or "Aamazing Technologies Inc." The supplier believed this company was controlled by Mr. Hui and, as a result, would not ship to any company controlled by Mr. Hui. Mr. Hui knew nothing of Aamazing Technologies Inc. He eventually found out that it was owned by Julius Chiang's brother, Jay Chiang.

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[4] 2012 ONSC 3922

[12] Discovery of this information caused a rift between Mr. Hui and Julius Chiang. According to Mr. Hui, he gave up his shareholding in Amazing Technologies Corp. a short time later.

[13] In 1992, Mr. Hui assisted the Koh brothers in incorporating a company known as Korea Data Systems (USA), Inc. He testified that he had no further involvement with this company from 1992 until 1994.

[14] By 1993, lawsuits had been commenced by Korea Data Systems Co. Ltd., Korea Data Systems (USA), Inc., Jung Koh and Dae Soo Koh against Amazing Technologies Corp., Aamazing Technologies Inc., Julius Chiang and Jay Chiang. The Koh brothers were 50% shareholders of Amazing Technologies Corp.

[15] In September 1993, Korea Data Systems Co. Ltd., Jung Koh, Dae Soo Koh, Amazing Technologies Corp., Ajay Amazing Technologies Inc., Julius Chiang and Jay Chiang entered into an agreement purporting to settle the outstanding litigation. This agreement was handwritten and signed by all the parties. All outstanding litigation ended.

[16] According to Mr. Hui, in 1994, Mr. Hui, who has an MBA and a background in accounting, was asked by the Koh brothers to assist them with an employee theft problem. Mr. Hui did so. As a result of assisting the Koh brothers, Mr. Hui gained a great deal of insight into the business of Korea Data Systems (USA), Inc.

[17] In 1994, it also became clear that the 1993 handwritten Settlement Agreement was not holding. In May 1994, Korea Data Systems Co. Ltd., Korea Data Systems (USA), Inc., Jung Koh and Dae Soo Koh sued Amazing Technologies Corp., Aamazing Technologies Inc., Julius Chiang and Jay Chiang in California.

[18] Mr. Hui testified that he was not directly involved with Korea Data Systems (USA), Inc. at this time. Nevertheless he did give the Koh brothers advice about commencing the litigation.

[19] Mr. Hui testified that in June 1995 he purchased Korea Data Systems (USA), Inc. from the Koh brothers. Mr. Hui continued the litigation.

[20] Julius Chiang defended the California case and testified at the trial. Jay Chiang initially defended the action, but then effectively dropped out of the proceedings.

[21] In the California action, Korea Data Systems Co. Ltd. successfully sued for breach of the handwritten Settlement Agreement. Judge Tully H. Seymour, of the California Superior Court for the County of Orange, found that, pursuant to the terms of the Settlement Agreement, Korea Data Systems Co. Ltd. was owed $8.5 million by Amazing Technologies Corp., Aamazing Technologies Inc. a.k.a. Ajay Amazing Technologies Inc., Julius Chiang personally and Jay Chiang personally. His Honour found that approximately $4 million of this amount had

been paid and gave judgment in favour of Korea Data Systems Co. Ltd. in the amount of approximately $4 million. The Judgment provided for simple interest at the rate of 10% from January 1, 1994 to January 31, 1998.

[22] In the same action, Korea Data Systems (USA), Inc. successfully sued Aamazing Technologies Corp. for monitors that it had received but not paid for. Justice Seymour awarded Korea Data Systems (USA), Inc. approximately $2,150,000 in damages. His Honour gave judgment against Jay Chiang personally and Julius Chiang personally for this same amount because they were the alter egos of Amazing Technologies Corp. and, thus, personally responsible for its debts. The Judgment provided for simple interest at the rate of 10% from January 1, 1994 to January 31, 1998.

[23] Korea Data Systems Co. Ltd. and Korea Data Systems (USA), Inc. began the California litigation in 1994 and obtained a judgment from Justice Seymour on April 20, 1998. At some point after this, Jung Koh and Dae Soo Koh, on behalf of Korea Data Systems Co. Ltd., purported to assign its interest in Justice Seymour's Judgment to Korea Data Systems (USA), Inc. The purported Assignment Agreement is undated and one page in length; the copy produced was only signed by the Koh brothers.

[24] Jay Chiang filed for bankruptcy in Ontario on September 28, 1998. He declared the California judgment to be a liability in his Statement of Affairs.

[25] In Korea, Korea Data Systems Co. Ltd. went bankrupt in November 2001.

[26] On April 8, 2008, Justice Seymour's Judgment was renewed for ten years.

[27] On August 18, 2008, a further Assignment Agreement was, according to Mr. Hui, entered into between Korea Data Systems Co. Ltd. and Korea Data Systems (USA), Inc. John Hui signed on behalf of Korea Data Systems (USA), Inc.; the signature on behalf of Korea Data Systems Co. Ltd. is in the name of Jung – Hyun Cho. This document is five pages in length. It is more complete than the one-page, undated Assignment to which I previously referred. This document provides that Korea Data Systems (USA), Inc. will continue to pursue the prosecution of certain outstanding lawsuits and collection efforts relating to the judgment of Justice Seymour. The agreement provides that Korea Data Systems (USA), Inc. and Korea Data Systems Co. Ltd. will divide funds derived from the collection efforts of Korea Data Systems (USA), Inc. It provides that Korea Data Systems Co. Ltd. will receive the first $380,000, after which Korea Data Systems (USA), Inc. will recover its legal fees. The agreement provides that any excess will be divided as follows: 2/3 for Korea Data Systems Co. Ltd. and 1/3 for Korea Data Systems (USA), Inc. Obviously Korea Data Systems Co. Ltd. still has a financial interest in these proceedings.

[28] Subsequent to the assignment, the litigation with which we are concerned was continued in the name of Korea Data Systems (USA), Inc., while Korea Data Systems Co. Ltd. ceased to be a named party. It cannot be forgotten, however, that Korea Data Systems Co. Ltd. was a

named party in the proceedings with which we are concerned prior to April 2008. As a result, obligations to disclose material facts when seeking *ex parte* extraordinary remedies rested on Mendlowitz & Associates Inc., Korea Data Systems (USA), Inc. and Korea Data Systems Co. Ltd.

[29] On September 28, 1998 Jay Chiang filed an assignment in bankruptcy naming Mendlowitz & Associates Inc. as Trustee. In his statement of affairs Jay Chiang valued his assets at $1000 and disclosed liabilities in excess of $19 million.

[30] Korea Data Systems Co. Ltd. ("KDS Korea") filed an accepted claim in the estate in excess of $6 million. The proof of claim was sworn by Jung Koh.

[31] Korea Data Systems (USA), Inc. ("KDS USA") filed an accepted claim in excess of $3 million.

[32] Both proofs of claim were submitted in and around February 4, 1999. Borden Ladner Gervais acted as counsel for KDS Korea and KDS USA at the time the proofs of claim were filed and they continue to act as counsel to this day for KDS USA in these proceedings. These claims were based on Judge Seymour's judgment from the California Superior Court.

[33] From 1999 until the end of 2012 Borden Ladner Gervais also acted as counsel to Mendlowitz & Associates Inc. (the "Trustee"). This has led to confusion concerning the identity of the moving party in the particular proceedings between these parties. This confusion was compounded by the fact that the Trustee, KDS Korea and KDS USA were frequently named as parties in the style of cause without regard to their standing in the particular motion or application.

[34] On October 5, 1998 KDS Korea and KDS USA issued a statement of claim (05-CL-5945 formerly 98-CV-156217) against Jay Chiang seeking to enforce the California judgment (the "enforcement action"). By endorsement dated November 1, 1999, Justice Farley granted KDS Korea and KDS USA leave to continue the enforcement action on the basis that the California judgment was grounded in fraud and had not been appealed. Justice Farley saw no reason not to allow the claim to proceed *nunc pro tunc*, despite the usual bar on claims against a bankrupt.

[35] On July 28, 2000 KDS Korea and KDS USA issued an action (00-CL-3835) against Jay Chiang, Christina Chiang and others alleging $10 million in damages for conspiracy and participating in fraudulent conveyances of property (the "fraudulent conveyances action"). The Trustee was a co-plaintiff in that action. The action was launched despite the fact that the claims of KDS Korea and KDS USA against the bankrupt had been accepted by the Trustee.

[36] This statement of claim alleged Jay Chiang and his brother defrauded Koh brothers, KDS Korea and KDS USA. It alleged that Jay Chiang's indebtedness to KDS Korea and KDS USA arose out of fraud. It alleged that the fraud took place in 1992 and 1993. It alleged that Christina Chiang purchased her family home at 10 Cortina Court in Richmond Hill using funds

obtained through fraudulent conduct which Jay Chiang had directed at KDS Korea and KDS USA. It alleged that Jay Chiang conferred a benefit on a number of defendants through his fraudulent conduct. It alleged that Christina Chiang knew that the funds used to purchase her home on Cortina Court were obtained by fraud and that KDS Korea and KDS USA were therefore entitled to trace those funds into the Cortina property.

[37] This statement of claim was amended four times to add new claims and new parties.

[38] On September 22, 2000 KDS Korea and KDS USA obtained, *ex parte*, an Anton Piller order and a Mareva injunction against Jay Chiang and others. The President of Mendlowitz & Associates Inc. filed an affidavit in support of this application for *ex parte* relief in which he in part deposed that the California proceedings had found Jay Chiang liable for fraud following a trial. Specifically, the affidavit references a finding that Jay Chiang colluded with his brother to defraud KDS Korea and KDS USA. Steven Cameron, the California attorney for KDS USA, also provided an affidavit in support of this application for *ex parte* relief. Mr. Cameron acts for KDS USA in California to this very day. Justice Farley's endorsement regarding the Anton Piller order and Mareva injunction refers to the Chiangs' fraud. [5]

[39] If there has been material nondisclosure in *ex parte* proceedings, the orders obtained in those proceedings can be rescinded. Because there can be damages caused by such *ex parte* orders, courts granting such remedies insist on an undertaking to pay damages which can include the cost of the proceedings.

[40] In January 2013, the Trustee changed counsel and began receiving legal advice from its current counsel, Minden Gross LLP. Minden Gross has no other clients in these proceedings. Minden Gross conducted an independent review of the various proceedings that had occurred over the last 14 years and assisted the Trustee in preparing a Trustee's Report dated October 11, 2013.

[41] It is common practice for a bankruptcy trustee to provide information and evidence by way of reports which, since the trustee is an officer of the court, do not have to be verified by affidavit and are admissible as evidence by the official statements or official documents exception the hearsay rule: *Impact Tool & Mould Inc. (Re)* (2007), 41 C.B.R. (5th) 112, aff'd 2008 ONCA 187, 41 C.B.R. (5th) 1, leave to appeal refused [2008] S.C.C.A. No. 220 (S.C.C.). *Montor Business Corp. (Trustee of) v. Goldfinger*, 2011 ONSC 2044, 75 C.B.R. (5th) 170.

[42] The Trustee indicated through counsel on March 20, 2014 that from 1998 until recently it believed that Mr. Hui was directly the victim of a fraud. As can be seen from Mr. Hui's testimony in prior proceedings, he purchased KDS USA in 1995. This was after the California

[5] (2000) 20 C.B.R. (4th) 264

proceedings that led to the California judgment were commenced.[6] As referred to earlier, Mr. Hui was well aware of this litigation when he purchased KDS USA and presumably took it into account when making his offer to purchase.

[43] Mr. Hui acquired KDS USA after there had been an unsuccessful settlement of the outstanding litigation over the unpaid monitors. This settlement involved the Koh brothers, the Chiang brothers and their companies.

[44] Interestingly in this regard, an article dated April 13, 2009 in *Canadian Business* magazine entitled "Business fraud: Two bad pennies," purporting to be an interview with Mr. Hui, portrays him as the victim of a fraud perpetrated by Jay Chiang and Christina Chiang. The Trustee indicated through counsel that this characterization of the relationship is representative of the Trustee's belief when it applied for, and provided an affidavit in support of, the Anton Piller order and Mareva injunction issued by Justice Farley on September 22, 2000. Counsel for the Trustee indicated that Mr. Mendlowitz did not find out until the 2011 trial of the enforcement and fraudulent conveyances actions that Mr. Hui did not own KDS USA when it was selling monitors to Jay Chiang's company.

[45] The Court, despite multiple proceedings including three trials for contempt held in 2005, 2007 and 2010 was under the same misapprehension until Mr. Hui testified in early 2011.

[46] In the 14 years that this litigation has been before the Superior Court of Justice there have been multiple interlocutory proceedings including motions for Mareva injunctions, an Anton Piller order, and Letters of Request. In addition, related proceedings have been conducted in California, Taiwan and Hong Kong and Singapore in which reference to and representations concerning the proceedings before this court have been made. In turn, documentation provided to foreign courts has been filed with this court.

[47] There have been multiple examinations of the Chiangs pursuant to section 163 of the *Bankruptcy and Insolvency Act*. To attach some reality to this observation, I refer to Tab 6 of the Trustee's Report which contains a list of transcripts in the civil and bankruptcy proceedings in Canada. While it is impossible to be precise without resorting to each transcript, it appears that there are 33 transcripts of examinations or cross examinations of Jay Chiang and 16 transcripts of examinations or cross examinations of Christina Chiang for the period November 8, 1999 to October 11, 2013. While this includes discovery and trial, many of these examinations were pursuant to section 163 of the *Bankruptcy and Insolvency Act*.

[48] In the Trustee's Report of October 11, 2013 and in the Trustee's submissions to this Court on March 20, 2014, counsel for the Trustee has indicated that it wishes to disclose

[6] The California judgment became the basis for the enforcement action in Ontario that has led to the contempt proceedings that are still ongoing.

information and documents which came to its attention during its review of the proceedings between the parties. The Trustee's position is that the materials in question are relevant to the: nature and *bona fides* of the underlying claims of KDS Korea and KDS USA; motivations and *bona fides* of John Hui in prosecuting these proceedings; *bona fides* and enforceability of indemnities and undertakings as to damages given by KDS USA and John Hui to the court; adequacy of the productions and disclosure made by KDS USA to the Trustee, Jay Chiang and Christina Chiang and the court; validity and enforceability of the California judgment obtained by KDS USA against Jay Chiang and Christina Chiang and the enforceability of that judgment in Ontario.

[49] The Trustee reports that it has reason to believe that substantial relevant documentary production has not been made.

[50] The Trustee reports that there has been a failure to make full disclosure of all material facts in support of the *ex parte* orders in the contempt proceedings.

[51] Counsel for KDS USA, Borden Ladner Gervais, advises that their client contests findings and statements in the Trustee's Report of October 11, 2013. KDS USA is adverse in interest to the Trustee in this regard.

[52] In addition KDS USA and John Hui are adverse in interest to the Trustee's wish to disclose all relevant documents in its possession. Broadly speaking, the relationship between the Trustee and KDS USA soured between the winter and fall of 2013 as the Trustee reviewed the file and prepared its Report. This led the Trustee to move for directions from the court on a number of issues and for the removal of Borden Ladner Gervais as counsel for KDS USA. Specifically, the Trustee moved for directions concerning:

- whether motion for the removal of Borden Ladner Gervais should be held in camera
- whether the determination of issues of privilege and confidentiality raised by KDS USA should be in camera
- whether the Trustee could disclose documents and information to Jay and Christina Chiang, relevant to their upcoming sanction hearing
- settlement of outstanding litigation with Winner International Group Ltd.
- the respective roles of the Trustee and KDS USA in the upcoming sanction hearing
- KDS USA's standing in the various outstanding proceedings
- KDS USA's application pursuant to section 38 of the *Bankruptcy and Insolvency Act*
- various trial scheduling matters,

- KDS USA's garnishment proceedings launched against the Trustee,
- return of Jay Chiang's travel documents,
- the Trustee's rights and obligations in relation to an appeal launched by KDS USA from the 2011 trial decision of the enforcement and fraudulent conveyances actions, and
- advice and directions concerning proceedings commenced by the Trustee and KDS USA in Taiwan against Christina Chiang.

[53] After the Trustee had arranged a date for its motion for directions, KDS USA served it with an injunction motion seeking a declaration that various schedules to the Trustee's Report were privileged and an order directing that the Trustee withhold them. Counsel for KDS USA did not serve its motion materials upon Jay Chiang or Christina Chiang, claiming that Jay Chiang and Christina Chiang had no standing on the injunction motion and that the injunction motion should be heard in camera. Finally, because the motion to disqualify Borden Ladner Gervais was scheduled to be heard by Justice Brown, Borden Ladner Gervais on behalf of KDS USA took the position that Justice Brown could not hear the injunction motion because that would result in Justice Brown reading the privileged documents. As a result the injunction motion and privilege claim were heard by Justice Mesbur on October 28, 2013.

[54] A brief containing 11 parts was filed with Justice Mesbur. This brief contained the material over which privilege was claimed.

[55] Justice Mesbur divided the information into three types: (1) solicitor client communication during the Trustee and KDS USA's joint retainer of Borden Ladner Gervais, (2) information disclosed while Borden Ladner Gervais and counsel for the Trustee were trying to craft a joint settlement and (3) information protected by common interest privilege.

[56] Justice Mesbur ruled that there was no privilege as far as the removal motion was concerned. The removal motion has yet to be heard.

[57] Justice Mesbur ruled that with respect to the motion for directions, information in tabs 1, 2, 3, 4, and 8 contained documents which included legal advice given by Borden Ladner Gervais to the Trustee and KDS USA when both had jointly retained that firm. Justice Mesbur ruled that this information could not be disclosed by the Trustee in a motion for directions without the consent of KDS USA. KDS USA did not then and does not now consent to the release of this information.

[58] Justice Mesbur ruled that tab 5 contained an outline of all the fees billed by Borden Ladner Gervais. No particulars of the actual services were provided. Justice Mesbur ruled that this outline was protected by solicitor client privilege.

[59] Justice Mesbur ruled that tab 6 was not protected by common interest privilege except for a portion containing a communication between Mr. Cameron and Minden Gross.

[60] Justice Mesbur ruled that tab 7 which contained emails from Minden Gross to counsel at Borden Ladner Gervais was not privileged.

[61] Justice Mesbur ruled that tab 9 contained excerpted paragraphs of the Trustee's Report that described information and documents, some of which were privileged. She held that those paragraphs should be redacted accordingly.

[62] Tab 10 contained an email and attachments from Mr. Cameron in California. Attached to the email was a document called a "Confidential Voluntary Settlement Brief" prepared for a conference scheduled for February 17, 2010. This was apparently a settlement brief filed in relation to litigation in California involving Mr. Hui and the Korean Export Insurance Corporation ("KEIC"). Justice Mesbur decided that the communications focused on joint settlement strategies for the Trustee and KDS USA and that privilege attached. The Trustee was not a party to this particular piece of litigation in California.

[63] Tab 11 contained an excerpt from the Trustee's report quoting from the Confidential Voluntary Settlement Brief referred to in tab 10. Justice Mesbur decided that this excerpt contained privileged information which should be removed from the redacted version of the Trustee's Report.

[64] As a result of Justice Mesbur's ruling two versions of the Trustee's Report exist: an unredacted version which was filed with Justice Brown and a redacted version filed on the motion for directions.

[65] Justice Mesbur was dealing with a claim of privilege in respect of two motions: (1) a motion seeking the removal of Borden Ladner Gervais as counsel and (2) a motion for directions. Justice Mesbur was not asked to consider the admissibility of these documents at the sanction hearing for Jay Chiang and Christina Chiang's contempt of court. Jay Chiang and Christina Chiang have standing at their sanction hearing because it can result in their incarceration. If the admissibility of these documents at the sanction hearing was a live issue before Justice Mesbur then KDS USA's position that Jay Chiang and Christina Chiang had no standing on that motion would not have made any sense.

[66] Counsel for the Trustee confirmed that the sanction hearing was not considered by Justice Mesbur. Mr. Gibson, who is not the counsel before me but who did appear for KDS USA on the privilege motion before Justice Mesbur, agreed in an email to counsel for the Trustee that "the Chiangs have a right to raise the issue of privilege at a later date should they choose to raise it."

[67] The Trustee, who has had access to this information, now wishes to withdraw the contempt proceedings. KDS USA wants the contempt proceedings to continue and wants Jay Chiang and Christina Chiang sentenced to further periods of incarceration (3-5 years for Jay Chiang and 8 months for Christina Chiang). KDS USA is adverse in interest to the Trustee in this regard.

[68] According to submissions from counsel for the Trustee made on March 20, 2014, information has come to its attention which suggests that the Koh brothers and their company KDS Korea were carrying on an invoice fraud from 1993 onwards. KDS Korea manufactured computer monitors and so it is a reasonable inference that the invoices were for computer monitors. The victim apparently was the Korean Export Insurance Corporation or KEIC. There is no evidence concerning the way in which the fraud was committed. Counsel for the Trustee also informed the court that Mr. Cameron had informed her that the Koh brothers were "running… an Enron type accounting fraud starting in 1993…" at KDS Korea. Counsel for the Trustee in a February 21, 2013 email stated that the Koh brothers defrauded the KEIC of hundreds of millions of dollars within a time frame which overlaps the allegations against the Chiangs.

[69] This court was told by Mr. Hui that the failure of Jay Chiang controlled companies to pay approximately $10 million to KDS Korea had a significant impact on the survival of that company. For example, in submissions to this court this year concerning an outstanding costs issue counsel for KDS USA made the following submission, at para. 29:

> Korea Data Systems Co. Ltd. had been a substantial manufacturer of computer monitors. Although its financial statements and business activities were not in evidence, its sales to Korea Data Systems (USA), Inc. alone were well into 9 figures in the late 1990s. There can be little doubt but that the Chiang's wrongdoing indirectly impacted the lives and livelihoods of many people.

In the 2011 trial Mr. Hui testified that the Chiangs' fraud had a "huge impact" on the survival of KDS Korea:

> [T]here was a huge impact on to the business of KDS Korea then, because at the time I think KDS Korea total sales was probably maybe $30, $40 million a year and for someone not paying them back for over $10 million was a huge impact to the survival of the company.

[70] Mr. Hui was cross-examined in the 2011 trial before me. Counsel for Christina Chiang asked Mr. Hui to agree that on its tax returns for the years 1995 to 2002 KDS USA claimed to have imported monitors worth substantially more than the total value of all monitors imported from Korea to the United States during that time. Counsel for Christina Chiang attempted to rely on statistics obtained from the United States International Trade Commission. Mr. Hui refused to accept this suggestion and suggested that counsel did not understand the statistics to which she was referring. Absent expert testimony concerning imports of computer monitors from Korea to the United States, I concluded this line of questioning was not helpful. This was, however, before Mr. Cameron's statement in his settlement brief that KDS Korea committed an "Enron type accounting fraud" against the KEIC. At this point one can only speculate on how this "Enron type accounting fraud" or "invoice fraud" was committed.

[71] The Trustee's Report referred, at para. 145, to Mr. Hui's discovery on February 1, 2011. Counsel for Jay Chiang asked Mr. Hui for a "plain language summary of what the KEIC litigation was about." Before he could answer, Mr. Blumenfeld, counsel for KDS USA, stated "[o]kay, so I am providing you what we have been able to do in that regard." Suffice to say there was no disclosure (presumably because Mr. Blumenfeld did not know) that KDS Korea had engaged in an invoice or Enron type accounting fraud during the relevant time.

[72] Counsel for the Trustee, during the March 20, 2014 hearing, put the matter succinctly when she informed the court that there was nondisclosure of the fact that the Koh brothers, who were portrayed as victims of the Chiang brothers, were actually "crooks themselves."

[73] There was nothing in the material put before Justice Farley when he granted the Mareva injunction and Anton Piller order in 2000 disclosing the fact that the Koh brothers and KDS Korea were engaged in a fraudulent invoice scheme an Enron type accounting fraud starting in 1993. Similarly, there was nothing to that effect disclosed to the Court when Justice Farley's Mareva injunction was amended on an *ex parte* application to include the E*TRADE account of Winter International Group Limited in 2009.

[74] There was no disclosure of the fact that the KDS USA's undertaking concerning damages, given to obtain and amend the Mareva injunction order of Justice Farley, had become hollow because that company was no longer in business. When this was disclosed, Mr. Hui provided his personal undertaking which is still in effect.

[75] The penalty for contempt of court involves an element of public law because respect for the role as well as the authority of the court is at issue: *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35. The nature and extent of the disclosure obligations in sanction hearings for contempt of court must be decided on a case-by-case basis: *Vale Inco Ltd. v. United Steel, Paper and Forestry Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, Local 6500*, 2010 ONSC 3039, 320 D.L.R. (4th) 185, at para. 7.

[76] In this proceeding KDS USA seeks a penitentiary sentence for Jay Chiang in the range of 3 to 5 years and an eight-month sentence for Christina Chiang. The Trustee wishes to withdraw the proceedings.

[77] Full disclosure is to be expected in most contempt cases: *Vale Inco*, at para. 9.

[78] This is an appropriate case to not only require but specifically order full disclosure because there is a genuine question concerning the adequacy of the disclosure to date.

The Chiangs' disclosure request

[79] I now wish to address the specific contentious documents which were collected in a brief by counsel for KDS USA and filed as Exhibit 1C on this motion. I now propose to refer to the 11 tabs in Exhibit 1C and make specific orders concerning disclosure. Before doing so, I will make certain general observations.

[80] I will first refer to emails authored by Ms. Francis, counsel for the Trustee at this time. Ms. Francis is free to express her views as she chooses. Ms. Francis can express any of the views recorded in her emails to counsel for Jay Chiang and Christina Chiang. It does not matter whether Ms. Francis has expressed those views to Mr. Cameron in the context of settlement discussions. It is not necessary to order disclosure of Ms. Francis' emails to permit her to express herself as she sees fit. Ms. Francis can express her views to Jay Chiang and Christina Chiang without resorting to her previous emails to Mr. Cameron. Similarly, the Trustee can reflect those views in its Report without the necessity of relying upon an email sent by Ms. Francis to counsel for KDS USA. The Trustee is free to publish Ms. Francis' emails subject to the exception described in these reasons. The emails simply prove that Ms. Francis expressed the opinions contained in them to Mr. Cameron or Mr. Blumenfeld as the case may be.

[81] When Mr. Cameron was communicating with Ms. Francis it was in the interests of attempting to settle many but not all of the outstanding issues. In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 19, the Supreme Court of Canada stated with respect to settlement privilege:

> There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement." [citation omitted]

[82] Exceptions to the privilege were described by Doherty J. (as he then was) in *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397:

> Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production.

[83] The party asserting privilege bears the burden of proving such privilege. The party relying on an exception to a privilege is similarly burdened.

[84] Counsel for the Trustee has three interests in this litigation: (1) limiting the Trustee's personal exposure which is and at that time was significant (2) terminating these proceedings by winding up the estate and (3) complying with the Trustee's obligations under the *Rules of Civil Procedure* and the *Bankruptcy and Insolvency Act*.

[85] KDS USA and KDS Korea do not share these objectives. In an email dated February 13, 2013 Mr. Cameron set out the objectives of Mr. Hui and KDS USA: settle with Winner International Group Limited and get money into the estate; settle with the Tsai defendants and Brenda Chang. Mr. Cameron also made it clear that there was no agreement concerning the Taiwan proceedings. The email noted that KDS USA and Mr. Hui wanted "to wrap things up as quickly and cheaply as possible with everyone except Jay." The Trustee has documented in its Report that, despite the statement in his email, Mr. Cameron on behalf of KDS USA was

utterly unhelpful in settling with Winner International Group Limited. As a result of Mr. Cameron's behaviour, counsel for the Trustee and Mr. Cameron have not spoken since the end of May 2013.

[86] There was never a common interest between the Trustee, KDS USA and KDS Korea. Their interests were quite different. This was confirmed by Mr. Blumenfeld in an email to Ms. Francis dated February 8, 2013 at 3:52 PM:

> [W]e must be able to advance positions that are different from your client's position, and have sought for that purpose a waiver of conflict from your client, which to date you have not provided. We do not accept your apparent position that any position taken by KDS that deviates from your client's position could result in our removal as counsel of record.

[87] Further to this point, Mr. Cameron has sworn an affidavit in which he describes his communications with Ms. Francis as being "for the purpose of attempting to reach a joint settlement position that could be presented separately to Christina Chiang, Mei Huang, and Winner International Group Limited and others."

[88] I am not persuaded by the evidence that KDS USA and KDS Korea have proven their claim of common interest privilege. I am not persuaded by the evidence that they have proven a united front against a common adversary.

[89] If I am wrong, I am satisfied that any common interest privilege has been lost as a result of the breakdown in the relationship between KDS USA and KDS Korea and the Trustee: *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 50 Alta. L.R. (3d) 131 (Alta. Q.B.), at para. 25; *Jetport Inc. v. Global Aerospace Underwriting Managers (Canada) Ltd.*, 2013 ONSC 235, at para. 33. Alternatively, by suggesting that Mr. Chiang's fraudulent behaviour had a significant impact on the survival of KDS Korea, the plaintiffs have put the reasons for KDS Korea's entrance into bankruptcy proceedings directly in issue. In those circumstances information suggesting that KDS Korea's financial difficulties had other causes cannot be shielded from view.

[90] I turn now to the brief of documents that was before Justice Mesbur.

[91] **Tab 1** is an email dated April 6, 2003 from Mr. Blumenfeld to Mr. Hui, Mr. Mendlowitz, Mr. Cameron and an unknown person. Assuming for a moment that the unknown person also represents Mr. Hui (and this is by no means clear) then this document would have been protected by solicitor client privilege, had it not been for the fact that Mr. Cameron forwarded it to Ms. Francis. Disclosure of the letter to Ms. Francis waived solicitor client privilege, assuming solicitor client privilege ever attached to the letter.

[92] If Mr. Cameron disclosed this letter for the purpose of attempting to reach a joint settlement position with Christina Chiang and others, then the letter is protected by settlement privilege. However settlement privilege will give way if there is a competing public interest.

No competing public interest is demonstrated with the exception of the reference in the last paragraph of the email to an indemnity from an entity called "KDS Canada." The indemnity was given to the Trustee to encourage it to continue as a plaintiff in outstanding proceedings. It appears that the indemnity from KDS Canada was worthless. This is consistent with KDS USA's hollow undertaking concerning damages on the Mareva order. If the court's Trustee is misled by a party, then there is a risk that the Trustee will mislead the court, resulting in a mistake or a miscarriage of justice. This risk is a competing public interest. Accordingly, the last paragraph of Mr. Blumenfeld's email which refers to "KDS America" is to be disclosed to Jay Chiang and Christina Chiang for the purpose of the sanction hearing.

[93] The letter from Mr. Blumenfeld to Mr. Hui at **Tab 2** was protected by solicitor client privilege until it was disclosed by Mr. Cameron to Ms. Francis. Thereafter the letter was protected by settlement privilege if one assumes that it was disclosed to Ms. Francis so that the Trustee and KDS USA could develop a common position for the purpose of settling some or all outstanding claims. Even if this is true, the last two paragraphs of Mr. Blumenfeld's letter refer to KDS Canada and will be disclosed on the same basis as the email referred to in Tab 1.

[94] Mr. Cameron's email of February 13, 2013 at **Tab 3** represents his assessment of the various issues referred to in his email. Accepting for a moment that Mr. Cameron expressed his views to Ms. Francis for the purpose of arriving at a joint settlement position, I see no competing public interest demanding the disclosure of this email. The same is true for the letter from Mr. Blumenfeld to Mr. Hui and Mr. Mendlowitz dated February 17, 2011 which Mr. Cameron attached to his email. Emails from Ms. Francis to Mr. Cameron are also included in this tab. Because it may be possible to draw conclusions about Mr. Cameron's position in these matters from Ms. Francis' emails, her emails will not be disclosed. Ms. Francis is free, however, to make her views known on these matters to Jay Chiang and Christina Chiang for purposes of the sanction hearing.

[95] **Tab 4** is an excerpt from the Trustee's Report. This excerpt makes reference to the aforementioned indemnity from KDS Canada. This excerpt should be disclosed to Jay Chiang and Christina Chiang for purposes of the sanction hearing.

[96] **Tab 5** is a schedule of fees rendered by Borden Ladner Gervais. No particulars are provided. All that is offered in the schedule is the billing date, the invoice number and the billing amount. Christina Chiang made a claim for costs against the Trustee and KDS USA. KDS USA has disputed this claim for costs. Even though this billing information is of a generic nature, lawyer's billings passed to a client are *prima facie* covered by solicitor client privilege: *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193. The presumption of privilege can be rebutted, however, if disclosure would not violate solicitor client confidentiality by revealing privileged communications: *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* (2007), 227 O.A.C. 38. Because the billing information is generic in nature, it is unlikely to reveal any privileged communications and can therefore be disclosed. While the relevance of this information at a sanction hearing is not clear, it is premature to

determine that now. This information will be disclosed to Jay Chiang and Christina Chiang for purposes of the sanction hearing.

[97] **Tab 6** is a reference in the Trustee's Report to a letter dated February 13, 2013 between Borden Ladner Gervais on behalf of KDS USA and counsel in Taiwan who was also acting for KDS USA. There is nothing confidential in this communication. It simply reports on the status of the matter in Taiwan, which is hardly confidential. The Trustee is a party to the proceeding in Taiwan and was entitled to this information and is entitled to disclose it to Jay Chiang and Christina Chiang. This excerpt is to be provided to Jay Chiang and Christina Chiang for purposes of their sanction hearing.

[98] **Tab 7** is composed entirely of emails from Ms. Francis to Mr. Blumenfeld, Mr. Cameron or both. As indicated earlier, Ms. Francis is entitled to make her views on these matters known. To the extent that her views are contained in emails she is entitled to publish them. Copies of these emails will be provided to Jay Chiang and Christina Chiang for purposes of the sanction hearing.

[99] **Tab 8** contains an email from Mr. Steve Cameron to Ms. Francis; it also contains an email from Ms. Francis to Mr. Steve Cameron. Mr. Cameron also attached a letter from Mr. Blumenfeld to Mr. Hui and Mr. Mendlowitz dated February 17, 2011. The letter contains legal advice. The letter was initially protected by solicitor client privilege which was waived when Mr. Cameron disclosed the letter to Ms. Francis. It is clear from Mr. Cameron's email that he and Ms. Francis were attempting to arrive at a common settlement position with respect to some of the defendants in the fraudulent conveyances action, the litigation in Taiwan, costs, and the upcoming sanction hearing for Christina Chiang. These documents are the same as those documents in tabs 3. I see no competing public interest that displaces settlement privilege. Because it may be possible to draw conclusions about Mr. Cameron's position in these matters from Ms. Francis' emails, her emails will not be disclosed to Jay Chiang and Christina Chiang. Ms. Francis is free to make her views on these matters known to Jay Chiang and Christina Chiang.

[100] **Tab 9** is an excerpt from the Trustee's Report. Paragraph 164 of this excerpt will be disclosed to Jay Chiang and Christina Chiang for purposes of the sanction hearing. The first sentence in paragraph 165 will also be disclosed. The balance of that paragraph and paragraph 166 will not be disclosed because it refers to an email of Mr. Cameron's which I have not ordered disclosed.

[101] **Tab 10** contains an email dated February 1, 2013 from Mr. Cameron to Ms. Francis, copied to Mr. Blumenfeld. Mr. Cameron's email explains to some extent several pieces of litigation involving KDS USA in California, including the KEIC case. Mr. Cameron was attempting to assist Ms. Francis in understanding this California litigation. Mr. Cameron attached an early settlement conference brief. According to Mr. Cameron's email he attached the settlement conference brief to show that Mr. Hui had a strong defence to that action.

[102] The settlement brief was filed with the Superior Court for the State of California. It is referred to as a "Confidential Voluntary Settlement Brief." The brief was prepared by Mr. Cameron and in it Mr. Cameron described himself as the attorney for Mr. Hui. This brief states that KDS Korea was running "an Enron type accounting fraud." This brief was clearly prepared in an attempt to settle in California litigation involving the KEIC. Even if Mr. Cameron was attempting to develop a joint settlement position with the Trustee and the brief is protected by settlement privilege, there is a competing public interest which requires its disclosure. Specifically KDS Korea was granted *ex parte* remedies in this jurisdiction that required disclosure of all material facts. KDS USA was similarly obligated. The fact that KDS Korea was involved in a huge accounting fraud during or proximate to the period with which we are concerned was never disclosed to the court. The *ex parte* order granting an Anton Piller order and Mareva injunction is one of the six orders referred to in Justice Farley's contempt order. Whether *ex parte* orders of the Superior Court of Justice were issued without the disclosure of all material facts is a competing public interest. Mr. Cameron's email and the accompanying settlement brief will be disclosed to Jay Chiang and Christina Chiang for the purpose of the sanction hearing.

[103] There is also a further competing public interest. Jay Chiang and Christina Chiang were sentenced to jail by a judge of this court. Those jail sentences were served. The Superior Court of Justice has an ongoing public interest in the integrity of the process that led to that result.

[104] **Tab 11** is an excerpt from the Trustee's Report. This excerpt refers to the matters set out in Tab 10. This excerpt will be provided to Jay Chiang and Christina Chiang for the purpose of their sanction hearing.

[105] Jay Chiang and Christina Chiang have made a very broad document production request. Specifically, Jay Chiang and Christina Chiang move for an order requiring the plaintiffs to produce all information in their possession, power or control that may be relevant to this sanction hearing, notwithstanding claims of privilege.

[106] The Trustee does not oppose the request insofar as it pertains to the Trustee's Report but is concerned that a broader production order against the plaintiffs "would run the risk of

perpetuating the case indefinitely." The Trustee requests that any disclosure order be restricted to the documents referenced in the Trustee's Report and any further documents which either the Trustee or KDS USA choose to disclose.

[107] Due to the issues that have arisen concerning the disclosure of material information I have decided to make an order requiring KDS USA to produce all documents relevant to the sanction hearing that are within their possession or control which have not previously been produced. This request includes KDS Korea. The test for relevance is whether withholding a document might reasonably impair Jay Chiang or Christina Chiang's ability to answer, negate or mitigate Justice Farley's contempt order of July 16, 2003. Documents in respect of which a

claim of privilege is asserted will be preserved, listed on a schedule and appropriately described in a manner consistent with our *Rules of Civil Procedure*.

[108] In order that proceedings are not endlessly prolonged, the Trustee is not required to wait for production of a schedule to continue carrying out its mandate. The Trustee can apply to me for directions concerning the sanction hearing and issues arising from my production order so that other judges of this court are not required to make orders concerning it.

[109] Jay Chiang and Christina Chiang's motion is granted in accordance with these reasons.

[110] Partial Indemnity costs, payable by KDS USA and KDS Korea are awarded to Christina Chiang, Jay Chiang and the Trustee. Christina Chiang, Jay Chiang and the Trustee will serve and file written cost submissions not to exceed 5 pages in length within three days after release of these reasons. KDS USA and KDS Korea will serve and file responding written costs submissions not to exceed three pages in length two days after receipt of cost submissions from Christina Chiang, Jay Chiang and the Trustee. Christina Chiang, Jay Chiang and the Trustee may serve and file written reply costs submissions not to exceed one page in length one day after receiving costs submissions from KDS USA and KDS Korea.

MARROCCO A.C.J.S.C.

Released: 20140429

Tab 2

See para. 119

CITATION: GOLFNORTH PROPERTIES INC. v. REBEL LAND HOLDINGS INC., 2019 ONSC 3479
COURT FILE NO.: CV-18-1354
DATE: 2019-06-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GOLFNORTH PROPERTIES INC.	
Applicant	Cynthia Davis, for the Applicant
– and –	
REBEL LAND HOLDINGS INC., THE PETERSBURG GOLF LIMITED PARTNERSHIP, 1471300 ONTARIO CORPORATION and MILL-GATE HOLDINGS INC.	Matthew B. Lerner, for the Respondents Rebel Land Holdings Inc., The Petersburg Golf Limited Partnership and 1471300 Ontario Corporation
Respondents	Jeremy A. Forrest, for the Respondent Mill-Gate Holdings Inc.
	HEARD: May 2, 2019

D. A. BROAD

REASONS FOR JUDGMENT

Background

(i) Parties

[1] The application concerns a dispute over the purchase or proposed purchase of ownership interests in a golf course Rebel Creek Golf Club (the "Golf Club") operated on approximately 146 acres of land (the "Property") in Petersburg Ontario.

[2] The respondent Rebel Land Holdings Inc. ("Rebel Land") owns the Property.

[3] The respondent Petersburg Golf Limited Partnership (the "Partnership") is a limited partnership registered under the *Limited Partnerships Act* R.S.O. 1990, c. L. 16. The Partnership leased the Golf Club from Rebel Land pursuant to a head lease agreement dated June 21, 2001.

[4] The respondent 1471300 Ontario Corporation (the General Partner") is the general partner of the Partnership.

[5] GolfNorth Management Corp. ("GolfNorth Management") (or related companies) owns or operates approximately 30 different golf courses across Ontario and Nova Scotia.

[6] The Partnership leased the Golf Course to GolfNorth Management to operate and manage the Golf Course pursuant to a lease agreement dated February 1, 2014 (the "Lease") for a term of 5 years commencing February 1, 2014 and terminating on January 31, 2019. The Lease included an option to renew for a further 5 year term conditional upon the Partnership and GolfNorth Management agreeing on the rent for the renewal term.

[7] The shareholding interests in Rebel Lands mirror the Limited Partnership Units (the "LPUs") in the Partnership such that each shareholder in Rebel Lands holds a corresponding number of LPUs in the Partnership. There are 25 LPUs currently held by 17 individual LPU holders.

[8] The applicant GolfNorth Properties Inc. ("GolfNorth Properties") is a corporate entity which is related to GolfNorth Management. It was the offeror in respect of an offer to purchase a maximum of twelve (12) shares in Rebel Land and twelve (12) LPUs in the Partnership pursuant to an offer dated June 14, 2018 (the "June 14 Offer"). The June 14 Offer is at the centre of the dispute between the applicant and the respondents on this Application.

[9] The respondent Mill-Gate Holdings Inc. ("Mill-Gate") at all material times was controlled by Mike Milloy who was an indirect shareholder in Rebel Land and LPU holder in the Partnership. Mill-Gate exercised or purported to exercise a right of first refusal, triggered by the

June 14 Offer from GolfNorth Properties, to purchase 10 shares in Rebel Land and 10 LPUs in the Partnership on July 26, 2018, as set forth below.

(ii) Lease Renewal and Lease Application

[10] Although not directly at issue on the application, it is helpful for context to briefly review the issues surrounding the Lease that prevailed at the time of the June 14 Offer.

[11] Negotiations between representatives of GolfNorth Management and the Partnership for the renewal of the Lease commenced in January, 2018. On June 18, 2018 GolfNorth Management gave written notice to the Partnership that it intended to renew the Lease ("Intention to Renew Notice").

[12] On August 10, 2018 counsel for the Partnership wrote to GolfNorth Management advising (a) that the landlord's negotiations with it had concluded on or about July 26, 2018, (b) that the Landlord had accepted an offer to lease commencing February 1, 2019 from Mill-Gate and (c) that the Lease with GolfNorth Management would terminate on January 31, 2019.

[13] The Lease renewal negotiations and the termination of the Lease were the subject of an application commenced by GolfNorth Management in August, 2018 bearing Court file number CV-18-1040 (the "Lease Application"). Ultimately in early October 2018 the Lease Application was settled (but for costs) whereby the Landlord and GolfNorth Management agreed that the Lease be renewed for a further term of five years at an agreed rent.

(iii) GolfNorth Properties' June 2018 Offer to Purchase Shares/LPU's

[14] GolfNorth Management considered the Golf Club to be one of the premium courses in its portfolio of golf courses. As a result it was interested in purchasing an ownership interest in it.

[15] Four (4) days prior to delivery by GolfNorth Management of its Intention to Renew Notice in respect of the Lease, GolfNorth Properties submitted to Rebel Land and the General Partner its June 14 Offer directed to all unit holders by which it offered to purchase a maximum of 12 shares of Rebel Land and 12 LPUs in the Partnership for $255,000 (less debt) for each

share/LPU. Shares in Rebel Land and LPUs in the Partnership are hereinafter collectively referred to as "units".

[16] The dispute on this Application centres around whether GolfNorth Properties' June 14 Offer constituted a "Permitted Offer" as defined in the Limited Partnership Agreement among the limited partners and the General Partner of the Partnership dated July 5, 2001 (the "LPA") and the Shareholders Agreement among the shareholders of Rebel Land (the "Shareholders' Agreement"). The LPA and Shareholders' Agreement are hereinafter collectively referred to as the "Agreements."

[17] The definition of "Permitted Offer" is functionally identical in the two Agreements.

[18] Pursuant to the Agreements, an offer to purchase units that is a Permitted Offer, and which is an offer that the selling unit holder wishes to accept, triggers a right of first refusal process in favour of firstly Rebel Land and the Partnership and thereafter the non-selling unit holders . The right of first refusal provisions stipulate that firstly Rebel Land and the Partnership and then the non-selling unit holders will have the prior right to purchase the units offered by the selling unit holders in response to submission of a Permitted Offer, by delivering an irrevocable purchase notice which must remain open for acceptance by the selling unit holders for a specified period. If no purchase notices are delivered within the stipulated time, the selling unit holders may, within three (3) months, accept the original offeror's offer to purchase.

[19] The Agreements provided that an offer to purchase which is not a Permitted Offer (i.e. a "Non-Permitted Offer") need not be acknowledged by Rebel Land or the General Partner and may not be accepted by any unit holder without the prior written consent of all unit holders.

[20] In summary, if a person (whether that be an existing unit holder or an outside party) offers to purchase one or more units from any unit holder by submitting a Permitted Offer, the right of first refusal process is triggered, whereby the non-selling unit holders have the right to purchase the units of the selling unit holders on the same terms as the Permitted Offer.

[21] If a person makes a Non-Permitted Offer to purchase units, the right of first refusal process is not triggered and the Non-Permitted Offer is only capable of being accepted by a unit holder with the prior written consent of all unit holders.

[22] In order to satisfy the definition of a Permitted Offer in the Agreements, an offer to purchase units must have certain attributes including the following:

(a) it must specify the proposed date of the purchase which shall be not less than 45 nor more than 90 days after the date the offer is delivered;

(b) it must contain the full name, address, telephone and fax particulars of the offeror and the individual who controls the offeror;

(c) it must be open for acceptance for a period of not less than 45 days;

(d) it must not be subject to any conditions or qualifications except for conditions relating to regulatory approval which may be required by applicable law, conditions relating to the ownership of the offered units free and clear of encumbrances, conditions relating to the corporate authority of the unit holder, and the requirement and condition that any purchaser be, or agree to become, a party to the Agreements on closing.

[23] The specific provisions of the definition of Permitted Offer in the Agreements which are in controversy between the applicant and the respondents in this application are as follows (as set out at Section 1 (64) of the Partnership Agreement):

> " "Permitted Offer" means an offer from the Offeror to purchase one or more, but not a fractional interest in any, LPU's of The Petersburg Golf LP from <u>any LPU Holder</u> which offer shall:
>
> (1) set out the number of LPUs that the Offeror proposes to purchase (the "Offered LPUs") from <u>the LPU Holder</u>;
>
> (2) state the cash price in Canadian Dollars which the Offeror is prepared to pay <u>the LPU Holder</u> per share for the Offered LPUs. The price offered to be paid for each of the Offered LPUs must be the same;"
>
> (underlining added).
>
> The corresponding provisions of the Shareholders' Agreement are to the same effect.

[24] The June 14 Offer was on the letterhead of "GolfNorth" and was signed by Shawn Evans as President and CEO of GolfNorth Properties. It was addressed to "Rebel Land Holdings Inc. Attention: Shareholders Rebel Land Holdings Inc. and The Petersburg Golf Limited Partnership Attention: Unit Holders of The Petersburg Limited Partnership." Below the signature of Shawn Evans were twelve spaces stating "The above offer is hereby accepted by the undersigned and holder of ____ Unit(s)," with spaces provided for a date to be inserted together with the name and signature of the individual accepting the offer.

[25] The June 14 Offer stated :

> "This Offer will set out the terms under which a corporation (the "Offeror") to be controlled or directed by GolfNorth Properties Inc. ("GolfNorth") is prepared to purchase up to twelve (12) shares (the "Shares") of Rebel Land Holdings Inc. (the "Corporation") and up to twelve (12) units (LPU's) of The Petersburg Golf Limited Partnership (the "Partnership")."

[26] The June 14 Offer set out the purchase price and the adjustments to which the purchase price would be subject and specified in particular as follows:

> "This Offer is being made to ALL Unit holders and, subject to the provisions of the Corporation's Shareholders Agreement and the Partnership's Limited Partnership Agreement, the Offeror will proceed toward Closing with the holders representing the first 12 Units that accept this Offer."

[27] The closing date was specified to be November 30, 2018 "provided that this date complies with the provisions of both the Limited Partnership Agreement of the Partnership, and the provisions of the Corporation's Shareholders' Agreement. The Closing may be adjusted earlier or later to ensure compliance with both of these agreements."

[28] The June 14 Offer specified that it was conditional upon the units to be acquired being free of all liens, claims and encumbrances and on five matters which mirrored the requirements of the Agreements, namely approval by the Boards of Directors of the Corporation and the General Partner and the Management Committee of the Partnership, any regulatory approval which is required by applicable law, and the offeror becoming a party to the Agreements.

[29] The offer stated that it was open for acceptance until 5 PM on Tuesday, July 31, 2018 (47 days from the date of the offer).

[30] Coincidently with delivery of the June 14 Offer, Mr. Evans sent an email to Ted Schlotzhauer, the holder of 30% of the units and a member of the Management Committee of the Partnership, stating, in part, as follows:

> "I wanted to summarize below the rationale for the way in which our offer is worded.
>
> The term "Permitted Offer" is defined in both the Shareholders' Agreement and the Limited Partnership Agreement. Both agreements state that in order to be a "permitted offer" the offer must be open for acceptance for a period of not less than 45 days. However, hopefully the fact that it's an offer to all partners/shareholders for up to 12 of their units will illicit (sic) some sense of urgency for those that want to sell."

[31] On or about June 18, 2018 David Fedy, corporate counsel to the Partnership, a director and officer of the General Partner, and a member of the Partnership's Management Committee, contacted John Murray, legal counsel for GolfNorth and requested the full name, address, telephone number and fax particulars of the Offeror and the individual who controls the Offeror, being information required to be included in a Permitted Offer and which was missing from the June 14 Offer.

[32] Mr. Fedy deposed in his Affidavit that he explained to Mr. Murray that, without this information, the June 14 offer technically may not qualify as a Permitted Offer.

[33] Mr. Murray responded to Mr. Fedy's inquiry by an email dated June 18, 2018 as follows:

> "As per our discussion please note that the Offer is from GolfNorth Properties Inc. for a corp to be controlled by GolfNorth. GolfNorth will be behind any purchaser and Jim Balsillie will be behind GolfNorth Properties Inc."

(iv) Exercise of Right of First Refusal by Mill-Gate Holdings Inc.

[34] On June 18, 2018 the Management Committee of the Partnership met and concluded that the June 14 Offer was a Permitted Offer pursuant to the Agreements and directed that the process for Permitted Offers required by the Agreements be implemented.

[35] On June 20, 2018, Mr. Fedy, as Secretary-Treasurer of Rebel Land, executed a "Secretary's Notice/General Partner's Notice" (the "Secretary's Notice") addressed to all unit holders, reciting that Rebel Land and the Partnership had received a Permitted Offer to purchase up to 12 shares and 12 LPUs, giving notice of the offer and advising that the recipients each have 10 days to advise if they wish to acquire any or all of the offered shares and LPUs. A copy of the June 14 Offer was appended to the Secretary's Notice. It is noted, that although not raised in submissions, the Secretary's Notice was awkwardly worded by advising that the recipients of the notice have 10 days to advise if they wished to "acquire any or all of the offered shares and LPUs" whereas it should have specified that the recipients have 10 days to advise if they wish to tender or offer some or all of their units in response to the June 14 Offer. This discrepancy appears to have been addressed in the accompanying email from Mike Milloy referred to as follows.

[36] The Secretary's Notice was circulated, along with the June 14 Offer, to unit holders with an email from Mr. Milloy, President, asking all unit holders to review the documents and, if they are interested in tendering their units, to complete the attached form and return it to Mr. Fedy.

[37] By July 9, 2018 Rebel Land and the Partnership had received written notice that holders of 10 units had elected to tender their units in response to the June 14 Offer. These included Mr. Schotzhauer, through his holding corporation Matbridge Investments Ltd. ("Matbridge") representing 7 units, and Art Van Camp, David Hanna and Steve Resnick (through his holding corporation ChudRez), representing one unit each (the "Selling Unit Holders").

[38] As Secretary-Treasurer of each of Rebel Land and the General Partner, Mr. Fedy executed a "Secretary's Notice/General Partner's Notice (the "Selling Notice") on July 11, 2018 directed to "All Other LPU Holders" of the Partnership and "All Other Shareholders" of Rebel Land.

[39] The Selling Notice recited, *inter alia*, that Rebel Land and the Partnership had received a Permitted Offer to purchase up to 12 shares and 12 LP units, that certain selling shareholders and selling LPU holders have agreed to sell a total of 10 units, that the Selling Notice shall constitute an irrevocable offer by the selling unit holders to sell the offered units to the other shareholders, and that Rebel Land and the Partnership wish to provide the Selling Notice to the other unit

holders pursuant to the Agreements, entitling them to match the GolfNorth offer with respect to any or all of the offered units.

[40] The Selling Notice gave notice that the recipients of the Selling Notice shall have 15 days to reply by stating how many of the offered units it desires to purchase.

[41] The Selling Notice was delivered to each of the non-selling unit holders by Mr. Milloy on July 11, 2018.

[42] On July 26, 2018 Mill-Gate delivered to Mr. Fedy a "Purchase Notice" addressed to the secretary of each of the General Partner and Rebel Land stating:

> "Pursuant to the Shareholders Agreement and Partnership Agreement (each as defined in the Selling Notice dated , (sic) Mill-Gate Holdings Inc. shall purchase all of the Offered Shares and Offered LPUs of the above-noted entities, being 10 Offered Shares and 10 offered LPUs, on the same terms and conditions as included in the Golf North (sic) Offer dated June 14, 2018."
>
> The Purchase Notice was executed by Mr. Milloy as President and Director of Mill-Gate.

[43] As set out below, on October 15, 2018 the General Partner and the secretary of Rebel Land formally determined that Mill-Gate had agreed to purchase the 10 units of the Selling Unit Holders in accordance with the Agreements. Pursuant to the Agreements, completion of that purchase was to take place no later than the 30th day following October 15, 2018, namely November 14, 2018.

(v) GolfNorth's October Offers to Purchase

[44] Prior to the foregoing determination by the General Partner and the secretary of Rebel Land, between October 4 and 6, 2018 GolfNorth Properties delivered a fresh offer to purchase to each of the Selling Unit Holders (Matbridge, Art Van Camp, David Hanna and Steve Reznick) (the "October GolfNorth Offers") by which GolfNorth Properties, stated to be a corporation controlled by Jim Balsillie, offered to purchase the units held by each of them (ten (10) in the aggregate) for an aggregate purchase price of $158,000 per unit, which would not be subject to any adjustments, with a closing date of November 29, 2018, subject to the provisions of the Agreements. The only conditions to which the October GolfNorth Offers were stated to be

subject were that the units be free of all encumbrances and upon any regulatory approval required by applicable law.

[45] The October GolfNorth Offers were open for acceptance by the Selling Unit Holders until November 23, 2018.

[46] The October GolfNorth Offers were accompanied by an email to each of the Selling Unit Holders from Mr. Evans which stated, in part, as follows:

> "Upon a detailed review of the shareholders' agreement and limited partnership agreement with our lawyers, we have determined that our June offer to purchase your shares/units did not constitute a "permitted offer" within the meaning of those agreements. We are of the view that Rebel Creek's process that followed our 'non-permitted' offer was inconsistent with the provisions of the above agreements and accordingly, any purported agreement that exists with Mr. Milloy's company to acquire your shares is unenforceable.
>
> We believe that you will find the attached offer much more attractive than our June 2018 offer."

[47] On October 10, 2018 the Management Committee retained Michael Woollcombe as a special independent counsel to the Management Committee in respect of governance matters, the two GolfNorth offers and related matters.

[48] On October 11, 2018 Mr. Fedy delivered a notice of a meeting of the Management Committee for October 15, 2018 for the purposes of considering and acting upon a number of matters, including receipt of Mr.Woolcombe's report regarding the June 14 Offer and regarding the October GolfNorth Offers.

[49] On October 11, 2018 Mr. Schotzhauer sent to Mr. Fedy a copy of his acceptance, on behalf of Matbridge, of the October GolfNorth Offer that he had received. The other Selling Unit Holders Messrs Van Camp, Hanna and Resnick also accepted the October GolfNorth Offer that each of them had received.

[50] At meetings on October 15, 2018 the Board of Directors of Rebel Land and the Board of Directors of the General Partner each approved and ratified the retainer of Mr. Woollcombe as

special independent counsel to the Rebel Land Board, the Management Committee and the Board of the General Partner.

[51] The minutes of the said Board meetings also recited that the secretary of Rebel Land confirmed his formal determination, pursuant to the Agreements, that Mill-Gate had agreed to purchase all of the relevant offered shares of Rebel Land and the offered LPUs of the Partnership.

[52] At its meeting on October 15, 2018 the Management Committee of the Partnership ratified and confirmed the retainer of Mr. Wollcombe to act as special independent counsel to the Management Committee, the Board of the General Partner and the Board of Rebel Land.

[53] The minutes of the October 15, 2018 meeting of the Management Committee (redacted to exclude privileged legal advice) state, *inter alia*, that the committee received Mr. Woolcombe's advice respecting the Purchase Notice of Mill-Gate delivered July 26, 2018 exercising its right of first refusal to purchase 10 units from the Selling Unit Holders and related matters, including what action should be taken by the Partnership, the General Partner and Rebel Land in connection therewith. Mr. Milloy absented himself from this portion of the meeting.

[54] The Management Committee authorized and directed Mr. Woolcombe, on behalf of the Partnership, to write to the relevant parties advising them of the Committee's determinations.

[55] By letters dated October 18, 2018 Mr. Woolcombe wrote to each of the Selling Unit Holders, advising them, *inter alia*, of the following:

(a) at their meetings on October 15, 2018 the Board of Directors of each of the General Partner and Rebel Land formally determined, as contemplated in the Agreements, that Mill-Gate had agreed to purchase all of the 10 offered units and, as a result, pursuant to the Agreements, completion of the purchase and sale of their units is to take place no later than the 30th day following October 15, 2018;

(b) Rebel Land and the Partnership have concluded that the actions of the Selling Unit Holders in purporting to accept the October GolfNorth Offer was contrary to and in breach of the Agreements.

[56] Mr. Woolcombe's letter also put each of the Selling Unit Holders on notice that Rebel Land and the Partneship will hold them personally accountable for all losses, costs or damages

incurred or suffered by them by reason of their breach or attempted breach of the agreements in connection with the October GolfNorth Offer or otherwise.

(vi) Original Application

[57] GolfNorth Properties issued a Notice of Application on October 25, 2018 seeking the following relief:

(a) an Order and Declaration that its June 14 Offer was not a permitted offer in accordance with the Agreements and is therefore improper, unenforceable and of no force and effect;

(b) an Order and Declaration that any offer to purchase the shares and units of Rebel Creek Golf Club submitted by Mill-Gate pursuant to the exercise of any right of first refusal over the June 14 Offer is improper, unenforceable and of no force and effect; and

(c) an Order and Declaration requiring Rebel Land, the Partnership and the General Partner to deliver notice to the shareholders and limited partnership unit holders of the October GolfNorth Offer submitted by GolfNorth to the Selling Unit Holders between October 4 and 6, 2018 as required by the Agreements.

[58] The stated grounds for the application, as set forth in the original Notice of Application, include the following:

(a) the June 14 Offer did not meet the strict requirements of a Permitted Offer;

(b) pursuant to the Agreements, an offer which is not a Permitted Offer need not be acknowledged or considered by the board or any shareholder or LPU holder and may not be accepted by any shareholder or LPU holder without the prior written consent of all the shareholders or LPU holders;

(c) Rebel Land and the Partnership did not secure the written consent of all of the unit holders in support of the June 14 Offer;

(d) as the June 14 Offer was not made in accordance with the provisions of the Agreements with respect to the definition of a Permitted Offer and Rebel Land and the Partnership failed to secure the consent of all of the unit holders with respect to the June 14 Offer, that offer could not be accepted by the Selling Unit Holders;

(e) as the June 14 Offer could not be accepted by the Selling Unit Holders, Mill-Gate was not able to exercise any right of first refusal over GolfNorth's June 14 Offer and Mill-Gate's Purchase Notice was improper and unenforceable;

(f) Rebel Land and the Partnership have not given notice to the unit holders of the October GolfNorth Offers;

(g) GolfNorth and the Selling Unit Holders require an Order and a Declaration that both GolfNorth's June 14 Offer and Mill-Gate's Purchase Notice are improper, unenforceable and null and void as well as an Order and Declaration that Rebel Land and the Partnership give notice to the unit holders of acceptance of the October GolfNorth Offers by the Selling Unit Holders for the purpose of permitting the unit holders the opportunity to exercise any right of first refusal.

(vii) Purported Closing of the Purchase by GolfNorth of Shares/LPUs from the Selling Unit Holders

[59] The Application was served on the respondents and was adjourned on consent on the following dates:

November 15, 2018

November 22, 2018

November 29, 2018

January 3, 2019

January 10, 2019

[60] Rebel Land, the Partnership and the General Partner delivered their Responding Application Record on February 1, 2019, as did Mill-Gate. Mill-Gate delivered an Amended Application Record on February 14, 2019.

[61] GolfNorth Properties delivered its Reply Application Record on February 22, 2019 containing the Reply Affidavit of Mr. Evans dated the same date.

[62] In his Reply Affidavit Mr. Evans revealed for the first time that between November 20 and 23, 2018, while the Application was pending, GolfNorth Properties purported to close the purchase transactions with the Selling Unit Holders pursuant to the October GolfNorth Offers by the delivery by each of them of an "Instrument of Transfer" of the units held by them. Mr. Evans asserted in his Reply Affidavit that the GolfNorth Properties "is now the owner of 10 shares and 10 LPUs."

[63] The purported "closings" of the purchase transactions with the Selling Unit Holders took place in late November, 2018 being three months prior to Mr. Evans' Reply Affidavit. The closings were effected notwithstanding that GolfNorth Properties at the time was seeking an Order and Declaration from the Court requiring Rebel Land, the Partnership and the General Partner to deliver notice to the unit holders of its October GolfNorth Offer, on the stated ground that such an Order and Declaration was necessary for the purpose of permitting the unit holders the opportunity to exercise any right of first refusal.

[64] On cross-examination Mr. Evans, on behalf of GolfNorth Properties, acknowledged that GolfNorth Properties, together with GolfNorth Management Corp., entered into a written Indemnity Agreement with each of the Selling Unit Holders indemnifying and saving them harmless from any losses, damages or liabilities arising from Mill-Gate's "offer to purchase" units and their failure to complete the sale transactions with Mill-Gate.

[65] The Indemnity Agreements were dated October 28, 2018, but were offered to the Selling Unit Holders by GolfNorth Properties on October 23, two days before Mr. Evans swore or affirmed his affidavit in support of the Original Application. His affidavit did not mention the fact that the GolfNorth companies had offered to indemnify the selling unit holders. Mr. Evans acknowledged on cross-examination this "may have been" intentional. He also acknowledged that the Indemnity Agreements, along with the higher purchase price in the October GolfNorth Offers as compared to the June 14 Offer, were intended by GolfNorth Properties to act as incentives to the Selling Unit Holders not to complete the sales to Mill-Gate.

(viii) Amended Notice of Application

[66] On March 22, 2019 GolfNorth Properties filed an Amended Notice of Application by which its claim for an Order and Declaration requiring Rebel Land, the Partnership and General Partner to deliver notice to the shareholders/LPU holders of its October GolfNorth Offer was removed and the following prayers for relief were added:

> 1(f) - An Order and Declaration that the October GolfNorth Offer to the Selling Unit Holders are Permitted Offers pursuant to the Agreements, were accepted by the Selling Unit Holders, and are binding and enforceable;

1(g) – An Order and Declaration that GolfNorth Properties is the rightful owner of 10 shares in Rebel Land and 10 LPUs in the Partnership; and

1(h) – An Order requiring Rebel Land and the Partnership to register the transfer of the shares and LPUs to GolfNorth Properties, recognize the voting rights attaching to the related shares and LPUs and GolfNorth Properties' exercise of those rights.

[67] The Notice of Application, as amended, states that the Application is being brought pursuant to Rule 14.05 of the *Rules of Civil Procedure.* The particular paragraph under sub-rule 14.05(3) is not specified. It would appear that the only paragraphs which may have possible application would be where the relief claimed is:

(d) the determination of rights that depend upon the interpretation of a contract;

(g) a declaration when ancillary to relief claimed in a proceeding properly commenced by a notice of application; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

[68] In response to an inquiry from the Court at the commencement of argument, each of the parties confirmed that they were not taking the position that the whole application or any issue should proceed to trial pursuant to Rule 38.10(1)(b). It was the position of all parties that the application should be decided on the basis of a written record consisting of the affidavit material filed by the parties and the transcripts of cross examinations on the affidavits.

Positions of the parties

(i) Position of the Applicant

[69] In summary, the applicant GolfNorth Properties position is as follows:

(a) its June 14 Offer was not a Permitted Offer as defined in the Agreements as it was not directed to "the LPU Holder" or "the Shareholder" but rather was a global offer made to all shareholders for the purchase of up to 12 shares;

(b) the Agreements required that "the Shareholder" or the "LPU Holder" be named shareholder(s) or LPU Holder(s) to qualify as a Permitted Offer;

(c) there is no evidence that anything in the factual matrix that existed when the Agreements were first created would be of assistance to the Court in interpreting the definition of a Permitted Offer;

(d) the intention of the respondents to treat the June 14 Offer as a Permitted Offer after it was made is not relevant to the determination of whether it was in fact a Permitted Offer;

(e) GolfNorth Properties was aware that the June 14 offer did not meet the requirements of a Permitted Offer and it intended to draft the offer as close to the definition of a Permitted Offer as possible in the circumstances;

(f) evidence of the parties' subsequent conduct is admissible to assist in contract interpretation only if the court concludes, after considering the contract's written text in its factual matrix, that the contract is ambiguous. It says that the definition of a Permitted Offer in the Agreements is not ambiguous;

(g) when admitted, evidence of subsequent conduct must be used cautiously and its weight will vary from case to case;

(h) the actions of the respondents following receipt of the June 14 Offer will not assist the court in determining the appropriate interpretation of a Permitted Offer;

(i) since the June 14 Offer was not a Permitted Offer, Mill-Gate did not have the right to exercise a right of first refusal;

(j) the October GolfNorth Offers meet the definition of a Permitted Offer in both Agreements;

(k) GolfNorth Properties' ownership of the 10 units ought to be recognized by Rebel Land, the Partnership and the General Partner upon compliance with the provisions of sections 9.3(1), (2) and (3) of the Limited Partnership Agreement and 6.3(1), (2) and (3) of the Shareholders Agreement;

(l) GolfNorth Properties has standing to seek to relief which it requests because it is party to the two offers that are the subject matter of the application. Due to the nature of the offers, they are subject to the terms of the Agreements. Although the interpretation of the Agreements is necessary for determination of whether the June 14 Offer is void, it does not remove GolfNorth's standing to seek the relief which it is seeking;

(m) GolfNorth seeks to have an accepted offer to transfer shares, to which it is a party, acknowledged by the respondents Rebel Land, the Partnership and the General Partner in accordance with the terms of the Agreements, given that those respondents have refused to do so;

(n) the Selling Unit Holders also have an interest in a determination as to which of the two GolfNorth Properties offers are binding upon them for the transfer of their shares.

[70] GolfNorth Properties did not pursue in submissions the position advanced in its Factum that, given Mr. Milloy's alleged "ongoing and improper involvement" in the decision of Rebel Land, the Partnership and the General Partner in respect of the June 14 Offer, Mill-Gate ought to be estopped from being able to exercise a right of first refusal in the event that the October GolfNorth Offers are deemed valid. Ms. Davis acknowledged that, should that occur, whether the non-selling unit holders should be granted a right of first refusal pursuant to the Agreements, is within the discretion of the court.

(ii) Position of the respondents Rebel Land, the Partnership and the General Partner

[71] In summary the position of the respondents Rebel Land, the Partnership and the General Partner is as follows:

(a) GolfNorth Properties is not a party to the Agreements and, as such, has no standing to ask the Court to accept its interpretation of provisions in them. The contract cannot confer rights or impose obligations upon a person who is not a party to the contract;

(b) the relief sought by GolfNorth Properties is entirely based on a contractual remedy emanating only from the Agreements;

(c) none of the Selling Unit Holders have provided any evidence in connection with the application, nor have any of them made any complaints regarding the determinations made Rebel Land, the Partnership and the General Partner that their purported acceptances of the October GolfNorth Offers were contrary to and a breach of the agreements and would not be recognized or implemented. No party to the Agreements is before the court asserting a complaint or remedy;

(d) GolfNorth Properties' proposed interpretation of the definition of Permitted Offer in the agreements fails to properly confront an admitted ambiguity. The Agreements do not specifically preclude nor permit making an offer to the unit-holding group at large, as GolfNorth Properties did. It is unclear from the express words whether an offer can be made to any limited partner or shareholder or if it must be made to "the" specific limited partner or shareholder." In order to resolve this ambiguity, the court must turn to the applicable principles of contractual interpretation;

(e) GolfNorth Properties' proposed interpretation would lead to an inequitable and commercially absurd result by denying selling shareholders their ability to sell under

an otherwise compliant Permitted Offer simply because the offer was delivered on a "first come first serve" basis rather than having been directed to specific unit holders;

(f) since there remains a textual ambiguity in the provisions, the subsequent conduct of the parties ought to be considered to determine the parties' intentions and understanding of the Agreements. Rebel Land, the Partnership and the General Partner, on the one hand, and GolfNorth Properties on the other, by their subsequent conduct, acted on the mutual and correct conclusion that the June 14 Offer was a Permitted Offer;

(g) GolfNorth Porperties is estopped from arguing that the June 14 Offer was not a Permitted Offer based upon the doctrine of estoppel by convention. Estoppel by convention requires:

(i) that the parties' dealings must have an been based on a shared assumption of fact or law;

(ii) the party must have conducted itself in reliance on such shared assumption resulting in a change of its legal position; and

(iii) it must be unjust or unfair to allow one of the parties to resile or depart from the common assumption. Accordingly, the party seeking to establish estoppel is to prove the detriment will be suffered if the other party's allowed to resile from the assumption.

(h) the requirements for the application of the doctrine of estoppel by convention have been met. There was a shared assumption between the parties that the June 14 Offer was a Permitted Offer. Rebel Land, the Partnership and the General Partner relied on the shared assumption by presenting the June 14 Offer to the unit holders as a Permitted Offer, followed the right of first refusal process applicable to Permitted Offers, and acted on the shared assumption to its detriment. In addition to acting on the June 14 Offer as a Permitted Offer, they treated the October GolfNorth Offers as void, with the result that the right of first refusal provisions were not followed in relation to it. GolfNorth Properties claims in its Amended Notice of Application that the time for any exercise of the right of first refusal has elapsed, thereby establishing detriment to Rebel Land, the Partnership and the General Partner,

(i) the purported closings under the October GolfNorth Offers are void. By reason of the exercise of the right of first refusal by Mill-Gate under the June 14 Offer, the Selling Unit Holders are precluded from transferring their units to GolfNorth Properties by virtue of the principle of *nemo dat quod non habet*;

(j) the purported closings of the purchase of the Selling Unit Holders' units did not comply with the Agreements, including in particular, the requirement that the right of first refusal provisions be followed, that the necessary approvals of the Management Committee and Board of Directors of the General Partner be secured, and that the required Assumption Agreement be delivered;

(k) GolfNorth Properties comes to court with unclean hands and therefore should not be entitled to equitable relief, in the form of declarations and mandatory orders, that it seeks.

(iii) Position of the Respondent Mill-Gate

[72] In summary the position of Mill-Gate is as follows:

(a) following receipt of the June 14 Offer, Rebel Land and the Partnership determined that it was a Permitted Offer;

(b) Mill-Gate properly exercised its right of first refusal as provided in the Agreements. As of July 9, 2018 the Selling Unit Holders had provided notice of their intention to sell in response to the June 14 Offer. On July 9, 2018 Rebel Land and the Partnership decided that they would not exercise their rights of first refusal. On July 11, 2018 Rebel Land and the Partnership notified the non-selling unit holders that they were now in a position to exercise their own rights of first refusal. On July 26, 2018 Mill-Gate gave written notice to Rebel Land and the Partnership of its intention to exercise its right of first refusal;

(c) pursuant to the Agreements, upon Rebel Land and the Partnership electing not to exercise their rights of first refusal, the Selling Unit Holders offers to sell their units became irrevocable offers to the Non-Selling Unit Holders. Mill-Gate has accepted the Selling Unit Holders' offers, obligating them to sell their units to Mill-Gate on the terms of the June 14 Offer;

(d) the October GolfNorth Offers are invalid as they are offers to purchase units from parties who are no longer able to sell them to GolfNorth Properties;

(e) GolfNorth Properties' allegations against Mr. Milloy of wrongful conduct are baseless.

Privity and the Standing of GolfNorth Properties to Rely upon the Agreements

[73] It is clear that the remedies that GolfNorth Properties seeks against the respondents in the amended Notice of Application, namely declarations and mandatory orders, are founded on alleged breaches of the Agreements by one or more of the respondents, or alternatively, on rights which GolfNorth Properties alleges are conferred on it, and corresponding obligations which are imposed on the respondents, by the Agreements. There is no suggestion that GolfNorth Properties' claims for relief are advanced on any basis other than the Agreements.

[74] GolfNorth Properties is not a party to either Agreement.

[75] It is a well-accepted general principle of contract law that no one but the parties to a contract can be bound by it, or entitled under it. This principle is known as that of privity of contract (see *Greenwood Shopping Plaza Ltd. v Neil J. Buchanan Ltd.* [1980] 2 S.C.R. 228, at para. 9).

[76] Accordingly, unless an exception to the principle of privity is found to apply, GolfNorth Properties has no standing to seek a remedy in reliance on the terms of the Agreements, to which it is a stranger.

[77] GolfNorth Properties did not cite any specific authority for the proposition that the doctrine of privity should not apply to the circumstances of its application, but submits two bases upon which the Court should find that to be the case:

(1) GolfNorth is a party to the two offers that are the subject matter of the application. The offers are subject to the terms of the Agreements as, to be effective, they must comply with the Agreements;

(2) the "general law of privity";

[78] The Supreme Court of Canada in *Greenwood* at para. 13 identified two recognized exceptions to the privity principle – agency and trust. There are also various statutory exceptions to the law of privity.

[79] In Waddams, *The Law of Contracts* (7th ed.) the author noted, at para. 291, that the courts have, on occasion, avoided the rule of privity by constructing a collateral contract. Examples given include:

(a) if a number of competitors enter a race, each agreeing with the organizers to obey the rules, it has been held that each competitor similarly agrees with every other (*The Satanita,* [1895] P.248 (C.A.) affd. [1897] A.C. 59);

(b) where motor dealers each agreed with a manufacturer to certain restrictions, a contract was formed between each dealer and every other (*McCannell v. Mabee-McLaren Motors Ltd.*, [1926] 1 D.L.R. 282 (B.C.C.A.)); and

(c) tenants of a shopping centre, covenanting individually with the landlord to restrict activities to certain kinds of businesses, can enforce covenants against each other (*Re Spike and Rocca Group Ltd.* (1979), 107 D.L.R. (3d) 62 (P.E.I.S.C.)).

[80] In my view the exception respecting collateral contracts has no application to the case at bar. The success of GolfNorth Properties' application depends upon a finding that the June 14 Offer was not a Permitted Offer and therefore was not capable of triggering the exercise of a right of first refusal among the non-selling unit holders. GolfNorth Properties' June 14 Offer was never accepted by any Selling Unit Holder and GolfNorth Properties therefore never became a party to any contract pursuant to that offer.

[81] It is not correct, as GolfNorth Properties argues in its Reply Factum, that "to be effective" its offers must "comply" with the Agreements. The parties to the Agreements, being all of the unit holders, agreed that there are only two circumstances in which a transfer of units may be effected – (1) following submission of a "Permitted Offer" (as defined) which triggers a right of first refusal process, or (2) by acceptance of a Non-Permitted Offer, provided all unit holders consent. Either type of offer may be "effective" according to the rules established by the parties in the Agreements. The fact that a non-party may make an offer to purchase units, the treatment of which will depend upon application of the rules established among the parties to the Agreements, does not confer rights pursuant to the Agreements on the non-party offeror on the basis of collateral contract.

[82] It is apparent that the "collateral contract" exception has been applied where a number or group of parties contract with a single common contracting party, such as a landlord or manufacturer, on identical terms which benefit each of them. The "collateral contract" exception operates to allow enforcement of the covenants of the common contracting party by the other parties against one another. The rationale supporting the exception to the privity rule based upon "collateral contract," as exemplified by the cases referred to above, has no application to the case at bar.

[83] GolfNorth Properties' reference to the "general law" of privity must be presumed to be a reference to the "principled exception" to the privity principle derived from the cases of *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 2 S.C.R. 299 (S.C.C.) and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108 (S.C.C.)

[84] *Fraser River* involved an action brought by the owner of dredging equipment against a charterer to whom it had chartered the equipment. A barge forming part of the equipment sunk while it was in the possession of the charterer due to its negligence. The owner recovered on its claim for the loss from its insurer and agreed with the insurer to pursue legal action against the charterer. The issue was whether the charterer, as a non-party, was entitled to rely upon the "waiver of subrogation" clause in the contract of insurance between the owner and its insurer in defence of the action.

[85] The Supreme Court of Canada found that a "principled exception" to the common law doctrine of privity of contract has been introduced by the caselaw.

[86] At para. 32 the Court observed that application of the principled exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, the determination in general terms is made on the basis of two critical and cumulative factors:

> (1) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision, and
>
> (2) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[87] In the case of *Coast-to-Coast Industrial Development Co. v. 1657483 Ontario Inc.,* 2010 ONSC 2011 (S.C.J.) Strathy, J. (as he then was) observed at para. 35 that both *London Drugs* and *Fraser River* recognized that "the third party beneficiary rule can stand in the way of sound commercial practice where business people agree to extend the benefit of the contract to third parties" and that the Supreme Court, in those cases, had "crafted what was intended to be a limited exception to the law of privity of contract, where the parties to a contract agree, expressly or impliedly, to extend the benefit of their contract to a third party."

[88] Strathy, J. also found at para. 44 that, while the principled exception to privity of contract is not restricted to defensive provisions, it would take very clear language to find that a contracting party has assumed a liability to a third party, particularly where that liability is potentially unlimited.

[89] In the later case of *Brown v Belleville (City)*, 2013 ONCA 148 the Court of Appeal made the following observations in *obiter* concerning the law of privity generally:

> It is important to note at the outset that the doctrine of privity of contract is of considerably diminished force in Canada as a continuing principle of contract law. It has been subject to a wealth of repeated academic and judicial criticism, leading to frequent calls for law reform in Canada and elsewhere. See for example, *London Drugs* at pp. 418-26; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1993] 3 S.C.R. 108 (S.C.C.), at para. 26; *McCamus*, at pp. 296-301. Indeed, several Commonwealth jurisdictions have abrogated the privity doctrine entirely, or in specific contexts, by statute. In other instances, the reach of the doctrine has been "significantly undermined by a growing list of exceptions to the rule": *McCamus*, at p. 299. See also Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexus Canada Inc., 2012) at p. 229. Several of the leading cases cited by the parties on this appeal afford abundant evidence of the relaxation of the ambit of the doctrine in particular cases. Thus, while the doctrine survives in Canada, it persists only in weakened form.

[90] I do not read the Court's *obiter* comments in *Brown* as abrogating or dispensing with the law of privity, or altering the test laid down by the Supreme Court of Canada in *Fraser River* for application of the "principled exception" to the privity rule. Indeed, the Court in *Brown* went on to apply the principled exception test to the facts of that case at paras. 95-111.

[91] In my view, the first branch of the "principled exception" test is not satisfied in the case at bar. There is no evidence that the parties to the Agreements intended to extend the benefit in question under the Agreements to a non-party seeking to rely on the contractual provision. The benefit is question is the right of a non-party offeror to seek a remedy based upon a complaint that its offer to purchase units was treated as a Permitted Offer, thereby triggering the right of first refusal process mandated by the Agreements.

[92] The question of whether the parties to the Agreements intended to extend to a stranger the benefit of seeking a remedy arising from the characterization of an offer to purchase units submitted by that stranger must be determined from a consideration of the Agreements in their entirety.

[93] GolfNorth Properties has pointed to no such expressed intention in the Agreements, nor has it pointed to any basis to imply such an intention to the parties to the Agreements.

[94] Moreover, the recitals to the Agreements are instructive in discerning the purpose and intent of the Agreements.

[95] The recitals to the Shareholders 'Agreement state as follows:

> (A) The Shareholders are the owners of all of the issued shares in the capital of Landco (Rebel Land);
>
> (B) Landco intends to or has purchased a parcel of land suitable for use as a golf course;
>
> (C) Each of the Shareholders wishes to enter into this Agreement to provide for the conduct of the business affairs of Landco, to provide for restrictions on the transfer and ownership of shares in the capital of Landco and to govern their relationship as shareholders of Landco with the intent that it shall constitute a unanimous shareholders agreement.

[96] The recitals to the Limited Partnership Agreement are to similar effect and provide as follows:

> (A) The General Partner and the Limited Partner (each person who subscribes for a LPU and is accepted as a Limited Partner in the Partnership) have agreed to form a limited partnership… pursuant to the [Limited Partnerships Act] in order to manage the construction and operation of an 18-hole golf course and other facilities comprising the Project (as defined) in accordance with the provisions of this Agreement;
>
> (B) The parties are desirous of determining their rights and responsibilities as between themselves, and have deemed it expedient and advisable to enter into this Agreement for the purposes of establishing and recording the relationship between them and their respective rights and obligations with relation to the matters hereinafter set forth.

[97] The Shareholders' Agreement and the Limited Partnership Agreement both contain, at section 1.11, a provision stating that the recitals are incorporated into and form a part of each agreement.

[98] It is evident that the shareholders of Rebel Creek and the General Partner and Limited Partners of the Partnership entered into the Agreements in order to govern the relationships among them exclusively and to set forth their rights and obligations as shareholders and partners. As specified in the recitals, the Agreements were intended govern the internal affairs of Rebel

Land and the Partnership. There is no indication that the parties to the Agreements intended to extend any benefits or rights under the Agreements to any non-party or parties.

[99] Section 1.1 (56) of the Limited Partnership Agreement provides that the term "Offeror" for the purposes of the agreement (including for the purpose of the definition of "Permitted Offer" in section 1.1 (64)) has the meaning ascribed in Section 9.5. That section provides that an Offeror may be any "Person." "Person" has the broadest possible definition in section 1.1. (65), including "any legal entity, however designated or constituted." The Shareholders' Agreement is to the same effect.

[100] It is therefore clearly contemplated that an offer may be made by a party to the Agreements or by a non-party. Notwithstanding this, neither agreement expressly extends or confers any rights or benefits to a non-party offeror.

[101] To infer an intention to the parties to extend the benefit of being entitled to seek a remedy based upon the characterization of an offer to purchase units submitted by a stranger to that stranger would create the potential for conflicting obligations being owed by Rebel Land, the Partnership and the General Partner to one or more parties to the Agreements on the one hand and to the stranger on the other. I do not accept that the parties, in entering into the Agreements, intended to create the potential for such conflicting obligations.

[102] In my view, the parties to the Agreements intended that any right to seek a remedy based on an alleged mischaracterization of an offer as a Permitted Offer would be reserved to a party or parties to the Agreements and would not extend to a stranger to the Agreements.

[103] In this case no party to the Agreements has made any complaint or sought any remedy resulting from the characterization by Rebel Land, the Partnership or the General Partner of the June 14 Offer as a Permitted Offer.

[104] Moreover, I agree with the observation of Strathy, J. in *Coast-to-Coast* that it would take very clear language to find that a contracting party (in this case Rebel Land, the Partnership or the General Partner) has assumed a liability to a third party. I find no such clear language, or

indeed any language, in the Agreements to support the assumption of liability in favour of GolfNorth Properties, a stranger to the Agreements.

[105] I therefore find that the first factor of the test for application of the principled exception to the privity rule has not been satisfied. Consideration of the second factor of the test in *Fraser River* is dependent upon the first factor being satisfied. In light of my finding that it has not been satisfied, it is not necessary to consider the second factor.

[106] GolfNorth Properties, as a non-party to the Agreements, therefore had no standing to bring and maintain the application and it must therefore be dismissed.

Meaning of "Permitted Offer" in the Agreements

[107] In the event that I am wrong with respect to the privity and standing issue, it would be useful for a determination to be made with respect to the proper interpretation of the term "Permitted Offer" in the Agreements.

[108] By way of background, it useful to review the context of the interpretation exercise.

[109] As indicated above, an Offer to purchase units which is not a Permitted Offer may only be accepted by a unit holder seeking to sell his or her units if all of the unit holders consent.

[110] It must be inferred that GolfNorth Properties intended its June 14 Offer to be acted upon by Rebel Land, the Partnership, the General Partner and the unit holders as a Permitted Offer pursuant to the Agreements. The evidence indicated that management of GolfNorth Properties had familiarized themselves with the relevant provisions of the Agreements and must therefore have been fixed with knowledge that a Non-Permitted Offer would be incapable of acceptance without the consent of all of the unit holders. There is no evidence that GolfNorth Properties sought or obtained the consent of all of the unit holders to the June 14 Offer either before or after its submission.

[111] Although in its affidavit material and in the grounds stated in the Amended Notice of Application GolfNorth Properties suggested that Rebel Land, the Partnership and/or the General Partner had an obligation to seek the consent of all of the unit holders upon receipt of the June 14

Offer, no contractual or other basis for such an obligation was indicated and the argument was not pursued in submissions. I find that there is no provision in the Agreements obligating Rebel Land, the Partnership and/or the General Partner to solicit or obtain the consent of the unit holders to an offer to purchase units submitted by any offeror. Moreover there is no evidence that GolfNorth Properties ever requested Rebel Land, the Partnership and/or the General Partner to solicit the consent of the unit holders to the June 14 Offer.

[112] It is clear that GolfNorth Properties submitted the June 14 Offer in an effort to achieve its objective to acquire an ownership interest in the Golf Club. It knew that the June 14 Offer would only be effective to potentially achieve that objective if it were treated by Rebel Land, the Partnership and/or the General Partner as a Permitted Offer. The fact that GolfNorth Properties' position was that the June 14 Offer should be treated as a Permitted Offer was made clear by Mr. Evans' email to Mr. Schlotzhauer which accompanied the offer, advising that the June 14 Offer was structured in a way which "will illicit (sic) some sense of urgency for those that want to sell." Only a Permitted Offer would be capable of eliciting a response from unit holders interested in selling in the absence of consent of all the unit holders.

[113] GolfNorth Properties never communicated to Rebel Land, the Partnership and/or the General Partner that it did not wish to have its June 14 Offer treated as a Permitted Offer, thereby triggering the right of first refusal process. I am unable to accept that GolfNorth Properties intended its June 14 Offer to have no legal effect.

[114] It was only approximately 40 days after Mill-Gate delivered its Purchase Notice to exercise its right of first refusal, thereby blocking GolfNorth Properties' attempt to acquire an ownership interest in the Golf Course, that GolfNorth Properties reversed its earlier position that the June 14 Offer should be treated as a Permitted Offer and took the position, in submitting its October GolfNorth Offer to the Selling Unit Holders, that its June 14 Offer was not a Permitted Offer and was therefore void. The basis for this position was not set forth in its covering email to the Selling Unit Holders. Neither was it set forth in its Original Notice of Application or in its Amended Notice of Application.

[115] The basis for GolfNorth Properties' position in this respect appears to have been first communicated in its Factum delivered April 5, 2019 which stated at para. 62 that the June 14 offer "was not a Permitted Offer as it was not directed to "the LPU Holder" or "the Shareholder but rather, was a global offer made to *all* shareholders for the purchase of *up to 12* shares, contrary to the definition of a Permitted Offer."

[116] The issue is therefore whether the definition of Permitted Offer in the Agreements, by the use if the phrases "any LPU Holder (or Shareholder)" and "the LPU Holder (or Shareholder)" in reference to the offeree, is such that, to be a Permitted Offer, an offer must be made to *one* named unit holder, or whether an offer may be made to two or more (or all) unit holders.

[117] GolfNorth Properties takes the position that there is no ambiguity in the definition of Permitted Offer in the Agreements and that the former interpretation of the provision is the only available one.

[118] As indicated above, Rebel Land, the Partnership and the General Partner take the position that the definition is ambiguous on the basis that an offer to purchase made to the unit holders at large is not precluded by the definition of a Permitted Offer and it is unclear from its express words whether an offer can be made to any unit holders or if it must be made to "the" specific unit holder.

[119] The principles governing the interpretation of a buy-sell provision of a shareholders' agreement very usefully summarized by L.A. Pattillo, J. in the case of *Sandiford v. 21045887 Ontario Inc.*, 2012 ONSC 5825 (S.C.J.) at paras. 44 – 47 as follows:

> (a) the meaning of a shareholders agreement is determined in accordance with the general rules governing contractual interpretation (See: *Canadian Business Corporation Law*, Kevin McGuinness, 2nd ed. (LexisNexis: 2007) at p. 1215);
>
> (b) a contract is to be interpreted in accordance with the intention of the parties at the time they entered into the agreement, having regard to the words the parties used in the provisions of the contract as a whole (see *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at pp. 899 - 901; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.));

(c) where the words under consideration are clear and unambiguous on their face, it is unnecessary to consider any extrinsic evidence in the interpretation exercise. However, in the event there is ambiguity, it is permissible to consider the circumstances in which the agreement was signed in interpreting the words. This is called the "factual matrix";

(d) commercial contracts must be interpreted in accordance with sound commercial principles and good business sense. An interpretation that would result in a commercial absurdity must be avoided (See *Consolidated-Bathurst* at pp. 901 – 902).

[120] I do not accept GolfNorth Properties' assertion that the term "shareholder" or "LPU Holder" (singular) when is used in a buy-sell provision of a shareholders' or partnership agreement is necessarily free of ambiguity and must be read in the singular only.

[121] The issue in *Sandiford* concerned the interpretation of a "shotgun" buy-sell provision in a shareholders' agreement which provided, *inter alia*, that "any Shareholder, may initiate a sale of the shares to the other Shareholders by giving written notice of sale to all of the other Shareholders…" (underlining added). The respondent in that case submitted that the wording of the shareholders' agreement required, by its wording, that only a single shareholder could initiate a sale of shares under the shotgun provision. Since the shotgun was initiated by two shareholders together holding 50% of the shares it did not strictly comply with the provisions of the agreement and was therefore void.

[122] At para. 49 Pattillo, J. held that, when the words of the provision are considered not only within the provision itself, but also in light of the shareholders agreement as a whole and in the context in which the shareholders agreement was made, it was not clear whether the word "shareholder" is meant to be read in the singular or plural, and that the term "shareholder" is clearly capable of being read in either the singular or the plural.

[123] GolfNorth Properties argues in the present case that the Agreements do not address the process should there be an over-subscription of tendered units in response to an offer like the June 14 Offer made by it. For example, the Agreements did not provide guidance had Mr. Milloy, who owned 3.5 units, tendered his units, resulting in an over-subscription of 1.5 units. In contrast, the Agreements expressly provides for a process should there be an over-subscription with respect to the exercise of the right of first refusal. GolfNorth Properties argues that a

conclusion that an offer that is not directed to a specified seller is a Permitted Offer could result in uncertainty which was not intended by the express requirements of the Agreements.

[124] I am unable to accept this submission. The June 14 Offer was structured in such a way as to eliminate any problem associated with an over-subscription by providing that, although the offer was being made to all unit holders, "the Offeror will proceed towards closing with the holders representing the first 12 units that accept this Offer."

[125] I am unable to find that the interpretation sought by Rebel Land, the Partnership and the General Partner would result in a commercial absurdity or would be inconsistent with sound commercial principles.

[126] The commercial purpose behind the Permitted Offer provisions is to allow unit holders to enjoy liquidity by allowing them to sell their units in response to a *bona fide* offer that has certain required attributes designed to ensure fairness to all non-selling unit holders, provided that all non-selling unit holders first have the opportunity to exercise the right of first refusal to purchase the units that the selling unit holders wish to sell. The right of first refusal process in this way affords the non-selling unit holders a measure of protection against having to accept the introduction of a new unit holder against their will. The provision respecting Non-Permitted Offers simply allows a sale of units on an expedited basis, by-passing the right of first refusal process, where all unit holders consent.

[127] In my view, permitting an offeror to submit a global offer to all unit holders on a "first-come first serve" basis, as was done by GolfNorth Properties with its June 14 Offer, rather than requiring it to go through a piecemeal process of making individual offers to individual unit holders, is not inconsistent with the commercial purpose behind the Permitted Offer provisions.

[128] I find that there is an ambiguity in the definition of a Permitted Offer in the Agreements on the issue of whether an offer must be made to a single offeree to qualify as a Permitted Offer or whether it may be made to multiple offerees on a first come, first serve basis. It is therefore permissible to consider extrinsic evidence to aid in the interpretive exercise.

[129] The parties are agreed that the record in this proceeding is devoid of any evidence from the original parties to the Agreements respecting the factual matrix that existed at the time that the Agreements were entered into that would assist in resolving the ambiguity.

[130] In the case of *Shewchuk v. Blackmont Capital Inc.,* 2016 ONCA 912 (C.A.) it was held that evidence of subsequent conduct of the parties to a contract is admissible to assist on the interpretative exercise, but only if the contract remains ambiguous after considering the text and its factual matrix (see para. 46). This is because there are dangers associated with reliance on evidence of subsequent conduct. These dangers include the fact that parties' behaviour in performing their contract may change over time which would permit the interpretation of the contract to fluctuate, that evidence of subsequent conduct may itself be ambiguous, and that over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract (see paras. 43-45).

[131] I do not find any of these dangers to be present in the case at bar.

[132] In Hall, *Canadian Contractual Interpretation Law* (Markham: LexisNexis, 2006) at p. 70 it is stated:

> The contextual approach to contractual interpretation followed by Canadian courts gives priority to the words chosen by the parties and will not allow context (including subsequent conduct) to overwhelm the words. However, when the parties have not expressed themselves clearly in words such that the best evidence of their mutual intention (the words they chose to govern their relationship) is inconclusive, resort can be had to the next-best available evidence, which is their own post-contractual conduct.

[133] This suggests that the subsequent conduct to be considered as an interpretive aid of the contracting parties' intention is that of the contracting parties themselves and not that of a stranger to the contract.

[134] In that context it is noted that the management committee of the Partnership made the determination that the June 14 Offer was a Permitted Offer as defined in the Agreements and directed that the right of first refusal process be followed and that no unit holder made any complaint with that determination. This, in my view assists in the resolution of the ambiguity in

favour of an interpretation that an offer may be made to two or more unit holders on a first come first serve basis.

[135] If the post-contractual conduct of GolfNorth Properties, a non-party to the Agreements, is to be considered, it is noted that it sought to have the June 14 Offer treated by Rebel Land, the Partnership and the General Partner as a Permitted Offer.

[136] I therefore find, based upon application of the principles governing the interpretation of commercial contracts, that the June 14 Offer was a Permitted Offer which triggered the right of first refusal process, resulting in a binding agreement between Mill-Gate for the purchase of the 10 units of the Selling Unit Holders.

[137] Thus, even if I am wrong that GolfNorth Properties lacks standing to bring the application by operation of the law of privity of contract, the application must nevertheless be dismissed.

Generally

[138] In light of these findings it is not necessary for me to consider whether GolfNorth Properties is estopped from claiming the relief which it seeks based upon the doctrine of estoppel by convention, or should be found to be disentitled to the relief sought on the basis of an allegation that it comes to the court with unclean hands.

Costs

[139] The parties have each filed Bills of Costs on the completion of submissions as requested by the Court.

[140] The parties are strongly urged to agree upon costs. If they are unable to do so, the respondents may make written submissions as to costs within 14 days of the release of these Reasons for Judgment. The applicant has 10 days after receipt of respondents' submissions to respond and the respondents have a further 5 days to reply. Each party's initial written submissions shall not exceed five double-spaced pages, exclusive of Offers to Settle, and authorities, while the respondents reply submissions, if any, shall not exceed 3 double-spaced

pages. All submissions shall be forwarded to me at my chambers at 85 Frederick Street, 7th Floor, Kitchener, Ontario N2H 0A7. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

D. A. Broad, J.

Released: June 10, 2019

CITATION: GOLFNORTH PROPERTIES INC. v. REBEL LAND HOLDINGS INC., 2019 ONSC 3479
COURT FILE NO.: CV-18-1354
DATE: 2019-06-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GOLFNORTH PROPERTIES INC

Applicant

- and -

REBEL LAND HOLDINGS INC., THE PETERSBURG GOLF LIMITED PARTNERSHIP, 1471300 ONTARIO CORPORATION and MILL-GATE HOLDINGS INC.

Respondents

REASONS FOR JUDGMENT

D.A. Broad, J.

Released: June 10, 2019

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Commercial Tenancies Act*, R.S.O. 1990, C. L.7, s. 32.**

Exemption of goods from seizure, property of under-tenant, etc.
Definition

32. (1) In this section,

"under-tenant" means a tenant to whom the premises or some part of the premises in respect of which rent is distrained for have been sub-let with the consent of the superior landlord or in default of such consent under the order of the judge of the Superior Court of Justice as provided by subsection 23 (2). R.S.O. 1990, c. L.7, s. 32 (1); 2006, c. 19, Sched. C, s. 1 (1).

Declaration by boarder, under-tenant, or lodger that immediate tenant has no property in goods distrained

(2) If a superior landlord distrains or threatens to distrain any goods or chattels of an under-tenant, boarder or lodger for arrears of rent due to the superior landlord by the superior landlord's immediate tenant, the under-tenant, boarder or lodger may serve the superior landlord, or the bailiff or other person employed by the superior landlord to levy the distress, with a statutory declaration made by the under-tenant, boarder or lodger setting forth that the immediate tenant has no right of property or beneficial interest in such goods or chattels, and that they are the property or in the lawful possession of the under-tenant, boarder or lodger, and also setting forth whether any and what amount by way of rent, board or otherwise is due from the under-tenant, boarder or lodger to the immediate tenant, and to the declaration shall be annexed a correct inventory, subscribed by the under-tenant, boarder or lodger, of the goods and chattels mentioned in the declaration, and the under-tenant, boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by the superior landlord, the amount if any, so due, or so much thereof as is sufficient to discharge the claim of the superior landlord. R.S.O. 1990, c. L.7, s. 32 (2).

Penalty for improper levy

(3) If the superior landlord, bailiff or other person, after being served with the declaration and inventory, and after the under-tenant, boarder or lodger has paid or tendered to the person the amount, if any, which by subsection (2) the under-tenant, boarder or lodger is authorized to pay, levies or proceeds with a distress on the goods or chattels of the under-tenant, boarder or lodger, the superior landlord, bailiff or other person is guilty of an illegal distress, and the under-tenant, boarder or lodger may replevy the goods or chattels in any court of competent jurisdiction, and the superior landlord is also liable to an action, at the suit of the under-tenant, boarder or lodger, in which the truth of the declaration and inventory may be inquired into. R.S.O. 1990, c. L.7, s. 32 (3). (emphasis added)

***Warehouse Receipts Act*, R.S.O. 1990, C. W.3, s. 15**

Attachment or levy upon goods for which a negotiable receipt has been issued

15 Where goods are delivered to a storer by the owner or person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable receipt is issued for them, they cannot thereafter while in the possession of the storer, be levied under an execution, unless the receipt is first surrendered to the storer. R.S.O. 1990, c. W.3, s. 15. (emphasis added)

***Planning Act*, R.S.O. 1990, C. P.13, subs. 42(1), (6)**

Conveyance of land for park purposes

Definitions

42 (0.1) In this section,

"dwelling unit" means any property that is used or designed for use as a domestic establishment in which one or more persons may sleep and prepare and serve meals; ("logement")

"effective date" means the day subsection 28 (1) of the *Smart Growth for Our Communities Act, 2015* comes into force. ("date d'effet") 2015, c. 26, s. 28 (1).

Conveyance

(1) As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes. R.S.O. 1990, c. P.13, s. 42 (1).

(2) REPEALED: 2015, c. 26, s. 28 (2).

Payment in lieu

(6) If a rate authorized by subsection (1) applies, the council may require a payment in lieu, to the value of the land otherwise required to be conveyed. 2015, c. 26, s. 28 (4).

***Toronto Municipal Code*, § 415-22 and 24**

§ 415-22. Conveyance of land for parks purposes. [Amended 2010-08-27 by By-law 1020-2010]

As a condition of development of land the owner of the land shall convey or cause to be conveyed to the City, land for park or other public recreational purposes in the following manner:

A. For residential uses, land equal to 5 percent of the land to be developed.

B. For non–residential uses, land equal to 2 percent of the land to be developed.

C. Where the development of a single parcel of land is proposed for both residential uses and non-residential uses, the respective rates set out in §§ 415-22A, 415-22B and 415-23 will be allocated proportionally according to the floor space of the respective uses.

§ 415-24. Cash-in-lieu of land dedication. [Amended 2010-08-27 by By-law 1020-2010]

A. Despite § 415-22, where the size, shape or location of land proposed for parkland dedication is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land.

B. Despite § 415-23, where the size, shape or location of land proposed for parkland dedication in parkland acquisition priority area is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land, provided:

(1) that the value of the cash-in-lieu does not exceed:

(a) Ten percent of the value of the development site, net of any conveyances for public road purposes, for sites less than one hectare in size.

(b) Fifteen percent of the value of the development site, net of any conveyances for public road purposes, for sites one hectare to five hectares in size.

(c) Twenty percent of the value of the development site, net of any conveyances for public road purposes, for sites over five hectares in size.

(2) In no case, will the residential parkland dedication, cash-in-lieu or combination thereof, be less than 5 percent of the development site or the value of the development site, net of any conveyances for public road purposes.

BETWEEN		Court File No. CV-16-11409-00CL
CANADIAN IMPERIAL BANK OF COMMERCE Applicant	- and -	URBANCORP (LESLIEVILLE) DEVELOPMENTS INC. et al. Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM AND AUTHORITIES OF TERRA FIRMA CAPITAL CORPORATION

(Receiver's motion for directions re: park levy adjustments – returnable June 19, 2019)

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