CITATION: PricewaterhouseCoopers Inc. v. Northern Citadel, 2023 ONSC 37
COURT FILE NO.: CV-22-00685200-00CL
DATE: 2023-01-19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF S. 101 OF THE *COURTS OF JUSTICE ACT, R.S.O., 19990 c. C.43,* AS AMENDED AND IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED**

PRICEWATERHOUSECOOPERS INC. (solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

AND

NORTHERN CITADEL CAPITAL INC., ONE8ONE DAVENPORT INC. and **181 DAVENPORT RETAIL INC.**

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Grant Moffat and Adam Driedger*, for PricewaterhouseCoopers Inc.

Ewa Krajewska, David Postel and Angela Lee, for Northern Citadel Capital Inc., One8One Davenport Inc., and 181 Davenport Retail Inc.

John Macdonald and Adam Sherman, for Richter Inc., proposed Receiver

Sean Pierce, for Non-Party, Khashayar Khavari

HEARD: October 31, 2022

ENDORSEMENT

Introduction

[1] PricewaterhouseCoopers Inc. ("PwC"), court-appointed Receiver and Manager of Bridging Finance Inc. ("BFI") and certain related entities and investment funds (in such capacity, the "Applicant" or the "Bridging Receiver"), seeks an order (the "Receivership Order") appointing Richter Inc. ("Richter") as receiver and manager (in such capacity, the "Receiver"), of all of the current and future assets, undertakings and properties (the "Property") of each of Northern Citadel Capital Inc., ("Northern Citadel"), One8One Davenport Inc. ("One8One") and 181 Davenport

Retail Inc. ("181 Retail") and together with Northern Citadel and One8One, (the "Respondents"), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* ("BIA") and section 101 of the *Courts of Justice Act* ("CJA").

[2] The application arises from an outstanding loan from BFI that was used for the development of a condominium project at 181 Davenport Road in Toronto (the "Davenport Project").

[3] Northern Citadel and One8One, do not oppose the application. However, they take the position that the form of relief in relation to the appointment of the Receiver is overly broad and unjustified.

[4] 181 Retail opposes the application. 181 Retail contends that it had nothing to do with the Davenport Project. Its position is that it simply holds title to a unit within the Davenport Project that is used as a sales presentation gallery for another project under development at Bloor and Yonge in Toronto (the "1 Bloor Project"). 181 Retail contends that BFI advanced funds for improvements to that unit under an Amending Agreement to the underlying Loan Agreement concerning the Davenport Project. BFI then obtained security against 181 Retail over the gallery. Those funds have since been repaid in full and 181 Retail contends it was removed as guarantor and obligor of the loan pursuant to a subsequent amending agreement. 181 Retail also contends that BFI agreed to discharge its security and instructed its counsel to do so, but BFI went into receivership before this was completed. 181 Retail contends that the appointment of a receiver over 181 Retail would not be just in these circumstances.

[5] The Respondents also reference that the Applicant seeks sweeping investigative powers for its proposed receiver, noting that the Applicant claims that, absent these powers, its "ability to recover on the Loan is at risk". The Respondents contend that the Applicant offers no evidence for finding that there is any such risk and although the Applicant claims these powers are also needed to discern the true state of affairs of the Respondents, the Applicant falls well short of demonstrating that the investigative powers it seeks are necessary or appropriate.

[6] The Respondents also contend that the Applicant's request to empower its proposed receiver to assign the Respondents into bankruptcy is unjustified.

[7] In response, the Bridging Receiver submits that the position and arguments asserted by 181 are contradicted by the express terms of the applicable documents and should be disregarded.

[8] The Applicant's evidentiary record consists of two affidavits of Tyler Ray, sworn on August 8, 2022, and September 20, 2022. The Respondent's evidentiary record consists of the affidavit of Sam Mizrahi, sworn October 13, 2022, and a written response to interrogatories by David Sharpe dated October 26, 2022.

Facts

[9] By Order of the Court dated April 30, 2021, PwC was appointed as the Bridging Receiver. The appointment was made pursuant to section 129 of the *Securities Act* upon application by the Ontario Securities Commission.

[10] As detailed in the Bridging Receiver's various reports, Bridging's investors are facing significant losses on their investments in the Bridging Funds (as defined in the Reports).

[11] One of the loans in Bridging's portfolio is the Loan (defined below) made by BFI on behalf of certain of the Bridging Funds to Northern Citadel and certain related entities. The loan is currently past maturity and is in default. On May 12, 2022, the Bridging Receiver issued the demand letters and BIA notices to the Respondents who have failed to make any payments in reduction of the Loan.

[12] Each of the Respondents is a corporation incorporated under the laws of Ontario. Sam Mizrahi was listed as the sole director of each of the Respondents up to May 15, 2022, three days after the Bridging Receiver delivered the Demand Letters and BIA notices to Mr. Mizrahi. Mr. Mizrahi remains listed as the sole officer of each of the Respondents.

[13] Pursuant to a loan agreement, BFI, as agent (in such capacity, the "Agent") on behalf of Bridging Income Fund LP and the related investment funds from time to time acting as lender (collectively, the "Lender") made available to Northern Citadel, Mizrahi Inc. ("MI") and 2495159 Ontario Inc. ("249 Ontario") and together with Northern Citadel and MI, the "Borrower") a non-revolving term credit facility (the "Loan") in the principal amount of $41,412,501 (the "Loan Agreement").

[14] Interest currently accrues on the Loan at the rate of 12% per annum. The Lender has received cash payments from the Borrower on only four occasions since December 2014. All of those payments were received prior to the expiry of the term of the Loan on April 30, 2022.

[15] As at June 30, 2022, the total amount owing under the Loan was $54,866,885.69, consisting of principal in the amount of $17,054,655.33 and accrued and unpaid interest in the amount of $37,812,230.36, together with all accrued costs to the date of payment.

[16] The Bridging Receiver understands that the original purpose of the Loan was to finance a portion of Northern Citadel's equity in the Davenport Project and certain loan advances were used to:

(a) fund cost overruns on the Davenport Project;

(b) make improvements to the approximately 4097 square-foot unit (the "Unit") at the Davenport Project to be used as a sales and presentation gallery for "The One" construction project located 1 Bloor Street West, Toronto, ON (the "1 Bloor Project"). The Unit is owned by the Respondent 181 Retail; and

(c) fund 249 Ontario's purchase of the property located at 14 Dundonald Street, Toronto, ON (the "Dundonald Property"). The Dundonald Property was subsequently conveyed in 2020 by 249 Ontario to the City of Toronto (the "Dundonald Conveyance") for the benefit of Mizrahi Development Group The One Inc., (the "One") and/or certain other entities involved in the development of the 1 Bloor Project.

[17] As security for all of the present and future indebtedness and obligations of the Respondents to the Lender under the Loan, each of the Respondents granted to the Agent and the Lender security over substantially all of its present and after-acquired property pursuant to separate general security agreements (the "Respondent GSAs").

[18] The Agent made a registration against 181 Retail pursuant to the *Personal Property Security Act* ("PPSA") on May 2, 2018. The Bridging Receiver, on behalf of the Agent and the Lender, also made a PPSA registration against each of Northern Citadel and One8One on May 12, 2020 following the failure by the Borrower to repay the Loan upon expiry of the Term.

[19] The only PPSA registration against each of Northern Citadel and One8One was made by the Bridging Receiver. There are two PPSA registrations against 181 Retail. The first was made by KEB Hana Bank Canada and a subsequent registration was made by the Agent.

[20] The Loan Agreement expressly provides that it may only be amended in writing and constitutes the entire agreement between the parties. The Loan Agreement was amended in 2016 (the "The November 2016 Amendment).

[21] The November 2016 Amendment provides that 181 Retail became a party to the existing Guarantee from One8One and the General Security Agreement dated December 17, 2014 granted to Bridging by the Borrower and One8One (the "Original GSA") subject to the amendments to each such agreement. The November 2016 Amendment also provides that the Loan Agreement, the Guarantee of the existing security, except as amended by the express provisions of the November 2016 Amendment, continue in full force and effect.

[22] The Guarantee is unlimited and provides as follows:

> 1.1 The Guarantors jointly and severally, hereby unconditionally and irrevocably guarantee payment of all the debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Borrower to the Lender or remaining unpaid by the Borrower to the Lender (hereinafter collectively referred to as the "obligations")…
>
> …
>
> 3.1 This Guarantee shall be a continuing guarantee of the Obligations and shall apply to and secure any ultimate balance due or remaining due to the Lender and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time of any sum of money for the time being due or remaining unpaid to the Lender.
>
> …
>
> 6.2 This Guarantee constitutes the entire agreement between the Guarantors and the Lender with respect to the subject matter hereof…
>
> 6.3 No amendment to this Guarantee will be valid or binding unless set forth in writing and duly executed by the Guarantors and the Lender.

...

6.6 The Guarantors will not be discharged or released from any of their obligations hereunder except upon payment in full of the total amount guaranteed hereunder, together with any interest thereon...

[23] The Original GSA charges all of 181 Retail's assets and secures all obligations owing by the Borrower and the Guarantors to the Lender:

... The Debtor [each Borrower or Guarantor]

1.1 ...hereby: (a) grants ... as and by way of a fixed and specific mortgage, pledge and charge to and in favour of the Secured Party [the Lender], and grants to [the Lender] a security interest in, all personal property of every nature and kind whatsoever ... owned by [each Borrower and Guarantor], beneficially or otherwise, or in which or in respect of which [each Borrower and Guarantor] has any interest or rights of any kind ...

1.4 This Agreement ... shall be held by [the Lender] as general and continuing security for due payment and performance of all Obligations.

[24] Pursuant to the November 2016 Amendment, the Lender provided an additional advance of $6,556,500 under the Loan (the "November 2016 Advance") and amended certain other terms of the Loan Agreement. The November 2016 Amendment provides that the November 2016 Advance is an additional advance under the Loan. This is illustrated in sections 7 and 13 of the November 2016 Amendment, which provide that:

[7] Effective as of the date hereof, the reference to "$29,271,251.00" in section 2.1 of the Loan Agreement is hereby deleted and replaced with "$35,827,751.00".

[12] Effective as of the date hereof, the reference to "$29,271,251.00" in the first recital of the Guarantee given by ... One8One Davenport Inc. and, as a result of this Agreement, 181 Davenport Retail Inc. in favour of the Lender on the 17th day of December, 2014 is hereby deleted and replaced with "$35,827,751".

[25] The foregoing provisions amended both the Loan Agreement and the Guarantee to reflect that the total amount of the Loan (and the amount guaranteed pursuant to the Guarantee) increased from $29,271,251.00 to $35,827,751.00. The difference between these two amounts is $6,556,500.00, the exact amount of the November 2016 Advance.

[26] The November 2016 Amendment further provides as follows:

[1] Effective the date hereof, Borrower shall mean collectively and on a joint and several basis Northern Citadel Capital Inc., Mizrahi Inc., and [249 Ontario] as though each were an original party to the Loan Agreement and the Existing Security ...

> [2] Effective the date hereof, Guarantors shall mean collectively and on a joint and several basis [One8One] and [181 Retail] as though each were an original party to the Loan Agreement and the Existing Security, as applicable. For greater certainty, for the purposes of this section, the Existing Security, includes, without limitation, ... [the Guarantee]
>
> [4] Mizrahi Inc., [181 Retail] and [249 Ontario] acknowledge that they have each received a copy of the Loan Agreement and the Existing Security and, by execution of this Agreement, that they each agree to be bound by same, as applicable, as though an original party thereto, as aforesaid.
>
> [17] The Obligors and the Lender acknowledge and agree that the remaining balance of the Loan, including, without limitation, the [November 16 Advance], after receipt of the Net Proceeds shall be secured by the Existing Security and the New Security.
>
> [24] The Obligors confirm that, to the extent a party thereto, the Loan Agreement add the Existing Security has not been discharged, waived or varied ... is binding on the Obligors, as applicable ... and shall be held by the Lender as, general and continuing security for the payment and fulfillment of all of the indebtedness, liabilities and obligations of the Obligors, as applicable, present or future, direct or indirect, contingent or not, matured or not, including without limitation, the obligations under the Promissory Note, as amended by this Agreement.

[27] The definition of "Obligors" as set out in the November 2016 Amendment includes 181 Retail.

[28] After the November 2016 Amendment, the Loan Agreement was amended by three additional Amending Agreements: the November 2017 Amendment, the May 2018 Amendment, and the December 2020 Amendment. The continuing nature of the Guarantee of 181 Retail for the full amount outstanding under the Loan was expressly referenced in each Amendment. The November 2017 Amendment specifically provides as follows:

> 4. As of November 1, 2017, the Obligors acknowledge and agree that there is $39,976,188.61 outstanding under the Loan and that they do not dispute their liability to the Lender on any ground whatsoever. The Obligors further confirm that they have no claim, demand, set off or counterclaim against the Lender on any basis whatsoever and that there is no matter, fact or thing which may be asserted by any of them in extinction or diminution of their indebtedness to the Lender or result in any bar to or delay in the recovery thereof. If there any such claims for set off, counterclaim, damages or otherwise, they are hereby expressly released and discharged.

[29] Nearly identical provisions are contained in the May 2018 Amendment and the December 2020 Amendment. In each case, the "Obligors", which is defined to include 181 Retail and Sam

Mizrahi personally, acknowledge the full amount outstanding on the Loan and agreed not to dispute the liability of each Borrower and Guarantor to the Lender on any ground whatsoever.

[30] The parties agree that the Loan Agreement and the Guarantee would constitute the entire agreement with respect to the subject matter and that no amendment would be binding or valid unless executed in writing by the Guarantors and the Lender. The parties further agreed that the Guarantee would not be satisfied or discharged in the event of a partial repayments under the Loan.

[31] The definition of "Obligors" as set out in the November 2016 Amendment was never subsequently amended in any way and includes 181 Retail.

[32] The foregoing is consistent with a subsequent general security agreement granted by 181 Retail in favour of the Lender on May 2, 2018 (the "181 Retail GSA"), which is substantially similar to the Original GSA. The 181 Retail GSA provides that the agreement shall be held by the Lender as general and continuing security for due payment and performance of all "Obligations".

[33] The term of the Loan expired on April 30, 2022 and became due and payable on that date. The Respondents failed to repay the full amount outstanding under the Loan.

[34] On May 2, 2022, counsel for the Bridging Receiver sent a default letter to the Respondents confirming the existence of the payment default. The Respondents failed to make any payments in respect of the indebtedness.

[35] On May 12, 2022, the Bridging Receiver delivered the Demand Letters to each of the Respondents advising that the payment default which continued for at least 10 days after the due date for payment therefore constituted an event of default under the Loan Agreement. Pursuant to section 12.1 of the original Loan Agreement, the indebtedness is immediately due and payable upon the occurrence of an event of default.

[36] The 10-day notice set out in the BIA notices expired on May 22, 2022 and as of that date, the Respondents had failed to repay the indebtedness.

[37] There is no dispute that the Loan is in default and past maturity.

Position of the Respondents

[38] 181 Retail takes the position that the receivership application as against it should be dismissed as it had nothing to do with the Davenport Project and it simply holds title to a Unit within the Davenport Project that is used as a sales presentation gallery for the 1 Bloor Project. 181 Retail contends that BFI advanced funds for improvements to the Unit under the November 2016 Amendment to the underlying Loan concerning the Davenport Project. BFI then obtained security against 181 Retail and over the gallery.

[39] According to Mr. Mizrahi, in late 2016, he approached BFI for two purpose unrelated to the Davenport Project. In particular, Mr. Mizrahi sought funds for:

(a) improvements to a retail unit within the Davenport Project to be used as a sales and presentation gallery (the "One Bloor Gallery") for the One Bloor Project; and

(b) the purchase, by 249, of the Davenport Property to be dedicated to the City of Toronto as parklands in connection with the One Bloor Project.

[40] Mr. Mizrahi states that he and representatives of BFI, specifically, Mr. David Sharpe, who was BFI's CEO, and Mr. Graham Marr, who held various senior positions at BFI over time, initially discussed entering into a separate agreement for this financing because it was for separate project. Ultimately, Mr. Sharpe and Mr. Marr informed Mr. Mizrahi that they preferred to proceed by way of an amendment to the Loan Agreement because they believed it would be easier and faster.

[41] In November 2016, BFI entered into the November 2016 Amendment with the parties to the Loan Agreement, as well as Mizrahi Inc., 249, and 181 Retail.

[42] Mr. Mizrahi acknowledges that 181 Retail was also added as a Guarantor and Obligor but contends that 181 Retail was to be released from its obligations upon repayment of the financing related to the One Bloor Project (the "Bloor-Related Financing").

[43] On July 9, 2020, BFI was repaid the sum of $10,062,593.99, being the total amount of the Bloor-Related Financing, plus accrued interest, and fees. Mr. Mizrahi goes on to assert that the parties to the Bloor-Related agreement understood that this was a full repayment of the Bloor-Related Financing and that the parties to the Bloor-Related agreement were released and 181 Retail, Mizrahi Inc. and 249 would be removed as Guarantor and Obligor from their obligations under that Loan Agreement.

[44] Mr. Mizrahi further contends that the parties and their counsel were primarily focused on the discharge of the Dundonald Property at the time of the repayment of the Bloor-Related Financing because of time sensitivity concerning the transfer of that property imposed by the City of Toronto and this caused them to overlook the discharge of 181 Retail.

[45] With respect to the December 2020 Amendment, Mr. Mizrahi contends that he did not sign for 181 Retail, because 181 had fulfilled its obligations to BFI with respect to the Bloor-Related Financing.

[46] Mr. Mizrahi states that he became aware of BFI's failure to discharge 181 Retail on April 21, 2021 and shortly thereafter he corresponded with Mr. Marr and Mr. Sharpe about this "oversight". He states that each of them verbally confirmed that the registration against 181 Retail would be discharged.

[47] Mr. Mizrahi contends that, in a tele-conference, he spoke to BFI's counsel, Phil Taylor of Chaitons LLP and Phil Rimer of Dentons LLP, who acts as counsel to various Mizrahi entities and Mr. Taylor during the telephone call:

(a) confirmed that Mr. Marr instructed him to discharge the registration against 181 Retail and the Mr. Marr had advised the Applicant of this fact; and

(b) stated that the discharge of the registration against 181 Retail was in progress and that the Applicant was aware of this fact.

[48] The registration was not discharged before BFI went into receivership on April 30, 2021.

[49] In summary, Mr. Mizrahi takes the position that there are no grounds for the Receiver to be appointed over 181 Retail, as 181 Retail is a respondent only because BFI's counsel failed to discharge BFI's security before BFI went into receivership.

[50] The written responses to interrogatories by Mr. Sharpe dated October 26, 2022, are consistent with the evidence of Mr. Mizrahi.

Response of the Bridging Receiver

[51] The Bridging Receiver takes the position that Mr. Mizrahi's objective in attempting to retroactively rewrite the terms of the various agreements is obvious: he seeks to shelter assets and information from the Applicant while avoiding further disruption to the 1 Bloor Project, which he jointly owns with certain former principals of Bridging.

[52] The Bridging Receiver submits that Mr. Mizrahi Affidavit provides Mr. Mizrahi's subjective interpretation of the applicable agreements and that is well-established that such evidence is irrelevant and need not be considered.

[53] The Bridging Receiver has significant concerns regarding certain events and transactions involving the Respondents, certain related entities, and the former principles of Bridging. These events and transactions are described in the affidavit of Tyler Ray, sworn August 8, 2022, at paragraphs 30 – 86 and are summarized as follows:

(a) 1 Bloor Project & Conflicts of Interest. The Bridging Receiver has significant concerns regarding the potential conflicts of interest between Jenny Coco and Natasha Sharpe in their capacities as principals of Bridging and members of the BFI Credit Committee, and separately as indirect owners of the 1 Bloor Project.

(b) November 2016 Amendment & Accounts. Pursuant to the November 2016 Amendment, the definition of "Borrower" was amended to include 249 Ontario and MI in addition to Northern Citadel. The Bridging Receiver contends that leading up to the November 2016 Amendment, Bridging lacked sufficient collateral coverage for the Loan and in order to cover the shortfall, MI was added as a Borrower under the Loan and the Accounts (primarily comprised of the sales commissions owing to MI in connection with the 1 Bloor Project) were pledged in favour of the Lender. The Accounts formed a material portion of the collateral subject to the Lender's security. On multiple occasions, the Credit Parties represented to Bridging that the estimated Loan repayments sourced through the 1 Bloor Project (by way of Accounts) would exceed $20 million in aggregate.

(c) July 2020 Partial Repayments. The Bridging Receiver has significant concerns regarding the involvement of Jenny Coco and Natasha Sharpe in the original Dundonald Property acquisition (and the subsequent Dundonald Conveyance) as both principals of Bridging and part owners of the 1 Bloor Project.

(d) December 2020 Amendment & 2020 Bridging Audits. MI and 249 Ontario were removed from the subject line and signature block of the December 2020 Amendment. MI and 249 now take the position that this had the effect of extinguishing their continuing liability under the Loan, which would leave the Lender with little to no other sources of recovery from the Loan. The Bridging Receiver continued to investigate this matter.

(e) Communication since Bridging Receivership. The Bridging Receiver has engaged with the Credit Parties on multiple occasions in an effort to understand their financial position and formulate a repayment plan for the Loan. These efforts have been unsuccessful.

(f) Alleged Cerieco Secret Guarantee. The Bridging Receiver has also become aware of an Alleged Secret Guarantee pursuant to which Sprott Bridging Income Fund LP allegedly guaranteed a loan (the "Cerieco Loan") by Cerieco to Mizrahi Commercial (The One) LP in the amount of approximately $213 million in connection with the construction of the 1 Bloor Project. The Bridging Receiver continues to investigate this matter.

[54] The Bridging Receiver takes the position that the Respondents' objection to the appointment of a receiver for 181 Retail is based on oral evidence that the documents do not mean what they plainly say. The Bridging Receiver submits that this oral evidence is not intended to clarify the written agreements but to directly contradict the terms of the agreements. The Bridging Receiver submits that this is not permissible.

[55] The Bridging Receiver submits that Mr. Mizrahi's affidavit evidence is irrelevant. The Applicant submits that the affidavit at paragraphs 13, 14, 18, 20, 21 contains evidence of the parties' intention that the obligations of 181 Retail were limited to what Mr. Mizrahi describes as the "Bloor-Related Financing". The Applicant submits that this evidence stands in direct contradiction to the terms of the Loan and security documents in which the Respondents repeatedly acknowledge that they are responsible for the full amount of the Loan. They contend that none of this evidence is admissible to override or contradict the clear terms of the Agreements negotiated and executed by sophisticated commercial parties with counsel.

[56] The Applicant summarizes its position as follows. The applicable agreements provide that 181 Retail is a guarantor on a joint and several basis for the full amount of the Loan and this is consistent with the surrounding circumstances applicable to the November 2016 Amendment. Further, consistent with the Loan Agreement (including the amendments), the Guarantee and the Original GSA, there is nothing to suggest that the parties intended to limit the liability of 181 Retail (or any other parties) to a single advance. There is no provision in any of the amendments to the Loan Agreement that removes or purports to remove any entity (including 181 Retail) as a

Guarantor. The subjective evidence of Mr. Mizrahi's understanding of the applicable agreements is irrelevant and need not be considered.

Law

[57] In support of its position, 181 Retail submits that case law in the estates context where solicitors failed to act on instructions prior to the death of their clients, decisions of this Court have repeatedly given effect to the instructions of clients that are not acted upon by the solicitors in time to properly give effect to those instructions. (See: *Blake v. Blake*, 2022 ONSC 4918; *Thompson v. Elliott Estate*, 2020 ONSC 1004 and *Bank of Montréal v. Chu*, 1994 CanLII 7246.

[58] 181 Retail submits that here, as in those cases, BFI's counsel had the necessary authority and direction to proceed but failed to act on those instructions in a timely manner.

[59] 181 Retail further submits that an entity's entry into receivership has effects similar to those of the death of an individual. The Respondents cannot discern a meaningful distinction that would call for the court to act differently here than it would in the estates context and, accordingly, request the court to direct the Applicant to discharge the security against 181 Retail.

[60] I disagree.

[61] The referenced estate cases do not address the situation where third-party creditor interests are present.

[62] The application in *Blake* was not opposed and the requested relief in the form of a vesting order prejudiced no one other than the applicant.

[63] In *Thompson*, an Acknowledgment and Direction to sever a joint tenancy was executed prior to the death of the transferor and it was the delivery of that document and not the actual registration that was the determining factor.

[64] In *Bank of Montreal*, the issue was the date on which a deed became effective – the date of execution or the date of registration. *Bank of Montreal* is not an estates case, and the endorsement was in respect of a motion to set aside a default judgment.

[65] The April 30, 2021 endorsement of Hainey J. appointing the Bridging Receiver states that the order sought on the application is in the best interest of the investors and will further the due administration of Ontario Securities Law.

[66] Since its appointment, the mandate of the Bridging Receiver has been to consider the interests of the investors in the various Bridging funds. The mandate of the Bridging Receiver is set out in the court order of April 30, 2021 and, effective from the date of the appointment, the principals of Bridging have no authority to administer the business and affairs of Bridging.

[67] The principles referenced by counsel to 181 in the "estate" cases are inapplicable to this case.

[68] In support of their position, the Bridging Receiver references *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*") where the Supreme Court of Canada set out the controlling rules on contractual interpretation and recognized the role of "surrounding circumstances" in the interpretive exercise. Courts are now directed to read the contract as a whole, giving their words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[69] The Bridging Receiver makes specific reference to para. 57 of *Sattva* and submits that while surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining any surrounding circumstances is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

[70] Further, the Bridging Receiver submits that evidence of surrounding circumstances should consist only of objective evidence of the background facts at the time of execution of the contract and not, as argued by 181 Retail, subjective evidence arising after the execution of the contract. In support of this proposition, the Applicant references *Sattva* at para. 58.

[71] The Applicant also references *Sattva* at para. 59 for the proposition that while the parol evidence rule does not preclude evidence of surrounding circumstances, it does preclude evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. To this end, the rule precludes evidence of the subjective intention of the parties. The purpose of the parol evidence rule is to achieve finality and certainty and to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.

[72] The Bridging Receiver also references *Soboczynksi v. Beauchamp*, 2015 ONCA 282 at para 44, where the Court of Appeal for Ontario also recognized that where there is an "entire agreement" clause (such as in the Loan Agreement and the Guarantee), this clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere.

[73] The foregoing is consistent with the subsequent Supreme Court decision in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC at para 30 where the Supreme Court further recognized that evidence of one-party's subjective intention has "no independent place" when considering the circumstances surrounding the formation of a contract.

[74] 181 Retail referenced *Shewchuk v. Blackmont Capital Inc.* (2016) ONCA 912 (CanLII), where the Court of Appeal for Ontario considered the guidance provided in *Sattva.* The relevant paragraphs of *Sattva* are 39 – 46 which read as follows:

> [39] In *Sattva*, the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach

contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 55-56; and *Seven Oaks Inn Partnership (c.o.b. Best Western Seven Oaks) v. Directcash Management Inc.*, 2014 SKCA 106, 446 Sask. R. 89, at para. 13.

[40] The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.

[41] In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55, at para. 11; and *King v. Operating Engineers Training Institute of Manitoba*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 72.

[42] There is an additional reason to distinguish subsequent conduct from the factual matrix – a reason rooted in the reliability of the evidence. In *Sattva*, the Supreme Court stated at para. 60 that consideration of the factual matrix enhances the finality and certainty of contractual interpretation. It sheds light on the meaning of a contract's written language by illuminating the facts known to the parties at the date of contracting. By contrast, as I will explain, evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language.

[43] There are some dangers associated with reliance on evidence of subsequent conduct. One danger, recognized in England where such evidence is inadmissible, is that the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time. Thus, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester Ltd.)*, [1970] A.C. 583 (H.L.), Lord Reid observed, at p. 603:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it

> was signed, but by reasons of subsequent events meant something different a month or a year later.

Indeed, in *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 (H.L.), at p. 261, Lord Wilberforce described reliance on subsequent conduct as "nothing but the refuge of the desperate."

[44] Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd.* (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, "the fact that a party does not enforce his strict legal rights does not mean that he never had them." As a consequence of the potential ambiguity inherent in subsequent conduct, "some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it is unequivocal": see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3(d) ed. (Toronto: LexisNexis, 2016), at p. 105.

[45] A third danger is 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.

[46] These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at the outset of the interpretive exercise. Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.

[75] The November 2016 Agreement is, in my view, the critical agreement which addresses the liability of 181 Retail. It amends the Loan Agreement. The Loan Agreement expressly provides that it may only be amended in writing and constitutes the entire agreement between the parties. The November 2016 Amendment also provides that the Loan Agreement, the Guarantee in the existing security, except as amended by the express provisions of the November 2016 Amendment, continue in full force and effect.

[76] The November 2016 Amendment provides that the November 2016 Advance is an additional advance under the existing Loan (and not a separate loan as the Respondent suggests). It further provides that 181 Retail agreed to be jointly and severally liable for the full amount outstanding on the Loan and agree to be bound by the terms of the Loan Agreement, the Guarantee, and the Original GSA as if it were an original party thereto.

[77] Simply put, there is no provision in the Loan Agreement, the Guarantee, the Original GSA, or the November 2016 Amendment that provides or purports to provide that 181 Retail's liability is limited to a particular advance under the Loan.

[78] There is no ambiguity in the written documents. The documents establish that 181 Retail is liable for the outstanding obligation under the Loan in accordance with the terms of the Guarantee and the 181 Retail GSA.

[79] The foregoing extract from *Shewchuk* is of no assistance to 181 Retail. The statements of Mr. Mizrahi and the answers of Mr. Sharpe were provided in 2022. The statements and answers may refer to November 2016, but they post-date the November 2017 Amendment, the May 2018 Amendment and the December 2020 Amendment and the appointment of the Bridging Receiver.

[80] Even if the statements of Mr. Mizrahi and the answers of Mr. Sharpe are considered to be part of the factual matrix of the November 2016 Amendment, these statements and answers are contradicted by the documents comprising the November 2017 Amendment, the May 2018 Amendment, and the December 2020 Amendment.

[81] The inescapable conclusion is that the evidence in the Mizrahi Affidavit and the answers of Mr. Sharpe of the parties' subjective intention regarding the relevant agreements runs afoul of the rules of contractual interpretation as set out in *Sattva* and gives rise to the concerns expressed by Strathy, C.J.O. at paras. 42 - 46 in *Shewchuk.*

[82] I conclude that the evidence in Mr. Mizrahi's affidavit and the answers of Mr. Sharpe are not admissible to vary or contradict the terms of the November 2016 Amendment, the May 2018 Amendment, and the December 2020 Amendment.

[83] In addition, 181 Retail's argument that it is no longer liable under the various agreements because Mr. Mizrahi did not sign the December 2020 Amendment on behalf of 181 Retail is misplaced. As no time was 181 Retail released or discharged from its obligations to BFI.

[84] With respect to the argument that there should be a discharge of the collateral mortgage, I am in agreement with the submission of the Applicant that there was no written agreement by Bridging to discharge the collateral mortgage upon receipt of the $10 million payment in connection with the conveyance of the Dundonald Property to the City of Toronto. The email exchanges between Mr. Mizrahi and Mr. Sharpe, which are attached as exhibits "A" and "C" to the Mizrahi Affidavit disclose Mr. Mizrahi's subjective understanding the effect of that payment, which, I have concluded, is irrelevant for the purpose of interpreting the Loan documents. The email exchanges at the time of the conveyance of the Dundonald Property to the City of Toronto address only the requested discharge of the charge granted to Bridging on the Dundonald Property. There is no mention of 181 Retail nor a requested discharge of the collateral mortgage.

[85] With respect to the exchange of emails prior to the appointment of the Bridging Receiver, it is important to note that there is no written agreement between the parties to discharge the collateral mortgage. It is also important to note that neither the former principals of Bridging, nor their former counsel, had any authority to take any steps in respect of the collateral mortgage after the appointment of the Bridging Receiver on April 30, 2021.

[86] In any event, the issue of the collateral mortgage is not determinative of the receivership application. Even if there was an agreement to discharge the collateral mortgage and that agreement is binding on the Bridging Receiver, the Bridging Receiver still holds the Guarantee, the Original GSA and the 181 Retail GSA (none of which have been released or discharged). As such, the collateral mortgage is not required for the appointment of the receiver over 181 Retail.

Appointment of a Receiver

[87] The authority to appoint a receiver is found in section 243 of the BIA and provides that the court may, on application by a secured creditor, appoint a receiver to take control of an insolvent person's property if it considers it to be convenient to do so.

[88] Section 101 of the CJA also provides for the appointment of a receiver when "it is just or convenient" to do so.

[89] In this case, the GSA's charge the property of the Respondents as security for the Respondent's obligations under the Loan. Therefore, the Respondent is a "secured creditor" within the meaning of the BIA.

[90] The Respondents have failed to repay the Loan notwithstanding expiry of the Term and the issuance of the Demand Letters and the BIA notices. There is no indication that the Respondents have assets of any meaningful value. I find that the Respondents fall within the meaning of "insolvent person" in the BIA.

[91] When determining whether is just or convenient to appoint a receiver, Courts should consider the following factors, among others:

(a) the existence of a debt and a default;

(b) the quality of the security;

(c) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(d) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(e) the likelihood of maximizing the return to the parties; and

(f) the risk to the security holder.

(See for example: *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612; *RMB Australia Holdings Limited v. Seafield Resources Limited*, 2014 ONSC 5205; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 ("*Carnival Leasing*"); and *Maple Trade Finance Inc. v. CY Oriental Holdings Limited*, 2009 BCSC 1527.)

[92] Further, in cases where the security documentation provides for the appointment of a receiver, the analysis is focused on a consideration of whether it is in the interests of all concerned to have a receiver appointed by the court. As noted in *Elleway Acquisitions Limited v. Cruz Professionals Limited*, 2013 ONSC 6866 at para-27:

> ... while the appointment of a receiver is generally regarded as extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or

equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

[93] The Bridging Receiver submits that it is both just and convenient to appoint a receiver in the circumstances and therefore the statutory test has been satisfied for the following reasons:

(a) pursuant to the Loan Agreement, the Borrower agreed to permanently repay the Loan on the expiry of the Term. The Respondents have failed to do so;

(b) as a result of the Payment Default, which constitutes an Event of Default under the Loan Agreement, the Bridging Receiver is contractually entitled to seek the appointment of Richter as Receiver;

(c) the 10-day notice set out in the BIA Notices has expired;

(d) the Bridging Receiver does not have full disclosure regarding the financial situation of the Respondents;

(e) the Bridging Receiver has significant concerns regarding the events and transactions involving the Respondents, certain related entities, and the former principals of Bridging; and

(f) based on the limited reporting delivered to the Bridging Receiver and the Agent by the Respondents, it does not appear that the Respondents have assets of any meaningful value.

[94] I am satisfied that the evidentiary record establishes the basis for the requested relief. I am in agreement with the Bridging Receiver that it is both just and convenient to appoint the Receiver.

[95] The Bridging Receiver also seeks the appointment of an investigative receiver to investigate the affairs of the debtors and to review transactions, even those concerning related non-parties.

[96] The themes considered on a request to appoint an investigative receiver have been set out by the Court of Appeal for Ontario in *Akagi v. Synergy Group* (2000) Inc., 2015 ONCA 368 at para. 90 at para. 66 states:

(a) The appointment of an investigative receiver is necessary to alleviate the risk posed to the plaintiff's right of recovery;

(b) The primary objective of investigative receivers is to determine the true state of affairs of the debtor and related entities;

(c) Generally, the investigative receiver does not control or operate the debtor's business; and

(d) The investigative receivership must be carefully tailored to assist the creditors recovery while protecting the debtor's interest and go no further than necessary.

[97] The Bridging Receiver submits that to date its attempts to obtain complete information from the Respondents in relation to the Loan have been unsuccessful and that in order to fully identify how the proceeds of the Loan were used, the Receiver requires the ability to investigate and compel production of documents relevant to the Loan.

[98] In my view, the investigatory powers are not necessary at this time. The business operations conducted by the Respondents are such that there is no immediate danger of dissipation of assets. The Receiver can make the necessary inquiries of the Respondents and, if the requested information is not produced in a timely and appropriate manner, the Receiver can return to court to request enhanced powers.

[99] The Bridging Receiver also requested the authorization to assign the Respondents into bankruptcy. One of the purposes for granting this relief is to permit the Receiver to avail itself of the enhanced investigatory power of a trustee in the face of an uncooperative debtor or suspicious circumstances. This request is similar in nature to the request to provide a receiver with investigatory powers. Given the nature of the business operations of the Respondents, there is no immediate danger of dissipation of assets. To the extent that the Respondents are not cooperating with the Receiver, the Receiver can, at some future time, apply to court to request the authorization to assign the Respondents into bankruptcy.

[100] In the result, I am satisfied that is both just and convenient to appoint Richter as receiver of all of the Respondents.

[101] I would ask counsel to provide me with a revised form of Order for my consideration.

C.J.

Chief Justice G.B. Morawetz

Date: January 19, 2023