

Court File No. 31-2303814  
Estate No. 31-2303814

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

---

**MOTION RECORD**  
(Returnable May 24, 2019)

---

May 13, 2019

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754  
181 Bay Street  
Toronto, ON M5J 2T9

**Steven L. Graff (LSUC # 31871V)**  
Tel: (416) 865-7726  
Fax: (416) 863-1515  
Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)

**Miranda Spence (LSUC # 60621M)**  
Tel: (416) 865-3414  
Fax: (416) 863-1515  
Email: [mspence@airdberlis.com](mailto:mspence@airdberlis.com)

*Lawyers for Crowe Soberman Inc. in its  
capacity as the proposal trustee of 1482241  
Ontario Limited*

**SERVICE LIST**  
**(as of May 13, 2019)**

TO: **AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Steven L. Graff (LSO # 31871V)**  
Tel: (416) 865-7726  
Fax: (416) 863-1515  
Email: sgraff@airdberlis.com

**Miranda Spence (LSO # 60621M)**  
Tel: (416) 865-3414  
Fax: (416) 863-1515  
Email: mspence@airdberlis.com

*Lawyers for Crowe Soberman Inc. in its capacity as the proposal trustee of  
1482241 Ontario Limited*

AND TO: **BLANEY McMURTRY LLP**  
Barristers and Solicitors  
1500 - 2 Queen Street East  
Toronto, ON M5C 3G5

**David Ullmann (LSO #423571)**  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
Email: dullmann@blaney.com

**Alexandra Teodorescu (LSO #63889D)**  
Tel: (416) 596-4279  
Fax: (416) 594-2506  
Email: ATeodorescu@blaney.com

*Lawyers for 1482241 Ontario Limited*

AND TO: **McCAGUE BORLACK LLP**  
The Exchange Tower  
Suite 2700  
130 King Street West  
Toronto, ON M5X 1C7

**Eric Turkienicz**  
Tel: (416) 860-3895  
Fax: (416) 860-0003  
Email: [eturkienicz@mccagueborlack.com](mailto:eturkienicz@mccagueborlack.com)

*Lawyers for 1482241 Ontario Limited*

AND TO: **PARIS & CO.**  
Brookfield Place  
161 Bay Street, Suite 2700  
Toronto, ON M5J 2S1

**Neil Paris**  
Tel: (416) 304-1717  
Fax: (647) 931-4718  
Email: [nparis@parislaw.ca](mailto:nparis@parislaw.ca)

*Lawyers for Jamshid Hussaini, Neelofar Ahmadi,  
and Homelife Dreams Realty Inc.*

AND TO: **DICKINSON WRIGHT LLP**  
199 Bay Street, Suite 2200  
Toronto, ON M5L 1G4

**Mark Shapiro**  
Tel: (416) 646-4603  
Fax: (844) 670-6009  
Email: [MShapiro@dickinson-wright.com](mailto:MShapiro@dickinson-wright.com)

**Michael Brzezinski**  
Tel: (416) 777-2394  
Fax: (844) 670-6009  
Email: [MBrzezinski@dickinson-wright.com](mailto:MBrzezinski@dickinson-wright.com)

*Lawyers for North York Family Physicians Holdings Inc.*

AND TO: **YONGE-NORTON LAW CHAMBERS**  
5255 Yonge Street, Suite 1300  
Toronto, Ontario  
M4B 3C2

**A. Paul Gribilas**  
Tel: (416) 446-1222  
Fax: (416) 446-1201  
Email: [pgribilas@ynlclaw.com](mailto:pgribilas@ynlclaw.com)

*Lawyers for Mann Engineering Ltd.*

AND TO: **CHAITONS LLP**  
5000 Yonge St.,  
North York, ON  
M2N 7E9

**George Benchetrit**  
Tel: (416) 218-1141  
Fax: (416) 218-1841  
Email: [george@chaitons.com](mailto:george@chaitons.com)

*Counsel for Dan Realty Corporation, E. Manson Investments Limited,  
Copperstone Investments Limited*

AND TO: **LERNERS LLP**  
130 Adelaide Street West, Suite 2400  
Toronto, ON M5H 3P5

**Domenico Magisano**  
Tel: (416) 601-4121  
Email: [dmagisano@lerners.ca](mailto:dmagisano@lerners.ca)

**Emily Y. Fan**  
Tel: (416) 601-2390  
Fax: (416) 601-4123  
Email: [efan@lerners.ca](mailto:efan@lerners.ca)

*Counsel for Janodee Investments Ltd. and Meadowshire Investments Ltd.*

AND TO: **TREASURER, CITY OF TORONTO**  
c/o George Charocopos  
Collections Department  
North York Civic Centre, Lower Level  
5100 Yonge Street  
North York, ON M2N 5V7

Fax: (416) 395-6703  
Email: [gcharoc@toronto.ca](mailto:gcharoc@toronto.ca)

AND TO: **DEPARTMENT OF JUSTICE**  
The Exchange Tower  
130 King Street West  
Suite 3400  
Toronto, ON M5X 1K6

**Diane Winters**  
Tel: (416) 973-3172  
Fax: (416) 373-0810  
Email: [diane.winters@justice.gc.ca](mailto:diane.winters@justice.gc.ca)

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE  
(Income Tax, PST)**  
P.O. Box 620  
33 King Street West, 6<sup>th</sup> Floor  
Oshawa, ON L1H 8E9

**Kevin J. O'Hara**  
Tel: (905) 433-6934  
Fax: (905) 436-4510  
Email: [kevin.ohara@ontario.ca](mailto:kevin.ohara@ontario.ca)

AND TO: **GOWLING WLG**  
100 King Street West  
Suite 1600  
Toronto, ON M5X 1G5

**Christopher Stanek**  
Tel: (416) 862-4369  
Fax: (416) 862-7661  
Email: [christopher.stanek@gowlingwlg.com](mailto:christopher.stanek@gowlingwlg.com)

**Natasha Carew**  
Tel: (416) 862-4295  
Fax: (416) 862-7661  
Email: [natasha.carew@gowlingwlg.com](mailto:natasha.carew@gowlingwlg.com)

AND TO: **DEVRY SMITH FRANK LLP**  
95 Barber Greene Road, Suite 100  
Toronto, ON M3C 3E9

**Larry Keown**  
Tel: (416) 446-5815  
Fax: (416) 449-7071  
Email: [larry.keown@devrylaw.ca](mailto:larry.keown@devrylaw.ca)

AND TO: **FASKEN MARTINEAU DUMOULIN LLP**  
Bay Adelaide Centre  
333 Bay Street, Suite 2400  
Toronto, ON M5H 2T6

**Stuart Brotman**  
Tel: (416) 865-5419  
Fax: (416) 364-7813  
Email: [sbrotman@fasken.com](mailto:sbrotman@fasken.com)

*Counsel for Torgan Properties Limited*

AND TO: **DENTONS CANADA LLP**  
77 King Street West, Suite 400  
Toronto, ON M5K 01A

**Neil Rabinovitch**  
Tel: (416) 863-4656  
Email: [neil.rabinovitch@dentons.com](mailto:neil.rabinovitch@dentons.com)

*Counsel for Clear Customs Brokers Ltd.*

AND TO: **CLYDE & CO. CANADA LLP**  
401 Bay Street, Suite 2500  
Toronto, ON M5H 2Y4

**Jamie Spotswood**  
Tel: (416) 366-6110  
Fax: (416) 366-6110  
Email: [Jamie.Spotswood@clydeco.ca](mailto:Jamie.Spotswood@clydeco.ca)

*Counsel for Allevio Clinic #1 Toronto Inc. o/a Allevio Inc.*

AND TO: **FASKENS MARTINEAU DUMOULIN LLP**  
Bay Adelaide Centre  
333 Bay Street, Suite 2400  
Toronto, ON M5H 2T6

**Natasha De Cicco**  
Tel: (416) 868-7856  
Fax: (416) 364-7813  
Email: [ndecicco@fasken.com](mailto:ndecicco@fasken.com)

**Dylan A. Chochla**  
Tel: (416) 868-3425  
Fax: (416) 364-7813  
Email: [dchochla@fasken.com](mailto:dchochla@fasken.com)

*Counsel for Purchaser*

**Additional Parties with Litigation Claims Against the Debtor**

AND TO: **AMY, APPLEBY & BRENNAN**  
Barristers, Solicitors & Notaries  
372 Erb Street West  
Waterloo, ON N2L 1W6

**William R. Appleby**  
Tel: (519) 884-7330  
Fax: (519) 884-7390  
Email: [billappleby@aab-lawoffice.com](mailto:billappleby@aab-lawoffice.com)

*Counsel for 7063580 Canada Inc.*

AND TO: **CLONFERO LAW FIRM**  
55 Adelaide Street East  
Suite 300  
Toronto, ON M5C 1K6

**Rene Clonfero**  
Tel: (416) 703-2077  
Fax: (416) 703-3351  
Email: [rclonfero@clonferolaw.com](mailto:rclonfero@clonferolaw.com)

*Counsel for Chang-Soon Yoo*

AND TO: **JEFFREY D. GRAY**  
Barrister & Solicitor  
5160 Yonge Street  
Suite 1006  
North York, ON M2N 6L9

Tel: (416) 512-1694  
Email: [jg@jeffgraylaw.ca](mailto:jg@jeffgraylaw.ca)

*Counsel for Daniel Steinberg*

AND TO: **MYER BOTNICK LEGAL SERVICES**  
3199 Bathurst Street  
Suite 215  
Toronto, ON M6A 2B2

Tel: (416) 256-9823  
Fax: (416) 784-0951  
Email: [mb@mblegal.ca](mailto:mb@mblegal.ca)

*Counsel for YYZ Plumbing Inc.*

AND TO: **YYZ PLUMBING INC.**  
3199 Bathurst Street, Unit 212  
Toronto, ON M6A 2B2

AND TO: **COMPUTERSHARE TRUST COMPANY OF CANADA**  
100 University Avenue  
12<sup>th</sup> Floor, South Tower  
Toronto, ON M5J 2Y1

**SERVICE BY EMAIL:**

sgraff@airdberlis.com; mspence@airdberlis.com; dullmann@blaney.com;  
ATeodorescu@blaney.com; eturkienicz@mccagueborlack.com; nparis@parislaw.ca;  
MShapiro@dickinson-wright.com; MBrzezinski@dickinson-wright.com;  
pgribilas@ynlclaw.com; george@chaitons.com;  
gcharoc@toronto.ca; diane.winters@justice.gc.ca; kevin.ohara@ontario.ca;  
christopher.stanek@gowlingwlg.com; natasha.carew@gowlingwlg.com;  
larry.keown@devrylaw.ca; sbrotman@fasken.com; neil.rabinovitch@dentons.com  
Jamie.Spotswood@clydeco.ca; ndecicco@fasken.com; dchochla@fasken.com  
billappleby@aab-lawoffice.com; rclonfero@clonferolaw.com  
jg@jeffgraylaw.ca; mb@mblegal.ca; dmagisano@lerners.ca; efan@lerners.ca

32016859.4

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**I N D E X**

<b>TAB</b>	<b>DOCUMENT</b>	<b>PAGES</b>
<b>1</b>	Eighth Report of the Proposal Trustee dated May 10, 2019	1-7
<b>A</b>	Appendix "A" Reasons for Decision by the Honourable Justice Chiappetta dated January 24, 2019	8-22
<b>B</b>	Appendix "B" Notice of Appeal dated February 1, 2019	23-36
<b>C</b>	Appendix "C" Endorsement of the Honourable Justice Hainey dated February 13, 2019	37-38
<b>D</b>	Appendix "D" Draft Schedule	39
<b>E</b>	Appendix "E" Proposal Approval Order of the Honourable Justice Hainey dated June 12, 2018	40-43
<b>F</b>	Appendix "F" Various emails on agreed sum for costs	44-46
<b>G</b>	Appendix "G" Proof of Claim and Affidavit of Neelofar Ahmadi	47-67
<b>H</b>	Appendix "H" Schedule Re Preliminary View on Claims	68

# **TAB 1**

Court File No. 31-2303814  
Estate No. 31-2303814

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**EIGHTH REPORT OF THE PROPOSAL TRUSTEE**  
**MAY 10, 2019**

**CROWE SOBERMAN INC.**  
Licensed Insolvency Trustee  
2 St Clair Avenue East, Suite 1200  
Toronto, Ontario, M4T 2T5

Telephone: 416.929.2500  
Fax: 416.929.2555

Court File No. 31-2303814  
Estate No. 31-2303814

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

---

**INDEX**

---

- A. Reasons for Decision by the Honourable Justice Chiappetta- January 24, 2019
- B. Notice of Appeal- February 1, 2019
- C. Endorsement of the Honourable Justice Hainey- February 13, 2019
- D. Draft Schedule
- E. Proposal Approval Order of the Honourable Justice Hainey- June 12, 2018
- F. Various emails on agreed sum for costs
- G. Proof of Claim and Affidavit of Neelofar Ahmadi
- H. Schedule Re Preliminary View on Claims

Court File No. 31-2303814  
Estate No. 31-2303814

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**EIGHTH REPORT OF THE PROPOSAL TRUSTEE  
MAY 10, 2019**

**INTRODUCTION**

1. This report (the “**Eighth Report**”) is filed by the Proposal Trustee. Unless otherwise noted, the defined terms used in this Eighth Report have the same meanings ascribed to them in the First Report through to the Seventh Report and the Supplemental Reports thereof.

**PURPOSE**

2. The purpose of this report (the “**Eighth Report**”) is to provide the Court with the following:
  - a. an update as to completing the administration of the estate and effecting a distribution to the Company’s creditors;
  - b. an update as to the discussions held between the Debtor and the Proposal Trustee as to the appropriate quantum of the Sale Proceeds to be released to the Debtor, and the appropriate amount to be held back to finalize the administration of the estate;
  - c. support for the Proposal Trustee’s motion for an Order of this Honourable Court:
    - (i) approving the activities of the Proposal Trustee as described in this Eighth Report of the Proposal Trustee;
    - (ii) approving the Proposal Trustee’s recommended interim dividends and interim distribution to the Debtor; and
    - (iii) directing the Debtor to commence the proposed disallowance of claim procedures as outlined in the Sixth Report of the Proposal Trustee.

## REQUEST FOR THE SALE PROCEEDS AND CONTINUED ADMINISTRATION

3. On October 15, 2018, the Company served an Amended Motion Record wherein it sought an Order, inter alia, directing the Proposal Trustee to disburse the entire Sale Proceeds to the Company. As at that date, a hearing to determine the Property Claimants' appeal from the Proposal Trustee's disallowance of their Property Claim (the "**Property Claim Appeal**"), had been scheduled to take place beginning December 3, 2018.
4. The Property Claim Appeal was heard December 4 and 5, 2018, and January 9, 2019 before the Honourable Justice Chiappetta. By reasons released January 24, 2019 (the "**Chiappetta Decision**"), Justice Chiappetta dismissed the Property Claim Appeal. A copy of the Chiappetta Decision is attached hereto as **Appendix "A"**.
5. The Property Claimants served a Notice of Appeal of the Chiappetta Decision on February 1, 2019. A copy of the Notice of Appeal is attached hereto as **Appendix "B"**. After the Notice of Appeal was filed, the Proposal Trustee was advised that the Property Claimants had retained new counsel.
6. On February 13, 2019, counsel for each of the Proposal Trustee, the Company, and the Property Claimants attended a 9:30 appointment before the Honourable Justice Hainey to address the distribution of the Sale Proceeds to the Company. Justice Hainey endorsed as follows:

Mr. Paris [the Property Claimants' new counsel] shall file an application for a stay of Justice Chiappetta's decision within a week and report back when the stay application has been scheduled. I will not order any funds to be released while the stay application is pending.

A copy of the Endorsement of the Honourable Justice Hainey dated February 13, 2019 is attached hereto as **Appendix "C"**.

7. The Property Claimants did not initiate the stay application contemplated in the endorsement. Following the passing of that deadline, the Proposal Trustee began to consider what quantum of Sale Proceeds could be immediately distributed to the Company, while retaining sufficient funds in trust to satisfy the proven claims and complete the administration of the Proposal.

8. As part of its analysis, the Proposal Trustee has met with the principal of the Company and provided various banking and accounting records, copies of the proof of claims received, and other requested materials from the administration of the estate.
9. On or about March 21, 2019, the Company advised the Proposal Trustee that it had retained new counsel at McCague Borlock LLP.
10. The Proposal Trustee and its counsel met with Mr. Eric Turkienicz of McCague Borlack on April 5, 2019, on without prejudice basis, to discuss the outstanding issues that must be addressed in order to complete the administration of the estate, with a view to determining the amount of Sale Proceeds to be immediately paid to the Company.
11. At the April 5 meeting, the Proposal Trustee tabled a draft schedule setting out a proposal for dealing with the remaining Sale Proceeds. The draft schedule provides for the following:
  - payment of interim dividends to creditors whose claims are not disputed by the Company;
  - a holdback of a sum sufficient to pay, in full, the claims submitted by creditors that are disputed by the Company. The Proposal Trustee does not propose to distribute any amounts to these creditors until such time as any objection motions are determined or settled;
  - payment to the City of Toronto of an agreed settlement amount arising from two fire code violations issued against the Company and Avison Young in relation to the Duncan Mill Property;
  - payment of agreed settlement amounts relating to the legal costs incurred by the First Mortgagee and the Second Mortgagee;
  - payment of outstanding professional fees to the end of March 2019; and
  - a holdback of a sum sufficient to cover future professional fees and ancillary matters, on the understanding that the only remaining matters to be addressed are (a) effecting distributions to creditors, and (b) seeking the Proposal Trustee's discharge. The Proposal Trustee understands that the Company will take carriage of any opposition

motions arising from the disallowance or partial disallowance of any proofs of claim, in accordance with the process for addressing such objections set out in the Order dated June 12, 2018 (the “**Proposal Approval Order**”); and

- payment to the Company of \$2,800,000, reflecting the balance of the Sale Proceeds after the payments and holdbacks referred to above. This figure reflects the amount available as at April 5, 2019, and will be reduced by any distributions made to the Company for monthly operating expenses after April 5, 2019.

A copy of the draft schedule is attached hereto as **Appendix “D”**. A copy of the Proposal Approval Order is attached hereto as **Appendix “E”**, for reference purposes.

12. To date, the Company has refused to accept the Proposal Trustee’s proposed distribution of Sale Proceeds as set out in the draft schedule. The Proposal Trustee has advised the Company that there are no discretionary items in the draft schedule that can be further adjusted.
13. The nature of the discussions to date have also given the Proposal Trustee cause to be concerned that the Company intends to raise further issues that may result in further disputes and work to be conducted by the Proposal Trustee and its counsel. For example, as of the date of this report, the Company has not confirmed its agreement to an order permitting the Proposal Trustee to distribute to each of the First Mortgagee and the Second Mortgagee an agreed sum for costs. This is despite having been provided with evidence that each of these parties, through counsel, has already come to an agreement with the Company regarding these amounts. Copies of emails reflecting these agreements are attached hereto as **Appendix “F”**.
14. The Proposal Trustee understands that the Company has other concerns with the draft schedule. The Proposal Trustee has requested that the Company articulate its response in writing, in order to better understand the factual and legal basis for the objections. As of the date of this report, the Proposal Trustee has not received such a written response from the Company.

15. On May 8, 2019, the Proposal Trustee received a new proof of claim filed by the Property Claimants, who now assert a 20% interest in any funds that are to be returned to the Company from the Sale Proceeds after creditors have been paid, on the basis of the Chiappetta Decision. A copy of the proof of claim is attached hereto as **Appendix "G"**.

16. As a result of having received this new proof of claim, the Proposal Trustee is of the view that the proposed payment to the Company reflected in the draft schedule must be reduced by a further 20%, to account for an appropriate holdback.

#### **PROOFS OF CLAIM**

17. In accordance with the Proposal Approval Order, the Proposal Trustee prepared and provided to the Company a schedule summarizing the proofs of claim that have been submitted, and setting out the Proposal Trustee's preliminary views with regard to which claims should be admitted, or fully or partially disallowed. The Proposal Trustee also provided the Company with copies of the proofs of claim. A copy of the schedule is attached hereto as **Exhibit "H"**.

18. On April 9, 2019, the Company provided the Proposal Trustee with a responding schedule setting out its objection to the Proposal Trustee's proposed admissions.

19. The Proposal Trustee must now move forward with formalizing its position with regard to the filed claims, having the Company formalize its objections, and communicating with creditors in order to schedule opposition motions, as contemplated by the Proposal Approval Order.

All of which is respectfully submitted this 10<sup>th</sup> day of May, 2019.

#### **CROWE SOBERMAN INC.**

Trustee acting under a Notice of Intention to Make a Proposal for  
1482241 Ontario Limited, and not in its personal capacity



Graeme Hamilton LIT, CIRP

# **APPENDIX “A”**

**CITATION:** Hussaini v. Crowe Soberman Inc., 2019 ONSC 642  
**COURT FILE NO.:** 31-2303814  
**ESTATE FILE NO.:** 31-2303814  
**DATE:** 20190124

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

## IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED, OF THE  
CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BETWEEN: )  
JAMSHID HUSSAINI AND NEELOFAR )  
AHMADI )  
Appellants )  
Craig A. Mills & Ivan Merrow, counsel for  
the Appellants Jamshid Hussaini, Neelofar  
Ahmadi )  
- and - )  
CROWE SOBERMAN INC., TRUSTEE )  
ACTING IN THE PROPOSAL OF )  
1482241 ONTARIO LIMITED ("148") )  
Respondent )  
Mervyn D. Abramowitz, David T. Ullmann,  
& Alexandra Teodorescu, counsel for the  
Respondent 1482241 Ontario Limited )  
Steven L. Graff & Miranda Spence, counsel  
for the Respondent Crowe Soberman Inc. in  
its capacity as the Proposal Trustee for  
1482241 Ontario Limited )  
HEARD: December 4 and 5, 2018, January  
9, 2019 )

V.R. CHIAPPETTA J.

## Overview

[1] The appellants, Jamshid Hussaini (“Hussaini”) and Neelofar Ahmadi (“Ahmadi”) (collectively “the Claimants”), appeal the disallowance of their claims in the bankruptcy proposal proceeding of 1482241 Ontario Limited (“148” or the “Debtor”). The Claimants are

both real estate agents in the Toronto area. They are the principals of Homelife Dreams Reality Inc., which is a corporation incorporated pursuant to the laws of Ontario ("Homelife").

[2] In 2012, the Claimants wanted to purchase a commercial property located at 240 Duncan Mill Road in Toronto, Ontario (the "Property"). The registered legal owner of the Property was 148, an Ontario corporation wholly owned by Alain Checroune ("Checroune") that carried on business buying, selling and managing commercial properties. 148 held the Property as trustee for Checroune.

[3] The Claimants attempted to purchase the Property from 148, but were unsuccessful because of issues with financing and title. In a second attempt to ultimately acquire the Property, the Claimants entered into an agreement with Checroune to buy 100% of 148's shares.

[4] By way of Share Purchase Agreement signed on June 22, 2012, the Claimants and Checroune agreed that Checroune would transfer 20% of the shares of 148 to the Claimants immediately, and that the balance of the shares would be transferred upon payment in full, with an October 1, 2015 closing date (the "June 22 Agreement"). By way of Amended Trust Declaration signed on the same day, the Claimants and Checroune agreed that Checroune would transfer and assign 20% of his beneficial interest in the Property to the Claimants (the "Amended Trust").

[5] The sale of the balance of the shares did not close.

[6] On June 13, 2014, the Claimants commenced an action against 148 and Checroune, seeking in part a declaration that they are beneficial owners of a 20% interest in the Property. A Fresh as Amended Claim was issued in November 14, 2016. Homelife was added as a party. The Claimants sought in part a declaration that Checroune's conduct as alleged therein was oppressive. This action was stayed when on October 13, 2017, 148 filed a Notice of Intention to Make a Proposal (the "Proposal Proceedings") pursuant to s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

[7] Crowe Soberman Inc. was appointed as the Proposal Trustee (the "Proposal Trustee"). The Proposal Trustee sold the Property to an arms-length purchaser at the end of February 2018. This agreement was approved by the Court on March 16, 2018. 148 submitted a proposal to its creditors on April 13, 2018. A requisite majority of creditors voted in favour of the proposal at a meeting held on May 4, 2018. The proposal was also approved by Court on June 12, 2018.

[8] The Claimants advanced two claims in the Proposal Proceedings: two property proofs of claim (collectively the "Property Claim") collectively claiming a 20% beneficial interest in the Property (or the proceeds from sale) based on the Amended Trust and an unsecured proof of claim (the "Litigation Claim") seeking damages for lost opportunity and lost profit based on 148's alleged oppressive conduct, along with legal fees incurred related to the 2014 litigation.

[9] The Proposal Trustee disallowed the Property Claim by way of Notice of Disallowance dated May 17, 2018.

[10] Although the Proposal Trustee has not disallowed the Litigation Claim, Justice Dunphy ordered that the Litigation Claim may be treated as disallowed for the purposes of this hearing.

[11] The Claimants appeal the disallowances, seeking a declaration that both the Property Claim and the Litigation Claim are valid and enforceable claims in the Proposal Proceedings. For reasons set out below, I have concluded that the Claimants have failed to establish a proprietary interest in the Property either by way of express trust or constructive trust, such that the Property Claim is neither valid nor enforceable. Further, the Claimants have failed to prove that 148 acted in a manner that was oppressive to their interests such that the Litigation claim is neither valid nor enforceable.

### Factual Background

#### *Negotiation of the June 22 Agreement*

[12] By Trust Declaration dated September 21, 2005, 148 held legal title to the Property in trust as a bare trustee for Checroune as the beneficiary (the “2005 Trust Declaration”). Pursuant to the 2005 Trust Declaration, 148 agreed to remit to Checroune all revenue owing from the Property and Checroune agreed to indemnify 148 for all liabilities relating to the Property.

[13] On February 8, 2012, the Claimants submitted an Agreement of Purchase and Sale to purchase the Property for \$15 million (the “APS”). The Claimants intended to purchase the Property themselves, without partners. The Claimants were unable to purchase the property as contemplated by the APS. The Claimants encountered issues with assuming the first mortgage without a penalty considering a maturity date of October 2015, with a Certificate of Pending Litigation that was registered against the property and with financing the purchase.

[14] In consultation with their lawyer at the time, the Claimants developed a different way to achieve their end goal of owning the Property: they would purchase 100% of the shares of 148, the owner of the property, for \$15 million.

[15] On June 6, 2012, the Claimants and Checroune entered into a written agreement whereby the Claimants would purchase Checroune’s shares in 148 (the “June 6 Agreement”). 148 was not a party to the June 6 Agreement. The June 6 Agreement reads in relevant part:

- (a) 148 is the registered owner of the Property and the Property is subject to a mortgage in the amount of \$9 million.
- (b) Checroune will sell the Claimants 36.67% of the issued shares of 148 with the further 63.33% to be made available by Checroune to the Claimants and to be transferred after all payments are made.
- (c) The price payable for the purchased shares will be based on the sum of \$6 million as the value of 148 subject to adjustments.
- (d) The Claimants shall pay a deposit of \$200,000 and a further sum of \$2 million upon closing.

- (e) Closing means 10 days after the Claimants sign the offer. If for any reason the transaction does not close, the offer becomes null and void and the deposit will be returned to the Claimants.
  - (f) The Claimants shall have the rights of a 36.67% shareholder following closing and will be entitled to vote on the election of the board of directors, the appointment of officers of the corporation and to share in the distribution of the profits of 148 to the extent of their shareholding.
  - (g) The Claimants have the right to manage the Property, collect rents and enter into leases with Checroune's written consent.
  - (h) Until the Claimants buy the full 100% of the shares in 148 as contemplated in the Agreement, they will not be permitted or entitled to manage the business of 148, retain profits, sell or re-mortgage the Property.
  - (i) Upon payment in full, Checroune will transfer the balance of the shares to the Claimants.
  - (j) Any liabilities arising out of matters occurring on or before the closing date or from existing litigation shall remain the responsibility of Checroune.
  - (k) The Claimants agree to accept title to the shares subject to the litigation brought by 214688 Ontario Ltd., provided that Checroune pay all costs related to this litigation and any damages resulting from this litigation.
- [16] On June 22, the parties amended the June 6 Agreement to reflect the following:
- (a) The Closing Date means Thursday June 21, 2012.
  - (b) The Claimants agree to purchase only 20% of the issued shares of 148 from Checroune for a total of \$1.2 million upon closing, \$200,000 of which has already been paid. Upon payment of this sum, Checroune shall transfer to the Claimants 20% of the shares of 148.
  - (c) The Claimants shall have the rights of a 20% shareholder following closing.
  - (d) The Claimants can thereafter purchase the remaining 80% of the shares of 148 from Checroune. The purchase price for the remainder of the shares shall be \$4.8 million (the remaining \$13.8 million price adjusted by the \$9 million existing mortgage). The closing date for the transfer of the balance of the shares shall be October 1, 2015, however, if the property can be refinanced without penalty then the closing date shall be October 1, 2014.
  - (e) Until the Claimants purchase 100% of Checroune's shares, they will not be entitled to manage the business of the corporation, retain profits, sell or re-mortgage the property owned by the business.

(f) The litigation shall be finally resolved by the date of the transfer of the balance of shares.

[17] On June 21, 2012, the Claimants paid Checroune \$1 million, in addition to the \$200,000 deposit previously paid on June 6, 2012.

[18] On June 21 and 22, 2012 a number of documents were exchanged between the parties including:

- (a) A director's resolution, signed by Checroune as sole director of 148, transferring 20% of his shares in 148 to the Claimants,
- (b) Share Certificates in respect of 20% of the shares of 148,
- (c) An Undertaking signed by Checroune to sell the remaining 80% of the shares to the Claimants, and
- (d) The Amended Trust Declaration.

[19] The Amended Trust Declaration amends the 2005 Trust Declaration wherein 148 as legal title-holder to the Property granted Checroune a 100% beneficial interest in the property. The Amended Trust assigns 20% of Checroune's beneficial interest in the Property to the Claimants. The Amended Trust Declaration was not registered on title and not referenced in the June 22 Agreement.

#### *Subsequent Disputes between the Claimants and Checroune*

[20] Subsequent to the June 22 Agreement, the Claimants began to lease the 6th floor of the Property from 148 as office space for Homelife. In or about June 2014, the Claimants came to believe that Checroune intended to sell the Property to another purchaser. This prompted them to commence the 2014 Litigation. The Claimants state that in August 2014, Checroune began a campaign of intimidation and harassment so that they would no longer wish to purchase the balance of the shares. They allege that Checroune turned off the lights, elevators and heating during business hours and canceled valid access cards and parking passes. Checroune denies that he engaged in such conduct. There is no third-party evidence before the Court.

[21] In October 2014, 148 terminated Homelife's tenancy, alleging that it breached the terms of its lease with 148 by not obtaining Checroune's consent prior to entering into sublease agreements. The Claimants deny this.

[22] On October 27, 2014, Justice Whitaker granted an injunction order restraining 148 and Checroune from disrupting Homelife's business as well as from selling, mortgaging, encumbering or dealing with the Property or shares in 148 without the Claimants' consent. Checroune nonetheless obtained a second mortgage on the Property, which was registered on title on September 21, 2016, without the Claimants' knowledge.

[23] On October 1, 2015, Checroune tendered to the Claimants in an effort to close the transfer of the remaining 80% of the shares. The Claimants refused to close. Their position is that they did not close on the purchase of the remaining 80% of the shares because Checroune failed to discharge the Certificate of Pending Litigation from title to the Property, as required by the June 22 Agreement. The Claimants did not attempt to extend the closing date and did not waive that condition of closing.

[24] In July 2016, Homelife left the Property and was no longer a tenant of 148.

#### *148's Bankruptcy*

[25] On October 13, 2017, 148 commenced restructuring proceedings by filing a Notice of Intention to Make a Proposal. Crowe Soberman Inc. was appointed as trustee with respect to the proposal.

[26] On November 3, 2017, the Court authorized the Proposal Trustee to sell the Property in accordance with a court-approved sale process. The Court expressly stated that its authorization did not determine the validity or enforceability of the agreements to which the Claimants were a party with Checroune.

[27] At the end of February 2018, the Proposal Trustee entered into an Agreement of Purchase and Sale with respect to the Property with an arms-length purchaser. This agreement was approved by the Court on March 16, 2018. The approval order provided that the sale proceeds should be held by the Proposal Trustee in trust.

[28] On April 13, 2018, 148 submitted a Proposal to its creditors.

[29] On April 25, 2018, the Claimants advanced the following claim in the Proposal Proceedings, which is subject to this appeal:

Two property proofs of claim collectively claiming a 20% beneficial interest (15% for Hussaini and 5% for Ahmadi) in what are now proceeds from the sale of the Property based on the language of the Amended Trust Declaration (the Property Claim).

[30] On May 3, 2018, the Claimants advanced the following claim in the Proposal Proceedings, which is also subject to this appeal:

Two unsecured proofs of claim seeking damages in the amount of approximately \$42 million (the Litigation Claim).

[31] On May 4, 2018, a requisite majority of creditors voted in favour of the Proposal. The Claimants did not vote as their claims were treated as contingent claims.

[32] On June 12, 2018, the Proposal was approved by the Court. The Claimants did not oppose the approval of the Proposal or appeal the order approving it.

[33] For the purposes of this appeal, the Claimants have reduced their Litigation Claim from 42 million to 4 million, being the difference between the price they offered for the Property under the June 22 Agreement (\$15 million) and the price the Proposal Trustee secured for the Property in the sale concluded in the Proposal (\$19 million).

### Issues

[34] The parties agree that this appeal presents to the Court the following issues:

- (1) Do the Claimants each have a trust claim against 148 pursuant to s.67 of the BIA in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust?
- (2) Should the Court find that a constructive trust arose benefitting the Claimants in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust or in respect of the \$1.2 million paid by them to Checroune?
- (3) If the Claimants each have trust claims with respect to the Sale Proceeds, what priority, if any, should be afforded to those trust claims?
- (4) Do the Claimants have an unsecured claim for damages against 148 with respect to the breaches alleged in the Litigation Claim?

### Analysis

1. *Do the Claimants each have a trust claim against 148 pursuant to s.67 of the BIA in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust?*

[35] I have concluded that the Claimants do not have a trust claim against 148 pursuant to s.67 of the BIA in respect of the proceeds of the Property currently held by the Proposal Trustee in trust.

[36] The Claimants assert that the language of the Amended Trust created an express trust. The Amended Trust states that Checroune transfers and assigns 20% of his 100% beneficial interest in the Property to the Claimants. Despite this language however, it cannot be said that there was sufficient certainty of intention to create a trust with respect to the Property. The language of the 2012 Amended Trust Declaration must be interpreted contextually, considering the whole of the circumstances, including the factual matrix within which it was made and the conduct of the parties thereafter: *Antle v. Canada*, 2010 FCA 280, 413 N.R. 128, leave to appeal refused, [2010] S.C.C.A. No. 462 at paras. 11-14.

#### *Law of Express Trust*

[37] Certainty of intention is one of the three certainties necessary to create a trust. In order for a trust to have certainty of intention, the language used must show that the settlor intended that the recipient must hold the property on trust for the benefit of the beneficiary: *Donovan*

W.M. Waters, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 140. However, there is no magic in the word "trust". Intention is a matter of substance over form, and language alone cannot create a trust: *Willis (Litigation Guardian of) v. Willis Estate* (2006), 23 E.T.R (3d) 292 (Ont. S.C.J.), affirmed, 2007 ONCA 552, 33 E.T.R. (3d) 187. It is important to interpret the words of a document purporting to create a trust in context. As stated by the Federal Court of Appeal in *Antle* at para. 12: "A test that requires one to look at all of the circumstances, and not just the words of the trust deed, is an approach that appears to have been adopted by Canadian courts generally."

[38] The other two certainties are certainty of object and certainty of subject-matter. Certainty of object is the requirement that the beneficiary of the trust must be ascertainable. Certainty of subject-matter is the requirement that the property to be held on trust must be clearly identifiable at the time the trust comes into existence. The beneficial interest which each beneficiary should have in that property must also be clearly identifiable. These certainties are required so that trustees, courts, and settlors can be sure that a trust is being properly administrated according to its terms.

#### *Application*

[39] 148 submits that the Claimants have failed to satisfy their onus in proving certainty of subject matter. It notes that the Amended Trust refers to the Property including Assets such as chattels, fixtures, equipment, and leases and rental agreements. This, it argues, is not only ambiguous in and of itself but is also inconsistent with the property the Claimants set out to acquire, namely 100% of the shares of 148. I disagree. The Amended Trust agreement adopts the definition of the Property in the 2005 Trust Agreement and provides further certainty of subject-matter in terms of what a proprietary interest in the Property would include. It is not inconsistent with the Claimants' intended ownership of 100% of the shares of 148, as 148 holds legal title to the Property and its assets.

[40] 148 further submits that the Claimants have not demonstrated certainty of intention to create a trust with respect to the Property. The Claimants' position is that they have discharged this burden. They submit that the explicit language of the Amended Trust is the best evidence in determining certainty of intention. Certainty of intention is satisfied, it is argued, by the unambiguous language of the Amended Trust, which clearly assigns 20% of Checroune's beneficial interest in the Property to the Claimants. I disagree.

[41] Certainty of intention relates to a clear intention that the trustee should hold property for the benefit of someone else. No particular form of words is required or determinative: *Willis (Litigation Guardian of) v. Willis Estate*, 2007 ONCA 552, 33 E.T.R. (3d) 187 at para. 2. In this case, it is important to consider the language of the 2012 Amended Trust Declaration contextually with the parties' stated and consistent intention for executing the Amended Trust and their conduct thereafter.

[42] The Claimants' intent was always to own the Property outright. They had no intention to be joint owners of the Property with Checroune. Checroune's intent was always to sell the Property outright. He had no intention to sell only part of the Property.

[43] It was only when the Claimants were unable to purchase the Property that they turned their efforts to owning 100% of the shares of 148. The Claimants had no intention to be minority shareholders of the business of 148. They did not want any partners. They wanted to own 148 outright so they could ultimately own the Property. Checroune's intent was always to sell 100% of his shares of 148. He had no intent to work with a minority shareholder. If he could not sell the Property outright, he wanted to sell all of the shares of 148.

[44] Ahmadi testified that the Claimants' lawyer put together the strategy to purchase 100% of Checroune's shares in 148 because the Claimants wanted to own the Property but were unable to purchase it outright. The parties intended that the Claimants would acquire 100% of the shares of 148 for \$15 million. The share transaction was subsequently structured so the Claimants initially acquired 36.67% of the shares (later amended to 20% of the shares) and were obligated to purchase the balance at a later date, to be transferred upon further payment. On cross examination, Ahmadi admitted that the parties made this arrangement because the Claimants could not obtain financing to purchase 100% of the shares outright, considering the Certificate of Pending Litigation registered on the Property. The share purchase was therefore structured in two tranches, but it was always the parties' shared intention that Checroune would sell 100% of his shares in 148 to the Claimants.

[45] It was in this context, upon the purchase of the first 20% of the shares and prior to the full completion of the intended share purchase, that the Amended Trust was executed.

[46] Ahmadi testified that the Claimants did not understand the details of the documents and did not understand the specifics relating to the Amended Trust, including the differences between beneficial and legal interests. Her evidence is that the Claimants understood that the purpose of the Amended Trust was "to protect our interest and to become the owners." It provided a measure of security to ensure that Checroune did not sell the Property without the Claimants' knowledge, pending the completion of the sale of the remaining shares pursuant to the June 22 Agreement. It therefore further served as an incentive to Checroune to comply with his obligations as defined in the June 22 Agreement in facilitating the sale of the remaining shares.

[47] Ahmadi described the Amended Trust as "extra security" to protect the Claimants' interests in ultimately acquiring 100% of the shares of 148 and, as a result, 100% of the Property. There is no evidence to suggest that at the time of the Amended Trust, the Claimants intended to receive a 20% proprietary or beneficial interest in the Property. Rather, the evidence is that the Claimants intended the Amended Trust to serve as security towards the close of the sale of the remaining 80% of the shares, and nothing more.

[48] Similarly, Checroune's evidence is that the Amended Trust was intended to act as "security" or to provide "additional security" pending the intended transfer of the remaining 80% of the shares. He states that he never intended to convey any part of the Property until the Claimants paid in full for 100% of the shares as contemplated by the June 22 Agreement.

[49] The parties' stated shared intention in creating the Amended Trust is demonstrated by their conduct subsequent its execution. At no time did the parties act in a manner consistent with the Claimants' enjoying a beneficial interest in the Property. For over three years, the Claimants

did not contribute to the ongoing expenses related to the Property, including maintenance and any payments toward the existing \$9 million mortgage, despite the obligation of the beneficial owner pursuant to the 2005 Trust Declaration to indemnify 148 for all liabilities relating to the Property. Similarly, at no time did the Claimants receive a share of profits derived from the Property, despite 148's obligation pursuant to the 2005 Trust Declaration to remit all revenue owing from the Property to the beneficial owner. Significantly, this conduct is also consistent with the parties' intention as reflected in the June 22 Agreement that until the Claimants purchased 100% of Checroune's shares, the Claimants would not be entitled to retain profits.

[50] The parties' demonstrated conduct fails to indicate the Amended Trust was intended to transfer a partial proprietary interest. Rather, it underscores their stated intention that the Amended Trust was intended to protect the Claimants' contractual agreement with Checroune to complete the purchase of the remaining shares.

[51] For these reasons, I have concluded the Amended Trust does not constitute an express trust as the Claimants have not demonstrated that there was certainty of intention.

#### *The Amended Trust post-October 2015*

[52] The transfer of the remaining shares as intended by the parties and contracted by the June 22 Agreement did not close on October 1, 2015. I agree with 148 that the Amended Trust, intended by the parties to secure the closing, is therefore rendered moot as of October 2015 as there is nothing more to secure.

[53] The Claimants paid Checroune \$1.2 million for 20% of the shares of 148 in furtherance of their intention as set out in the June 22 Agreement to acquire 100% of the shares. Today, they own 20% of the shares of a bankrupt company. At no time did they wish to own only 20% of the shares. The Claimants may have legal recourse against Checroune in this regard as a party to the June 22 Agreement. They do not have a claim against 148, however, with respect to any rights arising from the Amended Trust.

2. *Should the Court find that a constructive trust arose benefitting the Claimants in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust or in respect of the \$1.2 million paid by them to Checroune?*

[54] In the alternative, the Claimants submit that a constructive trust ought to be imposed over the sale proceeds in order to recognize their beneficial interest. It is their position that unless this remedy is applied, 148 and its creditors will be unjustly enriched at the Claimants' expense.

#### *Law of Constructive Trust*

[55] A constructive trust arises by operation of law as a means for equity to combat behaviour that is contrary to good conscience. It is a remedy for unconscionable transactions: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras. 18, 32, 45. Constructive trusts can arise in many circumstances, including to remedy an unjust enrichment; or to confiscate profits flowing from a wrong.

[56] The Claimants advance arguments based on both circumstances. They claim that 148 has been unjustly enriched, and that 148 has wrongfully breached an equitable duty to them and profited as a result.

[57] The elements of an unjust enrichment claim are: a benefit to one party, a corresponding deprivation to the other, and no juridical reason for the transfer of value: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 249 at para. 32. The enrichment must correspond with a deprivation from the plaintiff. The purpose of the unjust enrichment doctrine is to reverse unjust transfers. Accordingly, it must first be determined whether wealth has moved from the plaintiff to the defendant: *Professional Institute of the Public Service of Canada v. Canada*, 2012 SCC 71, [2012] 3 S.C.R. 660 at paras. 151-152. In order for a constructive trust to arise to remedy the unjust enrichment, monetary damages must be inadequate to compensate the plaintiff, and there must be a link between the benefit alleged to have been provided and the property over which the constructive trust is claimed; *Peter v. Beblow*, [1993] 1 S.C.R. 980 at para. 31.

[58] The Supreme Court in *Soulos* at para. 45 outlined four conditions that should generally be satisfied in order for a constructive trust based on wrongful conduct to arise:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (4) There must be no facts which would render the imposition of a constructive trust unjust in all the circumstances of the case.

#### *Application*

[59] The Claimants argue that 148 has been enriched by its breach of its duty as trustee to the Claimants. They argue that it has utilized the Property for its own benefit both prior to and after the filing of the Notice of Intention to Make a Proposal without regard to the Claimants' beneficial interest in the Property. This position, however, presumes that the Claimants enjoy a beneficial interest in the Property. For the reasons outlined above, I have concluded that they do not. 148 does not owe an equitable duty as trustee to the Claimants. Therefore, the first condition outlined by the Supreme Court in *Soulos* is not met.

[60] The Claimants further argue that 148 has been unjustly enriched to the extent that Checroune used the \$1.2 million he received from the Claimants to satisfy amounts purportedly owed by Homelife to 148. This submission confuses the various contractual relationships of the Claimants, Homelife, Checroune and 148. The payment by the Claimants of \$1.2 million was

made to Checroune pursuant to the June 22 Agreement. If there is an enrichment, it is to Checroune personally. Neither Homelife nor 148 were parties to the contract pursuant to which the Claimants paid Checroune the \$1.2 million.

[61] The Claimants submit that they have been deprived of the funds they paid in good faith in furtherance of their intention to acquire 100% of the shares of 148, the security they relied upon in the form of the Amended Trust and any benefits agreed upon in the June 22 Agreement. Again, if there is a deprivation it is at the hands of Checroune personally and not 148. The Claimants' alleged deprivation does not correspond to 148's alleged enrichment.

[62] Finally, the Claimants argue that there is no justification at law for 148 to retain "these benefits". For reasons noted above, however, it cannot be said that 148 was enriched as a non-party to the June 22 Agreement.

3. *If the Claimants each have trust claims with respect to the Sale Proceeds, what priority, if any, should be afforded to those trust claims?*

[63] I have concluded that the Claimants do not have trust claims with respect to the sale proceeds. I will nonetheless analyze the issue of priority, in case I am incorrect in this conclusion.

[64] The Claimants argue that if it is found that the Amended Trust grants them a proprietary interest, they are entitled to 20% of the sale proceeds, excluding all amounts paid under the Second Mortgage and any amounts paid to 148 and its counsel under the Proposal.

[65] 148 argues that if it is found that the Claimants are beneficiaries in accordance with the Amended Trust, 148's liabilities in respect of the Property are properly deducted from the sale proceeds before any residual benefit is paid to the Claimants or Checroune.

[66] I agree with 148. The 2005 Trust Declaration provides that 148 holds legal title to the Property as bare trustee for Checroune, who holds the entire beneficial interest in the Property. It further states that Checroune as beneficiary shall fully indemnify 148 as trustee from all liabilities, obligations, claims, charges, encumbrances and responsibilities, as well as all costs and expenses in connection with the Property including legal expenses. These terms were not altered in the Amended Trust. The terms of the trust itself are such that the Claimants do not have a right to the sale proceeds until 148's obligations are otherwise satisfied.

[67] This is consistent with the nature of a beneficiary's rights to the trust property. The beneficiary has no rights over the trust property, only rights over the trustee's actions with regard to the trust property. The trustee is the legal owner of the trust property, and has the rights necessary to direct trust assets to pay trust creditors. A trustee further has a right to reimburse himself or herself out of trust assets. For that purpose, trustees have priority as against beneficiaries in the trust property: Lionel Smith, "Trust and Patrimony", (2009) 28 ETPJ, 332.

[68] Where a trust directs that the trustee should make certain payments to a beneficiary, the beneficiary usually receives that benefit subject to deductions for the expenses of the trust property. This issue commonly arises in cases where there is a dispute between successive

beneficiaries about from where trust expenses should be deducted. If a beneficiary is entitled to the income produced by trust capital for life, for example, they usually receive that income subject to deduction for ordinary, recurring expenses such as repairs or property taxes. Major occasional improvements or expenditures are usually paid out of the trust capital, which may be subject to the beneficial interest of a different beneficiary. In all cases, it is always open to the settlor to dictate how the trust expenses are to be paid: *Waters' Law of Trusts in Canada* at 1028.

[69] If the Claimants are beneficiaries under the Amended Trust therefore, the nature of the Claimants' rights are such that 148's liabilities are deducted from the sale proceeds before any residual benefit is paid to the Claimants or Checroune. To do otherwise would be to ignore the express language of the Amended Trust and grant a priority contrary to that recognized in law.

*4. Do the Claimants have an unsecured claim for damages against 148 with respect to the breaches alleged in the Litigation Claim?*

[70] As shareholders of 148, the Claimants are permitted to apply for a court order under the oppression remedy provisions of the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B. 16, s.248 (the "OBCA"). The oppression remedy provisions of the OBCA state that where a court is satisfied that the business or affairs of the corporation have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder, the court may make an order to rectify the matters complained of (s.248(2)).

[71] The Litigation Claim is based on the allegations as set out in the Fresh as Amended Statement of Claim dated November 14, 2016. In that Claim, the Claimants seek a declaration of oppressive conduct or damages for oppressive conduct as against Checroune personally, not 148. The Claimants plead therein that 148 was an agent for Checroune and that Checroune is personally liable for the actions of 148.

[72] The allegations of improper conduct before the Court are similarly restricted to allegations about Checroune's actions. Ahmadi states (and Checroune denies) that Checroune turned off the lights and the elevators in the building at the Property and that he harassed subtenants.

[73] The onus is on the complainant pleading oppressive conduct to identify the expectation that he or she claims has been breached by the conduct in question and to establish that such expectations are reasonable: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 460 at para. 70.

[74] The Claimants have not provided any evidence in terms of their reasonable expectations. Ahmadi states that Checroune never involved the Claimants in the management of 148, never invited them to a shareholders' meeting and kept them in the dark about 148's operations and finances. She did not state that this amounted to a breach of a reasonable expectation.

[75] Practically speaking, there were only two shareholders of 148. It defies commercial reality that a shareholders' meeting would be called, particularly as the Claimants did not request a meeting and the parties spoke daily about the business of 148. Contrary to Ahmadi's evidence,

Checroune testified that he provided the Claimants with financial information about 148 and access to information in general.

[76] The Claimants argue that the June 22 Agreement created reasonable expectations that they would gain the associated rights of a 20% shareholder. The Agreement clearly states, however, that until the Claimants became 100% shareholders of 148, they could not manage the business, retain profits from the business, or mortgage or sell the business.

[77] In my view, therefore, the Claimants have failed to demonstrate that 148 engaged in oppressive conduct or breached their reasonable expectations.

#### *Damages*

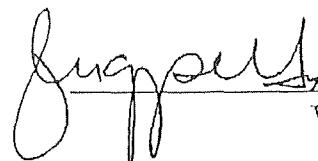
[78] For the purpose of damages, the Claimants argue that they reasonably expected that they would become the owners of the Property. It is appropriate, they submit, to therefore award them damages in the amount of \$4 million, being the difference between the price that they proposed to pay under the June 22 Agreement and the price the Property ultimately sold for under the Proposal.

[79] The Claimants have failed to consistently state their reasonable expectations. They have failed to explain how this remedy is connected to their reasonable expectations pursuant to the June 22 Agreement or the alleged oppressive conduct of 148. The Claimants' damages would only be based on the difference between the price in their agreement and the price the Property ultimately sold for if the agreement had been for the purchase of the Property. There is no evidence of this. In fact, the Claimants concluded an agreement to purchase 100% of Checroune's shares in 148, not the Property. If oppressive conduct was found, which it was not, damages would appropriately flow from the failed June 22 Agreement, and would reflect the impact of the oppressive conduct on the price of 148's shares.

#### Disposition

[80] It is for these reasons the appeal is dismissed.

[81] The parties are encouraged to agree on an appropriate costs award. If unable to do so, I will receive submissions of not more than three pages in writing. 148 shall submit their submissions within 30 days. The Claimants shall submit their submissions in response within 20 days thereafter. A Reply, if any, shall be submitted within 10 days thereafter.



V.R. Chiappetta J.

**CITATION:** Hussaini v. Crowe Soberman Inc., 2019 ONSC 642

**COURT FILE NO.:** 31-2303814

**ESTATE FILE NO.:** 31-2303814

**DATE:** 20190124

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JAMSHID HUSSAINI AND NEELOFAR AHMADI

Appellants

– and –

CROWE SOBERMAN INC., TRUSTEE ACTING IN  
THE PROPOSAL OF 1482241 ONTARIO LIMITED  
("148")

Respondent

---

**REASONS FOR JUDGMENT**

---

V.R. Chiappetta J.

# **APPENDIX “B”**



**MILLER THOMSON**  
AVOCATS | LAWYERS

MILLER THOMSON LLP  
SCOTIA PLAZA  
10 KING STREET WEST, SUITE 5000  
P.O. BOX 1011  
TORONTO, ON M5H 3S1  
CANADA

T 416.595.8500  
F 416.595.8695  
  
MILLERTHOMSON.COM

---

## FAX TRANSMISSION COVER

---

## URGENT

To: **David Ullmann & Mervyn Abramowitz** Fax: 416.594.4289  
**BLANEY MCMURTRY LLP**

AND **Miranda Spence** Fax: 416.863.1515  
TO: **AIRD BERLIS LLP**

From: **Craig A. Mills** File: 0196560.0001  
416.595.8596  
cmills@millerthomson.com

Date: **February 1, 2019** Pages (including this cover): **14**

If you have any problems with this transmission, please contact:  
**Maureen McLaren at 416.597.4375**

---

## MESSAGE

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTREAL

---

## NOTICE

This fax is intended for use only by the persons to whom it is specifically addressed above and should not be read by, or delivered to, any other person. This fax may contain privileged or confidential information. If you have received this fax in error, please notify us immediately by calling the sender's direct line above (collect if necessary). We thank you in advance for your co-operation and assistance.



**MILLER THOMSON**  
AVOCATS | LAWYERS

MILLER THOMSON LLP  
SCOTIA PLAZA  
40 KING STREET WEST, SUITE 5900  
P.O. BOX 1011  
TORONTO, ON M5H 3S1  
CANADA

T 416.595.8500  
F 416.595.8695

[MILLERTHOMSON.COM](http://MILLERTHOMSON.COM)

February 1, 2019

**DELIVERED VIA FAX**

Craig A. Mills  
Direct Line: 416.595.8596  
Direct Fax: 416.595.8695  
cmills@millerthomson.com

File: 0196560.0001

**BLANEY MCMURTRY LLP**  
2 Queen Street East,  
Suite 1500  
Toronto, Ontario M5C 3G5

**AIRD BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Attention: David Ullmann/Mervyn Abramowitz

Attention: Miranda Spence

Dear Sirs/Madam:

Re: **Hussani et al. v. 1482241 Ontario Limited et al.**  
Court File No. 31-2303814

Enclosed please find the Notice of Appeal and Appellant's Certificate Respecting Evidence which are being served upon you pursuant to the **Rules of Civil Procedure**.

Yours truly,

MILLER THOMSON LLP

Per:

Craig A. Mills  
CAM/mm

Enclosures  
37090546.1

Court File No. 31-2303814  
Court of Appeal No.

**COURT OF APPEAL FOR ONTARIO**

**BETWEEN:**

JAMSHID HUSSAINI and NEELOFAR AHMADI

Appellants

(Appellants in Appeal)

- and -

1482241 ONTARIO LIMITED AND CROWE SOBERMAN INC.,  
IN ITS CAPACITY AS THE PROPOSAL  
TRUSTEE FOR 1482241 ONTARIO LIMITED

Respondents

(Respondents in Appeal)

**NOTICE OF APPEAL**

**THE APPELLANTS**, Jamshid Hussaini and Neelofar Ahmadi, **APPEAL** to the Court of Appeal from the order of The Honourable Madam Justice Chiappetta dated January 24, 2019 (the "Order") made at Toronto.

**THE APPELLANTS ASK** that the Order be set aside and an order be granted as follows:

1. an order declaring that the Appellants have a valid trust claim pursuant to s. 67 of the *Bankruptcy and Insolvency Act* ("BIA") against 1482241 Ontario Limited ("148").
2. in the alternative, an order declaring that the Appellants have a constructive trust claim in respect of the Sale Proceeds of the Property (as defined below);
3. an order declaring that the Appellants' trust claims rank in priority to the creditors of 148 in respect of the Sale Proceeds;

4. an order declaring that the Appellants have a valid unsecured claim for damages against 148 pursuant to s. 248 of the *Business Corporations Act* (Ontario) ("Unsecured Claim");
5. an order for costs of this Appeal in favour of the Appellants.

**THE GROUNDS OF APPEAL** are as follows:

1. In the proposal proceedings of 148, the Appellants appealed the disallowance of their property claims by Crowe Soberman Inc., the trustee acting under the proposal of 148 (the "Trustee"). Their unsecured claims filed with the Trustee were also deemed to be disallowed by the Court and, accordingly, were subject to the Appellants' appeal.
2. The Motion Judge dismissed the Appellants' appeal based on her conclusion that the Appellants do not have trust claims pursuant to s. 67 of the BIA in respect to the property located at 240 Duncan Mill in Toronto (the "Property") or the sale proceeds resulting from the sale of the Property ("Sale Proceeds"). The Motion Judge also dismissed their appeal of the deemed disallowance of their Unsecured Claim.
3. The decision of the Motion Judge is a final determination of the Appellants' economic interests. The decision results in a significant loss to the Appellants as it forecloses the Appellants' claim to a beneficial interest in the Property and the resulting Sale Proceeds and negates their ability to recover the \$1,200,000 they paid in good faith to acquire the shares of 148 and a 20% beneficial interest in the Property and their claim for damages pursuant to the *Business Corporations Act* (Ontario).

4. The effect of the Motion Judge's decision is that 148 will have been able to use the BIA proposal regime to discharge the Appellants' valid trust claims and evade the ramifications of its wrongful conduct – a result which is both commercially unreasonable and inequitable.

#### **Express Trust**

5. The Appellants respectfully submit that the Motion Judge made the following errors in finding that the Amended Trust Declaration dated June 22, 2012 (the "Amended Trust") did not establish an express trust:

- (a) The Motion Judge erred in law in failing to apply the general principles for interpreting a commercial contract established in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53;
- (b) The Motion Judge erred in failing to consider: (1) the clear language of the Amended Trust establishing the mutual intention of the parties to grant the Appellants' a beneficial interest in the Property; (2) the objective evidence available to the Court underlying the negotiation and execution of the Amended Trust; (3) the purpose that the Amended Trust served in the context of the underlying transaction; and (4) the parties' mutual evidence that the Amended Trust was to serve as additional security or protection for the Appellants pending the closing of the Appellants' acquisition of the balance of the shares in 148;
- (c) the Motion Judge erred by failing to interpret the Amended Trust in a manner that accords with commercial principles and good business sense;

- (d) The Motion Judge improperly relied upon the subjective intention of Alain Checroune ("Checroune") and the conduct subsequent to the execution of the Amended Trust as opposed to the surrounding circumstances known to the parties at the time of the formation of the contract;
- (e) The Motion Judge erred in imposing an implied term to the Amended Trust that it was rendered moot due to the parties' failure to close under the share purchase agreement ("SPA") on October 1, 2015, based on the fact that: (1) the Amended Trust contains no term or provision to this effect, and (2) the failure to close was solely due to the failure of 148 and Mr. Checroune to resolve all outstanding litigation as of that date as required by the terms of the SPA. The effect is that the Motion Judge created a new agreement;
- (f) The Motion Judge erred in relying upon the Appellants' evidence that they did not intend to be minority shareholders or partners with Mr. Checroune indefinitely to conclude that they did not intend to acquire a beneficial interest in the Property. The Appellants' uncontradicted evidence was that they always intended to become owners of the Property;
- (g) The Motion Judge, in assessing the intention of the parties, erred in disregarding the terms of the SPA that entitled the Appellants to manage the Property, enter into leases and collect rents;

6. The Appellants respectfully submit that the Motion Judge's conclusion that they did not have any claim against 148 with respect to any rights arising from the Amended Trust is: (i) inconsistent with her finding that the Appellants own 20% of the shares of

148; and (ii) disregards the clear and unambiguous wording of the Amended Trust which states that the Appellants hold a 20% beneficial interest in the Property;

#### **Constructive Trust**

7. The Motion Judge erred in concluding that 148 did not owe an equitable obligation as trustee to the Appellants in the face of the unambiguous wording of the Amended Trust;

8. The Motion Judge erred in failing to find that 148 was enriched by: (i) its contravention of the Order of Justice Whitaker dated October 27, 2014 (the "**Injunction Order**") in granting a second mortgage in September 2016 on the Property in the amount of \$1.42 million (the "**Second Mortgage**"); and (ii) being able to utilize the Property and the resulting Sale Proceeds both prior to filing its proposal and as the central component to its BIA proposal without regard for the Appellants' beneficial interest;

9. The Motion Judge erred in failing to consider the inequitable result that arises from the Appellants' beneficial interest being disallowed due to the wrongful conduct of 148 and its principal, including the failure to satisfy a term in the SPA (which was in their sole control) and their oppressive conduct toward the Appellants and their company;

10. The Motion Judge erred in failing to consider the inequity resulting from 148 benefitting from being able to apply the \$1.2 million personally paid by the Appellants to amounts owed by the Appellants' company, while the Appellants are deprived of their beneficial interest in the Property and the Sale Proceeds;

**Priority**

11. The Motion Judge erred in finding that, if the Appellants have valid trust claims, 148's liabilities are properly deducted from the Sale Proceeds prior to any amounts being paid to the Appellants;
12. The Motion Judge erred by finding that the Amended Trust creates an obligation for the Appellants to indemnify 148 as trustee in respect to all of its liabilities despite the fact that the only party identified in the trust documents as having an obligation to indemnify was Mr. Checroun;
13. The Motion Judge erred by disregarding the fact that Checroun specifically agreed to assume responsibility for various liabilities of 148, including legal fees, pursuant to the terms of the SPA.

**Unsecured Claim**

14. The Motion Judge erred in concluding that Ms. Ahmadi's evidence that the Appellants were: (1) never permitted to exercise their rights as a 20% shareholder, including voting on the election of the board of directors or the appointment of officers of 148; (2) never invited to shareholders' meetings; and (3) never consulted about 148's operations, finances, and expenses, was not sufficient evidence of their reasonable expectations as minority shareholders in respect to their oppression claim.
15. The Motion Judge erred in disregarding 148's refusal to allow the Appellants to participate in the management of the Property, the collection of rents and leasing units in the building despite the clear terms of the SPA as evidence of 148's oppressive conduct;

16. The Motion Judge erred by failing to consider 148's contravention of the Injunction Order by permitting the registration of the Second Mortgage in determining whether oppressive conduct;
17. Such further and other grounds as counsel may advise and this Honourable Court permit.

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:**

- (a) Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C43, as amended, as the order under appeal is a final order of a judge of the Superior Court of Justice and is not an order referred to in section 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act;
- (b) Section 193(c) of the *BIA*, and leave to appeal is not required; and
- (c) In the alternative, if leave to appeal is required under section 193(e) of the *BIA* is required, the Appellants seek leave to appeal and staying the Order pending disposition of the appeal.

February 1, 2019

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto, ON Canada M5H 3S1

Craig A. Mills LSUC#: 40947B  
Email: cmills@millerthomson.com  
Tel: 416.595.8596  
Fax: 416.595.8695

Ivan Merrow LSO#: 70064U  
Tel: 905.415.6737  
imerrow@millertomson.com

Lawyers for the Appellants

TO: **BLANEY McMURTRY LLP**  
Barristers and Solicitors  
1500 - 2 Queen Street East  
Toronto, ON M5C 3G5

Mervyn Abramowitz  
Tel: 416.597.4887  
416.593.3396  
Email: mabramowitz@blaney.com

David Ullmann (LSUC #423571)  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
Email: dullmann@blaney.com

Lawyers for 1482241 Ontario Limited

AND TO: **AIRD BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Miranda Spence  
Tel: (416) 865-3414  
Fax (416) 863-1515  
Email: mspence@airdberlis.com

Lawyers for the Respondent, Crowe Soberman Inc

JAMSHID HUSSAINI et al.  
Appellants (Appellants in Appeal)

and

1482241 ONTARIO LIMITED et al.  
Respondents (Respondents in Appeal)

Court File No. 31-2303814  
Court of Appeal No.

01-FEB-2019 14:17

From: 4165958695

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**NOTICE OF APPEAL**

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto, ON Canada M5H 3S1

Craig A. Mills LSUC#: 40947B  
Email: cmills@millerthomson.com  
Tel: 416.595.8596  
Fax: 416.595.8695

Ivan Merrow LSO#: 70064U  
Tel: 905.415.6737  
imerrow@millerthomson.com

Lawyers for the Appellants

Court File No. 31-2303814  
Court of Appeal No.

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

JAMSHID HUSSAINI and NEELOFAR AHMADI  
Appellants  
(Appellants in Appeal)

- and -

1482241 ONTARIO LIMITED AND CROWE SOBERMAN INC.,  
IN ITS CAPACITY AS THE PROPOSAL  
TRUSTEE FOR 1482241 ONTARIO LIMITED

Respondents  
(Respondents in Appeal)

**APPELLANTS' CERTIFICATE**

The Appellants certify that the following evidence is required for the appeal, in the Appellants' opinion:

1. Motion Record of the Moving Parties, Neelofar Ahmadi, Jamshid Hussaini and Homelife Dreams Reality Inc. dated September 28, 2018;
2. Motion Record of 1482241 Ontario Limited dated October 26, 2018;
3. Reply Affidavits of the Moving Parties, Neelofar Ahmadi, Jamshid Hussaini and Homelife Dreams Reality Inc. dated November 13, 2018; and
4. Transcripts of the oral evidence of Neelofar Ahmadi and Alain Checroune dated December 4 and 5, 2018.

February 1, 2019

MILLER THOMSON LLP  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011

- 2 -

Toronto, ON Canada M5H 3S1

Craig A. Mills LSUC#: 40947B  
Email: cmills@millerthomson.com  
Tel: 416.595.8596  
Fax: 416.595.8695

Ivan Merrow LSO#: 70064U  
Tel: 905.415.6737  
imerrow@millerthomson.com

Lawyers for the Appellants

TO: **BLANEY McMURTRY LLP**  
Barristers and Solicitors  
1500 - 2 Queen Street East  
Toronto, ON M5C 3G5

Mervyn Abramowitz  
Tel: 416.597.4887  
416.593.3396  
Email: mabramowitz@blaney.com

David Ullmann (LSUC #423571)  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
Email: dullmann@blaney.com

Lawyers for 1482241 Ontario Limited

AND TO: **AIRD BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Miranda Spence  
Tel: (416) 865-3414  
Fax (416) 863-1515  
Email: mspence@airdberliss.com

Lawyers for the Respondent, Crowe Soberman Inc.

JAMSHID HUSSAINI et al.  
Appellants  
(Appellants in Appeal)

1482241 ONTARIO LIMITED et al.  
Respondents  
(Respondents in Appeal)

Court File No. 31-2303814  
Court of Appeal No.

01-FEB-2019 14:18

From: 41855958695

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at TORONTO

**APPELLANT'S CERTIFICATE**

MILLER THOMSON LLP  
SCOTIA PLAZA  
40 KING STREET WEST, SUITE 5800  
P.O. BOX 1011  
TORONTO, ON CANADA M5H 3S1

Craig A. Mills LSUC#: 40947B  
Email: cmills@millerthomson.com  
Tel: 416.595.8596  
Fax: 416.595.8695

Ivan Merrow LSO#: 70064U  
Tel: 905.415.6737  
imerrow@millerthomson.com

Lawyers for the Appellants

Page: 14/14

# **APPENDIX “C”**

9:30 A.M.

H

COUNSEL SLIPCOURT FILE NO 31-2303814DATE FEB 13, 2019NO ON LIST 1

1482241 ONTARIO LIMITED).

TITLE OF  
PROCEEDING

COUNSEL FOR:

PLAINTIFF(S)

APPLICANT(S)

PETITIONER(S)

David Ullmann for 148

PHONE &amp; FAX NOS

416 586-4289

416 593-2437

COUNSEL FOR:

PHONE &amp; FAX NOS

DEFENDANT(S)

RESPONDENT(S)

Vivanda Sgura for Plaintiff 148

416 586-7150

416 593-1515

Neil Port for Toronto Construction

Plaza

1482241 ONTARIO LIMITED)

February 13/19

Mr. Justice shall file

an application for a  
 stay of Justice Chippitho's  
 decision within a week  
 and report back to the

When the Stay Appelate  
has been scheduled.

I would not expect any  
fines & be released  
while the Stay Appelate  
is pending.

Hanley D

# **APPENDIX “D”**

1482241 Ontario Inc.

Analysis of Proposed Interim Dividends and Distribution to Debtor

	Secured Creditors	Amounts	Filed Prior to Deadline	Reviewed by Crowe		Analysis as of March 27 2019		
				Yes	No	Deferred NOTE 1	Disputed NOTE 2	Proposed Interim Dividend
1	Canada Holdings	\$ 604,726.03	Yes	No	No	\$ 604,726.03		
2	Canada Revenue Agency	\$ 3,972.76	Yes	Yes	No			\$ 3,972.76
<b>Unsecured Creditors</b>								
1	A Checroun Realty Corporation	\$ 553,015.08	Yes	No	No	\$ 553,015.08		
2	Alain Checroun	\$ 4,350,000.00	Yes	No	No	\$ 4,350,000.00		
3	Alain Checroun	\$ 1,440,000.00	Yes	No	No	\$ 1,440,000.00		
4	Alain Checroun	\$ 12,000,000.00	Yes	No	No	\$ 12,000,000.00		
5	Allevio Clinic #1	\$ 486,050.06	Yes	Partially- See Schedule		NOTE 3	\$ 486,050.06	
6	Canada Holdings	\$ 1,318,321.64	Yes	No	No	\$ 1,318,321.64		
7	Canada Holdings	\$ 136,588.65	Yes	No	No	\$ 136,588.65		
8	Canada Revenue Agency	\$ 17,699.01	Yes	Yes	No			\$ 17,699.01
9	Darlin Applied Canada Inc.	\$ 12,353.69	Yes	Yes	Yes		\$ 12,353.69	
10	Devry Smith LLP	\$ 128,153.49	Yes	Yes	Yes		\$ 128,153.49	
11	GDI Services Canada LP	\$ 95,746.42	Yes	Yes	Yes		\$ 95,746.42	
12	Gewling WLG	\$ 401,284.89	Yes	Yes	No			\$ 401,284.89
13	North York Family Physicians Holding	\$ 46,442.42	Yes	Yes	Yes		\$ 46,442.42	
14	Qualified Elevator Repair	\$ 18,247.23	Yes	Yes	Yes		\$ 18,247.23	
15	Rogers	\$ 871.56	Yes	Yes	Yes		\$ 871.56	
16	Toronto Hydro	\$ 199,934.53	Yes	Yes	No			\$ 199,934.53
17	Treasurer- City of Toronto	\$ 3,197.25	Yes	Yes	No			\$ 3,197.25
18	YZ Plumbing	\$ 17,960.20	Yes	Yes	Yes			\$ 17,960.20
<b>Contingent Creditors</b>								
1	Chung-Soo Yoo	\$ 800,000.00	No	No	No			
2	Clear Custom Brokers	\$ 500,000.00	Yes	Contingent	NOTE 4			
3	Home Life Dreams Realty	\$ 42,750,000.00	Yes	Contingent	Yes			
4	Jamilud Hussaini	\$ 42,750,000.00	Yes	Contingent	Yes			
5	Neelofar Ahmadi	\$ 42,750,000.00	Yes	Contingent	Yes			
						\$ 19,797,926.27	\$ 805,825.07	\$ 622,116.28
<b>Balance in trust account as of</b>								
						28-Feb-19		\$ 4,643,671.61
							\$ (15,000.00)	
							\$ (50,000.00)	
							\$ (26,046.92)	
							\$ (139,086.51)	
							\$ (28,250.00)	
							\$ (35,102.72)	
							\$ (38,421.41)	\$ (311,906.06)
<b>Proposed interim dividends</b>								
						NOTE 7	\$ (622,116.28)	
						NOTE 7	\$ (805,825.07)	\$ (1,427,941.35)
						Subtotal		\$ 2,903,823.60
<b>Proposed payment to debtor</b>								
						NOTE 8	\$ 2,800,000.00	
						Net in trust account after above holdback/distribution	\$ 103,823.60	

E&OE

NOTE 1 Claims are to agree to be deferred, not participate in a dividend, and agree to the dividend payments

NOTE 2 Claims are to be disallowed by the Trustee and/or Debtor pursuant to protocol determined by Court

NOTE 3 Partial claim supported per review by Trustee, balance contingent

NOTE 4 Possible agreement between claimant and debtor - outstanding

NOTE 5 First and second mortgage agreement, Court Order outstanding

NOTE 6 To be paid by Court Order

NOTE 7 Actual dividend and holdbacks to be determined by actual results in notes above

NOTE 8 Actual payment to debtor to be determined by actual results in notes above

# **APPENDIX “E”**

Court File No. 31-2303814

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

IN BANKRUPTCY AND INSOLVENCY

THE HONOURABLE ) TUESDAY, THE 12<sup>TH</sup>  
 )  
JUSTICE HAINY ) DAY OF JUNE, 2018  
 )

IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED, OF THE  
CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

**ORDER re PROPOSAL APPROVAL**

**THIS MOTION**, made by Crowe Soberman Inc., in its capacity as the proposal trustee (in such capacity, the “**Proposal Trustee**”) of 1482241 Ontario Limited (the “**Debtor**”), for an order, *inter alia*, (a) approving the fifth report of the Proposal Trustee dated April 13, 2018 (the “**Fifth Report**”) and the activities of the Proposal Trustee described therein; (b) approving the sixth report of the Proposal Trustee dated May 31, 2018 (the “**Sixth Report**”) and the activities of the Proposal Trustee described therein; (c) approving the Company’s proposal dated April 13, 2018, as amended on May 3, 2018 (the “**Proposal**”); (d) establishing a dispute resolution process for any objections raised by the Debtor relating to claims filed in the proposal; and (e) approving the fees and disbursements of the Proposal Trustee, the Proposal Trustee’s counsel, and the Debtor’s counsel, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Sixth Report of the Proposal Trustee dated May 31, 2018 (the “**Sixth Report**”) and the appendices thereto, the fee affidavit of Hans Rizarri sworn May 29, 2018 (the “**Rizarri Affidavit**”), the fee affidavit of Ian Aversa sworn May 31, 2018 (the “**Aversa**

*Affidavit*"), and the affidavit of Alain Checroune sworn June 8, 2018, and on hearing the submissions of counsel for the Proposal Trustee, counsel for the Debtor and such other counsel as were present, no one appearing for any other person on the service list, although properly served as appears from the affidavit of service of Miranda Spence sworn June 1, 2018, filed,

1. **THIS COURT ORDERS** that the time for service of the notice of motion and the motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that the Fifth Report and the activities of the Proposal Trustee described therein be and are hereby approved.
3. **THIS COURT ORDERS** that the Sixth Report and the activities of the Proposal Trustee described therein be and are hereby approved.
4. **THIS COURT ORDERS** that the Amended Proposal be and is hereby approved.
5. **THIS COURT ORDERS** that any objections raised by the Company to claims filed by creditors shall be addressed as follows:
  - (a) the Proposal Trustee will make an initial determination as to whether a claim ought to be admitted or disallowed, and will advise the Company of its determination in this regard;
  - (b) the Company will communicate any objection to the admitted claims to the Proposal Trustee, in writing, including the basis for the objection, within seven days of the issuance of the Proposal Trustee's decision in paragraph (a) above;

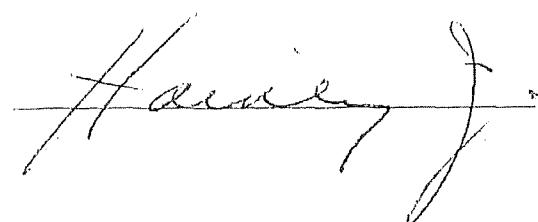
- (c) the Proposal Trustee will consider the objection raised by the Company, and will advise the Company and the relevant creditor of its determination of the claim having regard for the Company's objection;
- (d) if the Proposal Trustee admits a claim after having reviewed the Company's objection, the Company may seek to have its objection adjudicated on motion to the Court upon posting, with counsel for the Proposal Trustee, security for costs sufficient to cover the relevant creditor's substantial indemnity costs associated with the objection proceeding; and—  

- (e) the Proposal Trustee will work with the Company to schedule any objection motions, with the goal of minimizing the number of Court attendances required to address any such motions.

6. **THIS COURT ORDERS** that the fees and disbursements of the Proposal Trustee as described in the Sixth Report and as set out in the Rizarri Affidavit, be and are hereby approved, and the Proposal Trustee is hereby authorized to pay such fees from the Sale Proceeds.

7. **THIS COURT ORDERS** that the fees and disbursements of the Proposal Trustee's counsel as described in the Sixth Report and as set out in the Aversa Affidavit, be and are hereby approved, and the Proposal Trustee is hereby authorized to pay such fees from the Sale Proceeds.

8. **THIS COURT ORDERS** that the fees and disbursements of the Debtor's counsel in the sum of \$75,562.61, be and are hereby approved, and the Proposal Trustee is hereby authorized to pay such fees from the Sale Proceeds.



IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF  
ONTARIO

Court File No. 31-2303814

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

IN BANKRUPTCY AND INSOLVENCY  
Proceedings commenced at Toronto

ORDER re PROPOSAL APPROVAL

AIRD & BERLIS LLP  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

Steven L. Graff (LSUC # 31871V)  
Tel: (416) 865-7726  
Fax: (416) 863-1515  
Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)

Miranda Spence (LSUC # 60621M)  
Tel: (416) 865-3414  
Fax: (416) 863-1515  
Email: [mspence@airdberlis.com](mailto:mspence@airdberlis.com)

32760322.1

302553.00010/98816315.2

# APPENDIX “F”

**Graeme Hamilton**

---

**From:** Emily Y. Fan <efan@lerners.ca>  
**Sent:** February-20-19 10:56 AM  
**To:** Miranda Spence  
**Cc:** 'David T. Ullmann'  
**Subject:** 148 Ontario re Janodee

Miranda – I advise that the parties have resolved the costs issue for my clients' September, 2018 motion. 148 Ontario agrees to pay my clients the sum of \$25,000 on account of costs. Would be grateful if the funds could be released to Lerners LLP in Trust in short order.

Many thanks,  
Emily

**Emily Y. Fan | Lerners LLP** | Further | phone: (11) 300.3700 | direct: (11) 267.3434 | [efan@lerners.ca](mailto:efan@lerners.ca) | 110 Adelaide Street West, Suite 1100, Toronto, Ontario, M5H 3Z5



You may unsubscribe from certain types of e-mail messages sent by our firm including promotional e-mails and newsletters. To unsubscribe, forward this email message to [unsubscribe@lerners.ca](mailto:unsubscribe@lerners.ca).

**WARNING:**

From time to time, our spam filters eliminate legitimate email from clients. If your email contains important instructions, please ensure that we acknowledge receipt of those instructions.

This E-mail contains legally privileged and confidential information intended only for the individual or entity named in the message. If the reader of this message is not the intended recipient, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any review, dissemination, distribution or copying of this communication is prohibited. If this communication was received in error, please notify us by reply E-mail and delete the original message.

Please consider the environment before printing this email.

## Graeme Hamilton

**From:** Emily Y. Fan <efan@lerners.ca>  
**Sent:** February-20-19 10:54 AM  
**To:** 'David T. Ullmann'  
**Cc:** Lea Nebel  
**Subject:** RE: 148 - Costs

We accept the offer for 148 Ontario to pay our clients \$25k. I will send an email to the proposal trustee, copying you, asking that the funds be released to us in short order.

Emily Y. Fan | Lerners LLP | 100 Queen | phone: (416) 594-2437 | fax: (416) 594-2438 | [efan@lerners.ca](mailto:efan@lerners.ca) | 110 Adelaide Street West, Toronto, Ontario M5H 1E6 | [www.lerners.ca](http://www.lerners.ca)



**From:** David T. Ullmann  
**Sent:** February 11, 2019 9:40 AM  
**To:** Emily Y. Fan  
**Cc:** Lea Nebel  
**Subject:** 148 - Costs

Emily,

I have instructions to offer \$25,000 to resolve the costs issue.

Regards,

David

Emily Y. Fan  
David T. Ullmann  
Lerners LLP

David T. Ullmann  
Partner

416-596-4289 | 416-594-2437

2020000

This communication is intended only for the party to whom it is addressed, and may contain information which is privileged or confidential. Any other delivery, distribution, copying or disclosure is strictly prohibited

## Graeme Hamilton

---

**From:** George Benchetrit <George@chaitons.com>  
**Sent:** April-09-19 12:10 PM  
**To:** Miranda Spence  
**Subject:** FW: Cleaning up 148

Here's the settlement agreement.

**George Benchetrit**  
 Partner | Chaitons LLP | Tel: 416.218.1141

**From:** George Benchetrit  
**Sent:** Wednesday, January 23, 2019 10:27 AM  
**To:** David T. Ullmann  
**Subject:** Re: Cleaning up 148

David,

My clients accept your offer and I understand that the proposal trustee approves of the settlement. I will follow up with Miranda regarding payment of the settled amount from the funds held by the proposal trustee, which I am hoping can be done quickly and without further court attendances.

**George Benchetrit**  
 Partner | Chaitons LLP | Tel: 416.218.1141

----- Original message -----

**From:** "David T. Ullmann" <[DULLmann@blaney.com](mailto:DULLmann@blaney.com)>  
**Date:** 2019-01-22 9:33 AM (GMT-05:00)  
**To:** George Benchetrit <[George@chaitons.com](mailto:George@chaitons.com)>  
**Subject:** RE: Cleaning up 148

George,

Thanks for the follow up. I confirm that I have instructions to settle the matter of the balance owing under the penalty provision in the mortgage for \$25,000. Each party will bear their own costs. I remind you that since we began debating this matter the court has released at least two decisions (including one in this matter) which render the position you have taken in your materials untenable. We are quite confident that the court will not provide any recovery for your client if this was contested and likely award costs in our favour if this matter were to proceed. That being said, the settlement offer reflects our awareness that nothing is certain and the value to our client in resolving this matter sooner than later. I encourage your clients to take the opportunity to resolve this on these terms.

This offer is subject to approval by the Proposal Trustee (who is holding the funds and has to release them). I am not anticipating that to be an issue on these terms, but I expect it would become one if any higher amount was sought, given the change in the law.

# **APPENDIX “G”**

Crowe Soberman Inc.  
2 St. Clair Ave East, Suite 1100  
Toronto ON M4T 2T5  
Phone: (416) 929-2500 Fax: (416) 929-2555  
E-mail: Frances.Doria@CroweSoberman.com

District of: Ontario  
Division No: 09 - Toronto  
Court No: 31-2303814  
Estate No: 31-2303814

## FORM 31

## Proof of Claim

(Sections 50.1, 81.5, 81.6, Subsections 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1),  
and Paragraphs 51(1)(e) and 66.14(b) of the Act)

In the matter of the proposal of  
1482241 ONTARIO LIMITED  
of the City of Toronto  
in the Province of Ontario

All notices or correspondence regarding this claim must be forwarded to the following address:

Paris & Company Professional Corporation  
161 Bay Street, Suite 2700, Toronto M5J 2S1

In the matter of the proposal of 1482241 ONTARIO LIMITED of the City of Toronto in the Province of Ontario and the claim of James Hussaini and  
Neelofar Ahmadi, creditor,  
Investment of Neelofar Ahmadi, trustee or representative of the creditor, of the city of Toronto in the  
provinces of Ontario, do hereby certify:

1. That I am a creditor of the above named debtor (or I am \_\_\_\_\_ (position/title) of \_\_\_\_\_ creditor).

2. That I have knowledge of all the circumstances connected with the claim referred to below.

3. That the debtor was, at the date of proposal, namely the 13th day of October 2017, and still is, indebted to the creditor in the sum of \$ \_\_\_\_\_, as specified in the statement of account (or affidavit) attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled. (The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.)

4. (Check and complete appropriate category.)

A. UNSECURED CLAIM OF \$ 148,224.10,  
(other than as a customer contemplated by Section 262 of the Act)

That in respect of this debt, I do not hold any assets of the debtor as security and  
(Check appropriate description.)

Regarding the amount of \$ \_\_\_\_\_, I claim a right to a priority under section 136 of the Act

Regarding the amount of \$ \_\_\_\_\_, I do not claim a right to a priority.  
(Set out on an attached sheet details to support priority claim.)

B. CLAIM OF LESSOR FOR DISCLOSURE OF A LEASE \$ \_\_\_\_\_

That I hereby make a claim under subsection 65.2(1) of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based.)

C. SECURED CLAIM OF \$ \_\_\_\_\_

That in respect of this debt, I hold assets of the debtor valued at \$ \_\_\_\_\_ as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security and attach a copy of the security documents.)

D. CLAIM BY FARMER, FISHERMAN OR AQUACULTURIST OF \$ \_\_\_\_\_

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of \$ \_\_\_\_\_

(Attach a copy of sales agreement and delivery receipts.)

## FORM 31 — Concluded

- E. CLAIM BY WAGE EARNER OF \$ \_\_\_\_\_  
 That I hereby make a claim under subsection 81.3(8) of the Act in the amount of \$ \_\_\_\_\_,  
 That I hereby make a claim under subsection 81.4(8) of the Act in the amount of \$ \_\_\_\_\_,  
 F. CLAIM BY EMPLOYEE FOR UNPAID AMOUNT REGARDING PENSION PLAN OF \$ \_\_\_\_\_  
 That I hereby make a claim under subsection 81.5 of the Act in the amount of \$ \_\_\_\_\_,  
 That I hereby make a claim under subsection 81.6 of the Act in the amount of \$ \_\_\_\_\_,  
 G. CLAIM AGAINST DIRECTOR \$ \_\_\_\_\_

(To be completed when a proposal provides for the compromise of claims against directors.)

That I hereby make a claim under subsection 50(13) of the Act, particulars of which are as follows:  
 (Give full particulars of the claim, including the calculations upon which the claim is based.)

- H. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM \$ \_\_\_\_\_

That I hereby make a claim as a customer for net equity as contemplated by section 262 of the Act, particulars of which are as follows:  
 (Give full particulars of the claim, including the calculations upon which the claim is based.)

5. That, to the best of my knowledge, I \_\_\_\_\_ (initials not) (or the above-named creditor \_\_\_\_\_ (is/s is not)) related to the debtor within the meaning of section 4 of the Act, and \_\_\_\_\_ (they) (has/have not) (has not) dealt with the debtor in a non-arm's-length manner.

6. That the following are the payments that I have received from, and the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (or, if the creditor and the debtor are related within the meaning of section 4 of the Act or were not dealing with each other at arm's length, within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of Section 2 of the Act: (Provide details of payments, credits and transfers at undervalue.)

7. (Applicable only in the case of the bankruptcy of an individual.)

- Whenever the trustee reviews the financial situation of a bankrupt to determine whether or not the bankrupt is required to make payments under section 68 of the Act, I request to be informed, pursuant to paragraph 68(4) of the Act, of the new fixed amount or of the fact that there is no longer surplus income.
- I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address.

Dated at Toronto, this 2nd day of May, 2019.

Natalie

Witness

Phone Number:	<u>416-367-2323</u>
Fax Number:	<u>416-367-1530</u>
E-mail Address:	<u>natalie@natalie.ca</u>

NOTE: This affidavit is deemed to have been made before a notary public in the City of Toronto.

WARNING: A false statement made in section 12(1) of the Act relating to any or all of the particulars of the claim or the value of the security of interest, as stated in this affidavit, by the accused creditor,

Section 12(1) of the Act provides for a fine of \$5,000 for making a false statement.

District of: Ontario  
Division No. 09 - Toronto  
Court No. 31-2303814  
Estate No. 31-2303814

In the matter of the proposal of  
1482241 ONTARIO LIMITED  
of the City of Toronto  
in the Province of Ontario

### **AFFIDAVIT OF NEELOFAR AHMADI**

I, Neelofar Ahmadi, of the City of Toronto, in the Province of Ontario, MAKE OATH  
AND SAY:

1. On June 22, 2012, my business partner, Jamshid Hussaini, and I jointly purchased a 20% equity interest in 1482241 Ontario Limited (“148”) under a share purchase agreement.
2. Mr. Hussaini and I filed two earlier proofs of claim in this proceeding, and pursuant to appeals of the denial of those proofs of claim, Justice Chiappetta of the Ontario Superior Court of Justice issued reasons for decision on January 24<sup>th</sup>, 2019, recognizing our ownership interest in 148 (**Exhibit “A”**).
3. Among other things, Justice Chiappetta recognized our equity interest in the company, and concluded at paragraph 53 of Her Honour’s reasons for decision that “The Claimants paid Checroune \$1.2 million for 20% of the shares of 148 in furtherance of their intention as set out in the June 22 Agreement to acquire 100% of the shares. Today, they own 20% of the shares of a bankrupt company.” **[underlining added]**

-2-

4. Mr. Hussaini and I are therefore entitled to a 20% share in any remaining monies left over after creditors have been paid, from 148's liquidated assets.

SWORN BEFORE ME at the City of  
Toronto, in the Province of Ontario on May  
....., 2019

  
Commissioner for Taking Affidavits  
*(or as may be)*

  
NEELOFAR AHMADI

This is Exhibit "A" referred to in the Affidavit of Neelofar Ahmadi sworn May 2, 2019



---

*Commissioner for Taking Affidavits (or as may be)*

NEIL PARIS

**CITATION:** Hussaini v. Crowe Soberman Inc., 2019 ONSC 6424  
**COURT FILE NO.:** 31-2303814  
**ESTATE FILE NO.:** 31-2303814  
**DATE:** 20190124

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**IN BANKRUPTCY AND INSOLVENCY  
IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED, OF THE  
CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

BETWEEN: )  
JAMSHID HUSSAINI AND NEELOFAR )  
AHMADI )  
Appellants )  
- and - )  
CROWE SOBERMAN INC., TRUSTEE )  
ACTING IN THE PROPOSAL OF )  
1482241 ONTARIO LIMITED ("148") )  
Respondent )  
HEARD: December 4 and 5, 2018, January  
9, 2019 )  
Craig A. Mills & Ivan Merrow, counsel for  
the Appellants Jamshid Hussaini, Neelofar  
Ahmadi )  
Mervyn D. Abramowitz, David T. Ullmann,  
& Alexandra Teodorescu, counsel for the  
Respondent 1482241 Ontario Limited )  
Steven L. Graff & Miranda Spence, counsel  
for the Respondent Crowe Soberman Inc. in  
its capacity as the Proposal Trustee for  
1482241 Ontario Limited )

V.R. CHIAPPETTA J.

## Overview

[1] The appellants, Jamshid Hussaini ("Hussaini") and Neelofar Ahmadi ("Ahmadi") (collectively "the Claimants"), appeal the disallowance of their claims in the bankruptcy proposal proceeding of 1482241 Ontario Limited ("148" or the "Debtor"). The Claimants are

both real estate agents in the Toronto area. They are the principals of Homelife Dreams Reality Inc., which is a corporation incorporated pursuant to the laws of Ontario ("Homelife").

[2] In 2012, the Claimants wanted to purchase a commercial property located at 240 Duncan Mill Road in Toronto, Ontario (the "Property"). The registered legal owner of the Property was 148, an Ontario corporation wholly owned by Alain Checroune ("Checroune") that carried on business buying, selling and managing commercial properties. 148 held the Property as trustee for Checroune.

[3] The Claimants attempted to purchase the Property from 148, but were unsuccessful because of issues with financing and title. In a second attempt to ultimately acquire the Property, the Claimants entered into an agreement with Checroune to buy 100% of 148's shares.

[4] By way of Share Purchase Agreement signed on June 22, 2012, the Claimants and Checroune agreed that Checroune would transfer 20% of the shares of 148 to the Claimants immediately, and that the balance of the shares would be transferred upon payment in full, with an October 1, 2015 closing date (the "June 22 Agreement"). By way of Amended Trust Declaration signed on the same day, the Claimants and Checroune agreed that Checroune would transfer and assign 20% of his beneficial interest in the Property to the Claimants (the "Amended Trust").

[5] The sale of the balance of the shares did not close.

[6] On June 13, 2014, the Claimants commenced an action against 148 and Checroune, seeking in part a declaration that they are beneficial owners of a 20% interest in the Property. A Fresh as Amended Claim was issued in November 14, 2016. Homelife was added as a party. The Claimants sought in part a declaration that Checroune's conduct as alleged therein was oppressive. This action was stayed when on October 13, 2017, 148 filed a Notice of Intention to Make a Proposal (the "Proposal Proceedings") pursuant to s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

[7] Crowe Soberman Inc. was appointed as the Proposal Trustee (the "Proposal Trustee"). The Proposal Trustee sold the Property to an arms-length purchaser at the end of February 2018. This agreement was approved by the Court on March 16, 2018. 148 submitted a proposal to its creditors on April 13, 2018. A requisite majority of creditors voted in favour of the proposal at a meeting held on May 4, 2018. The proposal was also approved by Court on June 12, 2018.

[8] The Claimants advanced two claims in the Proposal Proceedings: two property proofs of claim (collectively the "Property Claim") collectively claiming a 20% beneficial interest in the Property (or the proceeds from sale) based on the Amended Trust and an unsecured proof of claim (the "Litigation Claim") seeking damages for lost opportunity and lost profit based on 148's alleged oppressive conduct, along with legal fees incurred related to the 2014 litigation.

[9] The Proposal Trustee disallowed the Property Claim by way of Notice of Disallowance dated May 17, 2018.

[10] Although the Proposal Trustee has not disallowed the Litigation Claim, Justice Dunphy ordered that the Litigation Claim may be treated as disallowed for the purposes of this hearing.

[11] The Claimants appeal the disallowances, seeking a declaration that both the Property Claim and the Litigation Claim are valid and enforceable claims in the Proposal Proceedings. For reasons set out below, I have concluded that the Claimants have failed to establish a proprietary interest in the Property either by way of express trust or constructive trust, such that the Property Claim is neither valid nor enforceable. Further, the Claimants have failed to prove that 148 acted in a manner that was oppressive to their interests such that the Litigation claim is neither valid nor enforceable.

#### Factual Background

##### *Negotiation of the June 22 Agreement*

[12] By Trust Declaration dated September 21, 2005, 148 held legal title to the Property in trust as a bare trustee for Checroune as the beneficiary (the "2005 Trust Declaration"). Pursuant to the 2005 Trust Declaration, 148 agreed to remit to Checroune all revenue owing from the Property and Checroune agreed to indemnify 148 for all liabilities relating to the Property.

[13] On February 8, 2012, the Claimants submitted an Agreement of Purchase and Sale to purchase the Property for \$15 million (the "APS"). The Claimants intended to purchase the Property themselves, without partners. The Claimants were unable to purchase the property as contemplated by the APS. The Claimants encountered issues with assuming the first mortgage without a penalty considering a maturity date of October 2015, with a Certificate of Pending Litigation that was registered against the property and with financing the purchase.

[14] In consultation with their lawyer at the time, the Claimants developed a different way to achieve their end goal of owning the Property: they would purchase 100% of the shares of 148, the owner of the property, for \$15 million.

[15] On June 6, 2012, the Claimants and Checroune entered into a written agreement whereby the Claimants would purchase Checroune's shares in 148 (the "June 6 Agreement"). 148 was not a party to the June 6 Agreement. The June 6 Agreement reads in relevant part:

- (a) 148 is the registered owner of the Property and the Property is subject to a mortgage in the amount of \$9 million.
- (b) Checroune will sell the Claimants 36.67% of the issued shares of 148 with the further 63.33% to be made available by Checroune to the Claimants and to be transferred after all payments are made.
- (c) The price payable for the purchased shares will be based on the sum of \$6 million as the value of 148 subject to adjustments.
- (d) The Claimants shall pay a deposit of \$200,000 and a further sum of \$2 million upon closing.

- (e) Closing means 10 days after the Claimants sign the offer. If for any reason the transaction does not close, the offer becomes null and void and the deposit will be returned to the Claimants.
  - (f) The Claimants shall have the rights of a 36.67% shareholder following closing and will be entitled to vote on the election of the board of directors, the appointment of officers of the corporation and to share in the distribution of the profits of 148 to the extent of their shareholding.
  - (g) The Claimants have the right to manage the Property, collect rents and enter into leases with Checroune's written consent.
  - (h) Until the Claimants buy the full 100% of the shares in 148 as contemplated in the Agreement, they will not be permitted or entitled to manage the business of 148, retain profits, sell or re-mortgage the Property.
  - (i) Upon payment in full, Checroune will transfer the balance of the shares to the Claimants.
  - (j) Any liabilities arising out of matters occurring on or before the closing date or from existing litigation shall remain the responsibility of Checroune.
  - (k) The Claimants agree to accept title to the shares subject to the litigation brought by 214688 Ontario Ltd., provided that Checroune pay all costs related to this litigation and any damages resulting from this litigation.
- [16] On June 22, the parties amended the June 6 Agreement to reflect the following:
- (a) The Closing Date means Thursday June 21, 2012.
  - (b) The Claimants agree to purchase only 20% of the issued shares of 148 from Checroune for a total of \$1.2 million upon closing, \$200,000 of which has already been paid. Upon payment of this sum, Checroune shall transfer to the Claimants 20% of the shares of 148.
  - (c) The Claimants shall have the rights of a 20% shareholder following closing.
  - (d) The Claimants can thereafter purchase the remaining 80% of the shares of 148 from Checroune. The purchase price for the remainder of the shares shall be \$4.8 million (the remaining \$13.8 million price adjusted by the \$9 million existing mortgage). The closing date for the transfer of the balance of the shares shall be October 1, 2015, however, if the property can be refinanced without penalty then the closing date shall be October 1, 2014.
  - (e) Until the Claimants purchase 100% of Checroune's shares, they will not be entitled to manage the business of the corporation, retain profits, sell or re-mortgage the property owned by the business.

(f) The litigation shall be finally resolved by the date of the transfer of the balance of shares.

[17] On June 21, 2012, the Claimants paid Checroune \$1 million, in addition to the \$200,000 deposit previously paid on June 6, 2012.

[18] On June 21 and 22, 2012 a number of documents were exchanged between the parties including:

- (a) A director's resolution, signed by Checroune as sole director of 148, transferring 20% of his shares in 148 to the Claimants,
- (b) Share Certificates in respect of 20% of the shares of 148,
- (c) An Undertaking signed by Checroune to sell the remaining 80% of the shares to the Claimants, and
- (d) The Amended Trust Declaration.

[19] The Amended Trust Declaration amends the 2005 Trust Declaration wherein 148 as legal title-holder to the Property granted Checroune a 100% beneficial interest in the property. The Amended Trust assigns 20% of Checroune's beneficial interest in the Property to the Claimants. The Amended Trust Declaration was not registered on title and not referenced in the June 22 Agreement.

#### *Subsequent Disputes between the Claimants and Checroune*

[20] Subsequent to the June 22 Agreement, the Claimants began to lease the 6th floor of the Property from 148 as office space for Homelife. In or about June 2014, the Claimants came to believe that Checroune intended to sell the Property to another purchaser. This prompted them to commence the 2014 Litigation. The Claimants state that in August 2014, Checroune began a campaign of intimidation and harassment so that they would no longer wish to purchase the balance of the shares. They allege that Checroune turned off the lights, elevators and heating during business hours and canceled valid access cards and parking passes. Checroune denies that he engaged in such conduct. There is no third-party evidence before the Court.

[21] In October 2014, 148 terminated Homelife's tenancy, alleging that it breached the terms of its lease with 148 by not obtaining Checroune's consent prior to entering into sublease agreements. The Claimants deny this.

[22] On October 27, 2014, Justice Whitaker granted an injunction order restraining 148 and Checroune from disrupting Homelife's business as well as from selling, mortgaging, encumbering or dealing with the Property or shares in 148 without the Claimants' consent. Checroune nonetheless obtained a second mortgage on the Property, which was registered on title on September 21, 2016, without the Claimants' knowledge.

[23] On October 1, 2015, Checroune tendered to the Claimants in an effort to close the transfer of the remaining 80% of the shares. The Claimants refused to close. Their position is that they did not close on the purchase of the remaining 80% of the shares because Checroune failed to discharge the Certificate of Pending Litigation from title to the Property, as required by the June 22 Agreement. The Claimants did not attempt to extend the closing date and did not waive that condition of closing.

[24] In July 2016, Homelife left the Property and was no longer a tenant of 148.

*148's Bankruptcy*

[25] On October 13, 2017, 148 commenced restructuring proceedings by filing a Notice of Intention to Make a Proposal. Crowe Soberman Inc. was appointed as trustee with respect to the proposal.

[26] On November 3, 2017, the Court authorized the Proposal Trustee to sell the Property in accordance with a court-approved sale process. The Court expressly stated that its authorization did not determine the validity or enforceability of the agreements to which the Claimants were a party with Checroune.

[27] At the end of February 2018, the Proposal Trustee entered into an Agreement of Purchase and Sale with respect to the Property with an arms-length purchaser. This agreement was approved by the Court on March 16, 2018. The approval order provided that the sale proceeds should be held by the Proposal Trustee in trust.

[28] On April 13, 2018, 148 submitted a Proposal to its creditors.

[29] On April 25, 2018, the Claimants advanced the following claim in the Proposal Proceedings, which is subject to this appeal:

Two property proofs of claim collectively claiming a 20% beneficial interest (15% for Hussaini and 5% for Ahmadi) in what are now proceeds from the sale of the Property based on the language of the Amended Trust Declaration (the Property Claim).

[30] On May 3, 2018, the Claimants advanced the following claim in the Proposal Proceedings, which is also subject to this appeal:

Two unsecured proofs of claim seeking damages in the amount of approximately \$42 million (the Litigation Claim).

[31] On May 4, 2018, a requisite majority of creditors voted in favour of the Proposal. The Claimants did not vote as their claims were treated as contingent claims.

[32] On June 12, 2018, the Proposal was approved by the Court. The Claimants did not oppose the approval of the Proposal or appeal the order approving it.

[33] For the purposes of this appeal, the Claimants have reduced their Litigation Claim from 42 million to 4 million, being the difference between the price they offered for the Property under the June 22 Agreement (\$15 million) and the price the Proposal Trustee secured for the Property in the sale concluded in the Proposal (\$19 million).

#### Issues

[34] The parties agree that this appeal presents to the Court the following issues:

- (1) Do the Claimants each have a trust claim against 148 pursuant to s.67 of the BIA in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust?
- (2) Should the Court find that a constructive trust arose benefitting the Claimants in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust or in respect of the \$1.2 million paid by them to Checroune?
- (3) If the Claimants each have trust claims with respect to the Sale Proceeds, what priority, if any, should be afforded to those trust claims?
- (4) Do the Claimants have an unsecured claim for damages against 148 with respect to the breaches alleged in the Litigation Claim?

#### Analysis

*1. Do the Claimants each have a trust claim against 148 pursuant to s.67 of the BIA in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust?*

[35] I have concluded that the Claimants do not have a trust claim against 148 pursuant to s.67 of the BIA in respect of the proceeds of the Property currently held by the Proposal Trustee in trust.

[36] The Claimants assert that the language of the Amended Trust created an express trust. The Amended Trust states that Checroune transfers and assigns 20% of his 100% beneficial interest in the Property to the Claimants. Despite this language however, it cannot be said that there was sufficient certainty of intention to create a trust with respect to the Property. The language of the 2012 Amended Trust Declaration must be interpreted contextually, considering the whole of the circumstances, including the factual matrix within which it was made and the conduct of the parties thereafter: *Antle v. Canada*, 2010 FCA 280, 413 N.R. 128, leave to appeal refused, [2010] S.C.C.A. No. 462 at paras. 11-14.

#### *Law of Express Trust*

[37] Certainty of intention is one of the three certainties necessary to create a trust. In order for a trust to have certainty of intention, the language used must show that the settlor intended that the recipient must hold the property on trust for the benefit of the beneficiary: *Donovan*

W.M. Waters, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 140. However, there is no magic in the word "trust". Intention is a matter of substance over form, and language alone cannot create a trust: *Willis (Litigation Guardian of) v. Willis Estate* (2006), 23 E.T.R. (3d) 292 (Ont. S.C.J.), affirmed, 2007 ONCA 552, 33 E.T.R. (3d) 187. It is important to interpret the words of a document purporting to create a trust in context. As stated by the Federal Court of Appeal in *Antle* at para. 12: "A test that requires one to look at all of the circumstances, and not just the words of the trust deed, is an approach that appears to have been adopted by Canadian courts generally."

[38] The other two certainties are certainty of object and certainty of subject-matter. Certainty of object is the requirement that the beneficiary of the trust must be ascertainable. Certainty of subject-matter is the requirement that the property to be held on trust must be clearly identifiable at the time the trust comes into existence. The beneficial interest which each beneficiary should have in that property must also be clearly identifiable. These certainties are required so that trustees, courts, and settlors can be sure that a trust is being properly administrated according to its terms.

#### *Application*

[39] 148 submits that the Claimants have failed to satisfy their onus in proving certainty of subject matter. It notes that the Amended Trust refers to the Property including Assets such as chattels, fixtures, equipment, and leases and rental agreements. This, it argues, is not only ambiguous in and of itself but is also inconsistent with the property the Claimants set out to acquire, namely 100% of the shares of 148. I disagree. The Amended Trust agreement adopts the definition of the Property in the 2005 Trust Agreement and provides further certainty of subject-matter in terms of what a proprietary interest in the Property would include. It is not inconsistent with the Claimants' intended ownership of 100% of the shares of 148, as 148 holds legal title to the Property and its assets.

[40] 148 further submits that the Claimants have not demonstrated certainty of intention to create a trust with respect to the Property. The Claimants' position is that they have discharged this burden. They submit that the explicit language of the Amended Trust is the best evidence in determining certainty of intention. Certainty of intention is satisfied, it is argued, by the unambiguous language of the Amended Trust, which clearly assigns 20% of Checroune's beneficial interest in the Property to the Claimants. I disagree.

[41] Certainty of intention relates to a clear intention that the trustee should hold property for the benefit of someone else. No particular form of words is required or determinative: *Willis (Litigation Guardian of) v. Willis Estate*, 2007 ONCA 552, 33 E.T.R. (3d) 187 at para. 2. In this case, it is important to consider the language of the 2012 Amended Trust Declaration contextually with the parties' stated and consistent intention for executing the Amended Trust and their conduct thereafter.

[42] The Claimants' intent was always to own the Property outright. They had no intention to be joint owners of the Property with Checroune. Checroune's intent was always to sell the Property outright. He had no intention to sell only part of the Property.

[43] It was only when the Claimants were unable to purchase the Property that they turned their efforts to owning 100% of the shares of 148. The Claimants had no intention to be minority shareholders of the business of 148. They did not want any partners. They wanted to own 148 outright so they could ultimately own the Property. Checroune's intent was always to sell 100% of his shares of 148. He had no intent to work with a minority shareholder. If he could not sell the Property outright, he wanted to sell all of the shares of 148.

[44] Ahmadi testified that the Claimants' lawyer put together the strategy to purchase 100% of Checroune's shares in 148 because the Claimants wanted to own the Property but were unable to purchase it outright. The parties intended that the Claimants would acquire 100% of the shares of 148 for \$15 million. The share transaction was subsequently structured so the Claimants initially acquired 36.67% of the shares (later amended to 20% of the shares) and were obligated to purchase the balance at a later date, to be transferred upon further payment. On cross examination, Ahmadi admitted that the parties made this arrangement because the Claimants could not obtain financing to purchase 100% of the shares outright, considering the Certificate of Pending Litigation registered on the Property. The share purchase was therefore structured in two tranches, but it was always the parties' shared intention that Checroune would sell 100% of his shares in 148 to the Claimants.

[45] It was in this context, upon the purchase of the first 20% of the shares and prior to the full completion of the intended share purchase, that the Amended Trust was executed.

[46] Ahmadi testified that the Claimants did not understand the details of the documents and did not understand the specifics relating to the Amended Trust, including the differences between beneficial and legal interests. Her evidence is that the Claimants understood that the purpose of the Amended Trust was "to protect our interest and to become the owners." It provided a measure of security to ensure that Checroune did not sell the Property without the Claimants' knowledge, pending the completion of the sale of the remaining shares pursuant to the June 22 Agreement. It therefore further served as an incentive to Checroune to comply with his obligations as defined in the June 22 Agreement in facilitating the sale of the remaining shares.

[47] Ahmadi described the Amended Trust as "extra security" to protect the Claimants' interests in ultimately acquiring 100% of the shares of 148 and, as a result, 100% of the Property. There is no evidence to suggest that at the time of the Amended Trust, the Claimants intended to receive a 20% proprietary or beneficial interest in the Property. Rather, the evidence is that the Claimants intended the Amended Trust to serve as security towards the close of the sale of the remaining 80% of the shares, and nothing more.

[48] Similarly, Checroune's evidence is that the Amended Trust was intended to act as "security" or to provide "additional security" pending the intended transfer of the remaining 80% of the shares. He states that he never intended to convey any part of the Property until the Claimants paid in full for 100% of the shares as contemplated by the June 22 Agreement.

[49] The parties' stated shared intention in creating the Amended Trust is demonstrated by their conduct subsequent its execution. At no time did the parties act in a manner consistent with the Claimants' enjoying a beneficial interest in the Property. For over three years, the Claimants

did not contribute to the ongoing expenses related to the Property, including maintenance and any payments toward the existing \$9 million mortgage, despite the obligation of the beneficial owner pursuant to the 2005 Trust Declaration to indemnify 148 for all liabilities relating to the Property. Similarly, at no time did the Claimants receive a share of profits derived from the Property, despite 148's obligation pursuant to the 2005 Trust Declaration to remit all revenue owing from the Property to the beneficial owner. Significantly, this conduct is also consistent with the parties' intention as reflected in the June 22 Agreement that until the Claimants purchased 100% of Checroune's shares, the Claimants would not be entitled to retain profits.

[50] The parties' demonstrated conduct fails to indicate the Amended Trust was intended to transfer a partial proprietary interest. Rather, it underscores their stated intention that the Amended Trust was intended to protect the Claimants' contractual agreement with Checroune to complete the purchase of the remaining shares.

[51] For these reasons, I have concluded the Amended Trust does not constitute an express trust as the Claimants have not demonstrated that there was certainty of intention.

#### *The Amended Trust post-October 2015*

[52] The transfer of the remaining shares as intended by the parties and contracted by the June 22 Agreement did not close on October 1, 2015. I agree with 148 that the Amended Trust, intended by the parties to secure the closing, is therefore rendered moot as of October 2015 as there is nothing more to secure.

[53] The Claimants paid Checroune \$1.2 million for 20% of the shares of 148 in furtherance of their intention as set out in the June 22 Agreement to acquire 100% of the shares. Today, they own 20% of the shares of a bankrupt company. At no time did they wish to own only 20% of the shares. The Claimants may have legal recourse against Checroune in this regard as a party to the June 22 Agreement. They do not have a claim against 148, however, with respect to any rights arising from the Amended Trust.

2. *Should the Court find that a constructive trust arose benefitting the Claimants in respect of the Sale Proceeds of the Property currently held by the Proposal Trustee in trust or in respect of the \$1.2 million paid by them to Checroune?*

[54] In the alternative, the Claimants submit that a constructive trust ought to be imposed over the sale proceeds in order to recognize their beneficial interest. It is their position that unless this remedy is applied, 148 and its creditors will be unjustly enriched at the Claimants' expense.

#### *Law of Constructive Trust*

[55] A constructive trust arises by operation of law as a means for equity to combat behaviour that is contrary to good conscience. It is a remedy for unconscionable transactions: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras. 18, 32, 45. Constructive trusts can arise in many circumstances, including to remedy an unjust enrichment; or to confiscate profits flowing from a wrong.

[56] The Claimants advance arguments based on both circumstances. They claim that 148 has been unjustly enriched, and that 148 has wrongfully breached an equitable duty to them and profited as a result.

[57] The elements of an unjust enrichment claim are: a benefit to one party, a corresponding deprivation to the other, and no juridical reason for the transfer of value: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 249 at para. 32. The enrichment must correspond with a deprivation from the plaintiff. The purpose of the unjust enrichment doctrine is to reverse unjust transfers. Accordingly, it must first be determined whether wealth has moved from the plaintiff to the defendant: *Professional Institute of the Public Service of Canada v. Canada*, 2012 SCC 71, [2012] 3 S.C.R. 660 at paras. 151-152. In order for a constructive trust to arise to remedy the unjust enrichment, monetary damages must be inadequate to compensate the plaintiff, and there must be a link between the benefit alleged to have been provided and the property over which the constructive trust is claimed: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at para. 31.

[58] The Supreme Court in *Soulos* at para. 45 outlined four conditions that should generally be satisfied in order for a constructive trust based on wrongful conduct to arise:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (4) There must be no facts which would render the imposition of a constructive trust unjust in all the circumstances of the case.

#### *Application*

[59] The Claimants argue that 148 has been enriched by its breach of its duty as trustee to the Claimants. They argue that it has utilized the Property for its own benefit both prior to and after the filing of the Notice of Intention to Make a Proposal without regard to the Claimants' beneficial interest in the Property. This position, however, presumes that the Claimants enjoy a beneficial interest in the Property. For the reasons outlined above, I have concluded that they do not. 148 does not owe an equitable duty as trustee to the Claimants. Therefore, the first condition outlined by the Supreme Court in *Soulos* is not met.

[60] The Claimants further argue that 148 has been unjustly enriched to the extent that Checroune used the \$1.2 million he received from the Claimants to satisfy amounts purportedly owed by Homelife to 148. This submission confuses the various contractual relationships of the Claimants, Homelife, Checroune and 148. The payment by the Claimants of \$1.2 million was

made to Checroune pursuant to the June 22 Agreement. If there is an enrichment, it is to Checroune personally. Neither Homelife nor 148 were parties to the contract pursuant to which the Claimants paid Checroune the \$1.2 million.

[61] The Claimants submit that they have been deprived of the funds they paid in good faith in furtherance of their intention to acquire 100% of the shares of 148, the security they relied upon in the form of the Amended Trust and any benefits agreed upon in the June 22 Agreement. Again, if there is a deprivation it is at the hands of Checroune personally and not 148. The Claimants' alleged deprivation does not correspond to 148's alleged enrichment.

[62] Finally, the Claimants argue that there is no justification at law for 148 to retain "these benefits". For reasons noted above, however, it cannot be said that 148 was enriched as a non-party to the June 22 Agreement.

3. *If the Claimants each have trust claims with respect to the Sale Proceeds, what priority, if any, should be afforded to those trust claims?*

[63] I have concluded that the Claimants do not have trust claims with respect to the sale proceeds. I will nonetheless analyze the issue of priority, in case I am incorrect in this conclusion.

[64] The Claimants argue that if it is found that the Amended Trust grants them a proprietary interest, they are entitled to 20% of the sale proceeds, excluding all amounts paid under the Second Mortgage and any amounts paid to 148 and its counsel under the Proposal.

[65] 148 argues that if it is found that the Claimants are beneficiaries in accordance with the Amended Trust, 148's liabilities in respect of the Property are properly deducted from the sale proceeds before any residual benefit is paid to the Claimants or Checroune.

[66] I agree with 148. The 2005 Trust Declaration provides that 148 holds legal title to the Property as bare trustee for Checroune, who holds the entire beneficial interest in the Property. It further states that Checroune as beneficiary shall fully indemnify 148 as trustee from all liabilities, obligations, claims, charges, encumbrances and responsibilities, as well as all costs and expenses in connection with the Property including legal expenses. These terms were not altered in the Amended Trust. The terms of the trust itself are such that the Claimants do not have a right to the sale proceeds until 148's obligations are otherwise satisfied.

[67] This is consistent with the nature of a beneficiary's rights to the trust property. The beneficiary has no rights over the trust property, only rights over the trustee's actions with regard to the trust property. The trustee is the legal owner of the trust property, and has the rights necessary to direct trust assets to pay trust creditors. A trustee further has a right to reimburse himself or herself out of trust assets. For that purpose, trustees have priority as against beneficiaries in the trust property: Lionel Smith, "Trust and Patrimony", (2009) 28 ETPJ, 332.

[68] Where a trust directs that the trustee should make certain payments to a beneficiary, the beneficiary usually receives that benefit subject to deductions for the expenses of the trust property. This issue commonly arises in cases where there is a dispute between successive

beneficiaries about from where trust expenses should be deducted. If a beneficiary is entitled to the income produced by trust capital for life, for example, they usually receive that income subject to deduction for ordinary, recurring expenses such as repairs or property taxes. Major occasional improvements or expenditures are usually paid out of the trust capital, which may be subject to the beneficial interest of a different beneficiary. In all cases, it is always open to the settlor to dictate how the trust expenses are to be paid: *Waters' Law of Trusts in Canada* at 1028.

[69] If the Claimants are beneficiaries under the Amended Trust therefore, the nature of the Claimants' rights are such that 148's liabilities are deducted from the sale proceeds before any residual benefit is paid to the Claimants or Checroune. To do otherwise would be to ignore the express language of the Amended Trust and grant a priority contrary to that recognized in law.

4. *Do the Claimants have an unsecured claim for damages against 148 with respect to the breaches alleged in the Litigation Claim?*

[70] As shareholders of 148, the Claimants are permitted to apply for a court order under the oppression remedy provisions of the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B. 16, s.248 (the "OBCA"). The oppression remedy provisions of the OBKA state that where a court is satisfied that the business or affairs of the corporation have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder, the court may make an order to rectify the matters complained of (s.248(2)).

[71] The Litigation Claim is based on the allegations as set out in the Fresh as Amended Statement of Claim dated November 14, 2016. In that Claim, the Claimants seek a declaration of oppressive conduct or damages for oppressive conduct as against Checroune personally, not 148. The Claimants plead therein that 148 was an agent for Checroune and that Checroune is personally liable for the actions of 148.

[72] The allegations of improper conduct before the Court are similarly restricted to allegations about Checroune's actions. Ahmadi states (and Checroune denies) that Checroune turned off the lights and the elevators in the building at the Property and that he harassed subtenants.

[73] The onus is on the complainant pleading oppressive conduct to identify the expectation that he or she claims has been breached by the conduct in question and to establish that such expectations are reasonable: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 460 at para. 70.

[74] The Claimants have not provided any evidence in terms of their reasonable expectations. Ahmadi states that Checroune never involved the Claimants in the management of 148, never invited them to a shareholders' meeting and kept them in the dark about 148's operations and finances. She did not state that this amounted to a breach of a reasonable expectation.

[75] Practically speaking, there were only two shareholders of 148. It defies commercial reality that a shareholders' meeting would be called, particularly as the Claimants did not request a meeting and the parties spoke daily about the business of 148. Contrary to Ahmadi's evidence,

Checroune testified that he provided the Claimants with financial information about 148 and access to information in general.

[76] The Claimants argue that the June 22 Agreement created reasonable expectations that they would gain the associated rights of a 20% shareholder. The Agreement clearly states, however, that until the Claimants became 100% shareholders of 148, they could not manage the business, retain profits from the business, or mortgage or sell the business.

[77] In my view, therefore, the Claimants have failed to demonstrate that 148 engaged in oppressive conduct or breached their reasonable expectations.

#### *Damages*

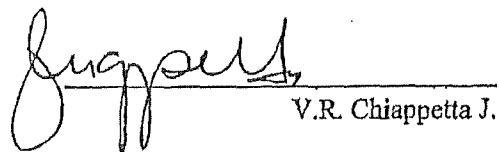
[78] For the purpose of damages, the Claimants argue that they reasonably expected that they would become the owners of the Property. It is appropriate, they submit, to therefore award them damages in the amount of \$4 million, being the difference between the price that they proposed to pay under the June 22 Agreement and the price the Property ultimately sold for under the Proposal.

[79] The Claimants have failed to consistently state their reasonable expectations. They have failed to explain how this remedy is connected to their reasonable expectations pursuant to the June 22 Agreement or the alleged oppressive conduct of 148. The Claimants' damages would only be based on the difference between the price in their agreement and the price the Property ultimately sold for if the agreement had been for the purchase of the Property. There is no evidence of this. In fact, the Claimants concluded an agreement to purchase 100% of Checroune's shares in 148, not the Property. If oppressive conduct was found, which it was not, damages would appropriately flow from the failed June 22 Agreement, and would reflect the impact of the oppressive conduct on the price of 148's shares.

#### Disposition

[80] It is for these reasons the appeal is dismissed.

[81] The parties are encouraged to agree on an appropriate costs award. If unable to do so, I will receive submissions of not more than three pages in writing. 148 shall submit their submissions within 30 days. The Claimants shall submit their submissions in response within 20 days thereafter. A Reply, if any, shall be submitted within 10 days thereafter.



Chiappetta  
V.R. Chiappetta J.

**CITATION:** Hussaini v. Crowe Soberman Inc., 2019 ONSC 642  
**COURT FILE NO.:** 31-2303814  
**ESTATE FILE NO.:** 31-2303814  
**DATE:** 20190124

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JAMSHID HUSSAINI AND NEELOFAR AHMADI

Appellants

— and —

CROWE SOBERMAN INC., TRUSTEE ACTING IN  
THE PROPOSAL OF 1482241 ONTARIO LIMITED  
("148")

Respondent

---

**REASONS FOR JUDGMENT**

---

V.R. Chiappetta J.

In the matter of the proposal of  
1482241 ONTARIO LIMITED  
of the City of Toronto  
in the Province of Ontario

Court File No. 31-2303814

***SUPERIOR COURT OF ONTARIO***

PROCEEDING COMMENCED AT  
TORONTO

**AFFIDAVIT OF NEELOFAR AHMADI**

**PARIS & COMPANY**  
161 Bay Street, Suite 2700  
Toronto ON M5J 2S1

Neil Paris LSO# 48139G  
[nparis@parislaw.ca](mailto:nparis@parislaw.ca)  
Tel: 416-304-1717  
Fax: 647.931.4718

Lawyers for the Applicants (Appellants)

# APPENDIX “H”

## 148 Ontario Claims Register

Secured Creditors	Amounts	Proven	Filed Prior to Deadline	Admitted by Crowe	Opposed by Debtor
1 Caruda Holdings	\$ 804,726.03	No	Yes	No	
2 Canada Revenue Agency	\$ 3,972.76	Yes	Yes	Yes	
Unsecured Creditors	Amounts	Proven	Filed Prior to Deadline	Admitted by Crowe	Opposed by Debtor
1 A Checroune Realty Corporation	\$ 553,015.98	No	Yes	No	
2 Alain Checroune	\$ 4,350,000.00	No	Yes	No	
3 Alain Checroune	\$ 1,440,000.00	No	Yes	No	
4 Alain Checroune	\$ 12,000,000.00	No	Yes	No	
5 Allevio Clinic #1	\$ 486,050.06	No	Yes	Partially- See Schedule	
6 Caruda Holdings	\$ 1,318,321.64	No	Yes	No	
7 Caruda Holdings	\$ 136,588.65	No	Yes	No	
8 Canada Revenue Agency	\$ 17,699.61	Yes	Yes	Yes	
9 Daikin Applied Canada Inc.	\$ 12,353.69	Yes	Yes	Yes	
10 Devry Smith LLP	\$ 128,153.49	Yes	Yes	Yes	
11 GDI Services Canada LP	\$ 95,746.42	Yes	Yes	Yes	
12 Gowling WLG	\$ 401,284.89	Yes	Yes	Yes	
13 North York Family Physicians Holdings Inc.	\$ 46,442.42	Yes	Yes	Yes	
14 Qualified Elevator Repair	\$ 18,247.23	Yes	Yes	Yes	
15 Rogers	\$ 871.56	Yes	Yes	Yes	
16 Toronto Hydro	\$ 199,934.53	Yes	Yes	Yes	
17 Treasurer- City of Toronto	\$ 3,197.25	Yes	Yes	Yes	
18 YYZ Plumbing	\$ 17,960.20	Yes	Yes	Yes	
Contingent Creditors	Amounts	Proven	Filed Prior to Deadline	Admitted by Crowe	Opposed by Debtor
1 Chang-Soon Yoo	\$ 800,000.00	No	No	No	
2 Clear Custom Brokers	\$ 500,000.00	No	Yes	Contingent	
3 Home Life Dreams Realty	\$ 42,750,000.00	No	Yes	Contingent	Yes
4 Jamshid Hussaini	\$ 42,750,000.00	No	Yes	Contingent	Yes
5 Neelofar Ahmadi	\$ 42,750,000.00	No	Yes	Contingent	Yes

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**(IN BANKRUPTCY AND INSOLVENCY)**

**Proceedings commenced at Toronto**

**MOTION RECORD**  
(returnable May 24, 2019)

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Steven L. Graff (LSUC # 31871V)**  
Tel: (416) 865-7726  
Fax: (416) 863-1515  
Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)

**Miranda Spence (LSUC # 60621M)**  
Tel: (416) 865-3414  
Fax: (416) 863-1515  
Email: [mspence@airdberlis.com](mailto:mspence@airdberlis.com)

*Lawyers for Crowe Soberman Inc. in its capacity as the proposal  
trustee of 1482241 Ontario Limited*