Estate No: 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

MOTION RECORD OF A-1 WINDOW MFG. LTD.

(MOTION FOR SECOND EXTENSION OF TIME TO FILE A PROPOSAL)

RETURNABLE 17/MAR/2021 AT 1:00 PM

15/MAR/2021

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd
Surrey, B.C. V3T 2X2

Mikhael Magaril (LSBC #511386)
Tel: (604) 259-6200
Fax: (604) 259-6202
Email: MMagaril@BearCreekLaw.com

Lawyer for A-1 Window Mfg. Ltd.

TO THE SERVICE LIST

Estate No: 32-2701357

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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

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ONTARIO
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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

FACTUM OF THE APPLICATION RESPONDENT

A-1 WINDOW MFG. LTD.

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TO THE SERVICE LIST

Contents

PART 1 – OVERVIEW

1. The debtor, Unique Restoration Ltd. ("**Unique**") applies for a second extension of time in which it would file a proposal under the *Bankruptcy and Insolvency Act*, as well a partial lifting of the stay in respect of the Starlight litigation.

2. The creditor A-1 Window Mfg. Ltd. ("**A1**") opposes the second extension of time. A1 likely has no standing in respect of any application to lift the stay in respect of the Starlight litigation and thus takes no position on that front.

3. A1 opposes the second extension of time. Because of the date of when A1 was served any notice of this motion, it lacked the ability to bring its own proper and timely motion to have the stay (partially) lifted in its proceeding.

4. A1's opposition rests on the statutory criteria required to be met by Unique in ss. 50.4(9)(c) [creditor is materially prejudiced]. A1 says an extension will materially prejudice it. A1 however recognizes the time constraints. For the purpose of expediting this hearing A1 does not advance any argument that Unique has not met the criteria in ss. 50.4(9)(a) or 50.4(9)(b) – though it has serious reservations that the Starlight litigation would be a viable proposal and reserves its right to challenge that on any subsequent motion to further extend time.

5. The test for lifting a stay under s. 69.4 however is slightly more favourable to A1. A stay can be lifted when a creditor is materially prejudiced – same as s. 50.4(9)(b), but it also allows a stay to be lifted if the Court is satisfied under s. 69.4(b) that it is equitable on other grounds to make such a declaration.

6. To avoid a duplicity of proceedings, A1 submits that in determining whether to extend the time to file a proposal, if the Court accepts that A1 is materially prejudiced, or that it is equitable on other grounds to lift the stay, then the appropriate remedy is simply to lift the stay on such terms as the Court may deem fit, and then allow the extension of time subject to the Court itself being satisfied that Unique has met the test in s. 50.4(9).

7. A1 is materially prejudiced, and it would be equitable on other grounds to lift the stay, because:

a. Its claim against Unique involves unliquidated amounts that cannot be disposed of in a summary fashion. They require assessments of credibility and the ability to use the applicable rules of court to advance their case, none of which are available through the *BIA* process;

b. A1 may have other claims against individuals for the swearing of false statutory declarations that allowed Unique to obtain progress draws. The other individuals cannot be identified by A1 easily because Unique was dilatory in its obligations under the B.C. *Supreme Court Civil Rules* to provide documents and unilaterally refused to attend at an examination for discovery;

c. Delay in identifying individuals who may have sworn the false statutory declarations, or obtain the proceeds thereof, will jeopardize A1's ability to bring a successful claim against them and obtain the fruits of any judgment thereon. Money in such circumstances has a way of dissipating quickly;

d. If A1 was able to identify such individuals through other means (i.e. a *Norwich* order), any action of knowing assistance and knowing receipt would not be stayed, but Unique's participation would be necessary for the complete and proper adjudication of such a claim; and

e. The claim that A1 advances is one that would survive bankruptcy under s. 178 of the *BIA*.

PART II – FACTS

8. A1 commenced a proceeding against Unique originally on 23/JUL/2020 bearing British Columbia Supreme Court action number S-207317 from the Vancouver registry (the "**A1 Action**"): **Disini #1** at Exhibit A.

9. The A1 Action advances claims that Unique, or someone on behalf of Unique swore false statutory declarations to obtain progress draws. It seeks punitive damages, tracing remedies, and a s. 178 declaration.

10. Unique filed a Response to Civil Claim alleging various set-offs and damages that were not particularized except in part. The parts that were particularized only amounted to some $13,124.59 leaving a tidy sum still owing to A1.: **Disini #1** at Exhibit B.

11. As a result of delinquencies arising from early on in the litigation, A1 brought an application to compel Unique to produce particulars of those damages and set-offs: **Disini #1** at Exhibit C and para 5.

12. The delinquencies include:

    a. A representation by Unique's counsel that he expected that particulars would be provided by 16/OCT/2020, despite the demand being made on 29/SEP/2020 and the particulars being due within 10 days: **Disini #1** at Exhibit D, internal exhibits A and C

    b. A representation by Unique's counsel that they will be able to conduct a proper investigation of Unique's defence by 18/SEP/2020: **Disini #1** at Exhibit D, internal exhibit D

    c. In response to a request for availability for Unique to attend an examination for discovery sent on 29/SEP/2020, counsel for Unique unilaterally indicated on 26/OCT/2020 that his client will not sit until he has completed his investigation of the matter: **Disini #1** at Exhibit D, internal exhibit B, and **Disini #1** at Exhibit E, internal exhibit A.

    d. On 26/OCT/2020 counsel for Unique provides a proposed timeline of 30/NOV/2020 for delivery of documents and for particulars, but fails to provide the documents: **Disini #1** at Exhibit E, internal exhibit A

13. The response to demand for particulars was provided by Unique on or about 26/NOV/2020: **Disini #1** at Exhibit F. Including the sum previously articulated by Unique of $13,124.59, which is disputed as being the fault of A1, the rest of the claims of set off are highly questionable as they predominantly involve the provision of labour by Unique. However, despite Unique's best efforts at increasing its claim of set-off, there is still approximately $10,000 owing to A1 on Unique's best day in Court.

14. Notable is that in this same correspondence of 26/NOV/2020 at the end counsel advises that "Unique has some preliminary documents that it will disclose".

15. On 09/DEC/2020, counsel for Unique indicates that Unique's list of documents "should be done within the next couple of weeks": **Disini #1** at Exhibit G.

16. On 07/JAN/2021 counsel for A1 provides correspondence demanding Unique's documents and also asks if his recollection that Unique's counsel represented to the presider that the particulars and documents would go hand-in-hand was correct: **Disini #1** at Exhibit H.

17. The e-mail response does not answer that question: **Disini #1** at Exhibit I.

18. Email correspondence begins with counsel for the proposal trustee begins on 08/JAN/2021 and arguments similar to those advanced in this factum are made to the proposal trustee's counsel to have them consent to lifting the stay: **Disini #1** at Exhibit J.

19. On 05/FEB/2021 a more detailed letter is sent to the proposal trustee's counsel articulating that there appears to be a breach of the statutory trust created by the B.C. *Builders Lien Act* is communicated to counsel for the trustee. Questions are also posed about whether the stay was extended as there was no notice given to A1: **Disini #1** at Exhibit K.

20. Documentation was enclosed in that letter that strongly suggests that Unique got paid in full as it had the 10% holdback released and there was a certificate of completion issued. These representations are made by the strata property's lawyer: **Disini #1** at Exhibit L.

21. On 12/MAR/2021 counsel for the proposal trustee alerts A1's counsel that there is this motion returnable on 17/MAR/2021.

22. Numerous questions are then posed by e-mail to counsel for both Unique and the proposal trustee. Questions about why A1 was not served are left unanswered: **Disini #1** at Exhibit M.

23. Counsel for Unique in this proceeding is / was also counsel for Unique in the A1 Action.

24. Despite A1 having advanced its own claim in which present counsel for Unique in this proceeding was also counsel for Unique in that proceeding, and despite early correspondence

commencing on 14/JAN/2021 with counsel for the trustee voicing concern and seeking to lift the stay in respect of the A1 action, A1 was not served with any motion materials until 12/MAR/2021.

PART III – ISSUES AND THE LAW

25. In order for Unique to obtain a (second) extension of time, it must satisfy all of the criteria in s. 50.9(4) of the *BIA.* This includes that no creditor is materially prejudiced.

26. A creditor can also apply to have the stay lifted, on terms, if it satisfies the criteria in s. 69.4 of the *BIA.* That criteria is broader and more beneficial to A1 as a creditor as s. 69.4(b) allows the stay to be lifted if it is equitable on other grounds to do so.

Complex Actions and Unliquidated Claims

27. The A1 Action will involve determinations of contractual interpretation but also assessments of credibility. The pleadings reveal a dispute as to whether any extra work was requested by Unique, a contest as to who is contractually liable for any deficiencies for failing any pressure tests, an assessment of whether the work that A1 performed was deficient, whether the amounts particularized as set-offs and damages by Unique were actually incurred or if A1 is liable for them (i.e. how many hours did Unique actually attend, if any, to deal with the failed pressure tests and are the hours or rate for them embellished). The A1 Action pleadings also involve unliquidated damages – namely punitive damages, as well as accounting remedies.

28. These are not matters that can be resolved on a summary basis. These are claims that are require adjudication, testing of evidence through cross-examination, and the use of the rules of civil procedure to obtain documents and other evidence to advance the case. As a result the amount owing to A1 cannot be summarily disposed of and leave should be granted so that it may be litigation in the ordinary course. See for instance: *382231 Ontario Ltd. v. Wilanour Resources Ltd.*, [1982] O.J. No. 2432 (Ont. S.C.) where Justice Anderson said as follows:

> 10 Whether the claims asserted in the action are or are not such as to fall within the scope of the Act, they are plainly claims of a nature which cannot be disposed of in any summary fashion. Some proceeding analogous to an action, involving pleadings, production, discovery and trial, appears inevitable. Nor does it seem in any way

reasonable to anticipate that if a stay were granted, or this action dismissed as against Clarkson, that the claims would disappear. That being the case, it would seem unreasonable to stay or dismiss the action and require that it be reconstituted in a slightly different form which, in all probability, would in any event result in a trial before a High Court judge. All that would result would be a tactical victory for one party, a tactical reverse for another, and a substantial increment of costs. It seems obvious to me that the proper course is to grant leave for the action to proceed.

29. Another case on point that advance the same principle, as well as other general principles related to the lifting of a stay include *Re Advocate Mines Ltd.*, [1984] O.J. No. 2330 (Ont. S.C.) in which Registrar Ferron stated as follows:

> **2** The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
>
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
>
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
>
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
>
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

Claims Survive Bankruptcy

30. It is clear that if A1 is able to prove that Unique swore false statutory declarations and misappropriated the money for itself, or otherwise, then such a judgment would survive bankruptcy as it arises out of embezzlement, and misappropriation while acting in a fiduciary duty. Section 10 of the B.C. *Builders Lien Act* provides as follows:

> Contract money received constitutes trust fund

> 10 (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.
>
> (2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.
>
> (3)If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.
>
> (4)Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

31. A1's claim of false statutory declarations by Unique are actually repeated by Starlight in its own pleadings, at para 56 of that Notice of Civil Claim.

32. Given that A1 does not seek to be able to execute on its judgment at this time if the stay is lifted, it will not give it a leg-up on other creditors. Given the magnitude of the A1 Action compared to the Starlight proceeding, it is difficult to imagine how it would interference with the administration of the proposal. It would not dwarf the proposal nor consume all of the resources available – particularly when the Starlight proceeding is set for a 24-day trial commencing early next year.

33. In such circumstances it is appropriate to lift the stay. See for instance *Re Bookman*, [1983] O.J. No. 956 (Ont. S.C.) in which Registrar Ferron stated as follows:

> 6 Once, however, it is clear that the claim for which leave is sought is one which, if proved, survives the bankruptcy and that its prosecution will not interfere with the administration of the bankrupt estate or give the creditor an unfair advantage over the other creditors of the estate, then leave may, in proper cases, be given.

Identifying Other Individuals and Proceeding Against Them; Unique's Participation Required

34. If A1 is correct and someone on behalf of Unique swore false statutory declarations then they may very well attract personal liability for various torts, including "knowing assistance" and potentially "knowing receipt" if they actually obtained those funds. These individuals may or may not be the directors. They may be project managers. They may be the accountant. A1 cannot easily discover who those other people are, and how the money is to be traced, without the documents that are squarely within Unique's position.

35. Those other individuals may be claimed against successfully – at which point if A1 is able to collect it would no longer be a creditor of Unique. This would then increase the *pro rata* share of all other creditors.

36. A1 could theoretically start a John Doe proceeding and obtain a *Norwich* style order in B.C. from various other persons involved in the construction project (i.e. the engineering firm, or the strata corporation). However if the person executing the statutory declarations was a director, then there is a stay against them by operation of s. 69.31 of the *BIA*. If they are not directors, then a multiplicity of proceedings are still undesirable as it may involve inconsistent findings of fact, and a possible duplication of court time. Further, Unique's participation would still be necessary to determine if the statutory declarations were executed knowing they were false, or being wilfully blind in relation to same. See for instance *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*, [1999] S.J. No. 153 (Q.B.). in which Baynton J. allowed the lifting of a stay on the basis that the bankrupt's participation in the proceeding was necessary for the complete adjudication of the creditor's claim, and the claim was one for fraudulent misrepresentation which would survive bankruptcy.

37. It must also be remembered, that the reason that A1 is unable to determine who swore the statutory declarations and where the money went, is that Unique breached its obligations under the B.C. Supreme Court Civil Rules. It would not be equitable for Unique to benefit from its own dilatory approach and breach of the rules of civil procedure.

38. The B.C. *Supreme Court Civil Rules* provides as follows at Rule 7-1(1):

> **List of Documents**
>
> (1)Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a)prepare a list of documents in Form 22 that lists
>
> (i)all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
>
> (ii)all other documents to which the party intends to refer at trial, and
>
> (b)serve the list on all parties of record.

39. Unique's Response to Civil Claim was filed 25/SEP/2020 (but a filed copy wasn't served right away). A1 had 7 days to file a Reply if it chose to; in this case it did not. A1 served its list of documents on or about 04/NOV/2020 – a period of 40 days. Unique never served its list of documents: **Disini #1** at para 8 and 16, as well as Exhibit H.

PART IV – ORDER SOUGHT

40. A1 seeks an order that the stay imposed by s. 69(1) of the *BIA* in these Notice of Intention proceedings, and any subsequent stay imposed by s. 69.1 of the BIA, is lifted for the purpose of permitting A1 to continue the prosecution of its action against the Debtor, and any director of the Debtor that is added, in the A1 Action for purposes of proving any claim as against the Debtor or its directors, as to liability and quantum, provided, however, that absent any further Order of this Court A1 shall take no steps to execute any judgment against the Debtor or its directors outside of these proceedings in respect of the Debtor under the BIA.

41. In the alternative, A1 seeks an order that the stay imposed by s. 69(1) of the *BIA* in these Notice of Intention proceedings, and any subsequent stay imposed by s. 69.1 of the BIA, is lifted for the purpose of permitting A1 to exercise its rights available under Part 7 – Procedures for Ascertaining Facts, of the B.C. *Supreme Court Civil Rules*, in the A1 Action against the Debtor, and that absent any further Order of this Court neither A1 nor Unique shall take no steps to obtain a final judgment.

42. A1 further seeks an order causing it to be added to the Service List.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Mikhael Magaril HSMFTW

Digitally signed by Mikhael Magaril HSMFTW
Date: 2021.03.15 10:32:33 -07'00'

Mikhael Magaril (LSBC 511386)
Lawyer for A1

SCHEDULE A – LIST OF AUTHORITIES

Cases

1. *382231 Ontario Ltd. v. Wilanour Resources Ltd.*, [1982] O.J. No. 2432 (Ont. S.C.)
2. *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*, [1999] S.J. No. 153 (Q.B.).
3. *Re Advocate Mines Ltd.*, [1984] O.J. No. 2330 (Ont. S.C.)
4. *Re Bookman*, [1983] O.J. No. 956 (Ont. S.C.)

SCHEDULE B – LEGISLATION

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 at ss. 50.4, 69.31, 69.4, 178

2. *Builders Lien Act*, R.S.B.C. 1979, c. 40 at s. 10

50.4 Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

69.31 Stay of proceedings — directors

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

69.4 Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

178 Debts not released by order of discharge

178 (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

> **(i)** before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or
>
> **(ii)** within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred

> **(i)** before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or
>
> **(ii)** within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

10 Contract money received constitutes trust fund

10 (1)Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.
(2)Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.
(3)If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.
(4)Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

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ESTATE NO. 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

Respondent's Factum (Second Extension of Time)

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Mikhael Magaril (LSBC 511386)
Tel: (604) 259-6200
Fax: (604) 259-6202
Email: MMagaril@BearCreekLaw.com
Lawyer for A-1 Window Mfg. Ltd.

TAB 2

Estate No: 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

1ST AFFIDAVIT OF ALANNA SOPHIA G. DISINI AFFIRMED 15/MAR/2021

I, Alanna Sophia G. Disini, of the City of Surrey, Province of British Columbia AFFIRM AND SAY: D

1. I am the legal assistant for Mikhael Magaril, lawyer for A-1 Window Mfg. Ltd ("**A1**"), and as such have knowledge of the matters contained in this Affidavit. Where the statements include herein are based on information and belief, I have stated the source of that information and believe it to be true.

2. A1 commenced a proceeding against the debtor Unique Restoration Ltd. ("**Unique**") originally on 23/JUL/2020 bearing British Columbia Supreme Court action number S-207317 from the Vancouver registry (the "**A1 Action**"). It alleged an unpaid balance owed by Unique as a result of work done and materials supplied to a property in North Vancouver. As the name implies, A1 is in the business of manufacturing and installing windows. Attached as **Exhibit "A"** to this Affidavit is a copy of the Amended Notice of Civil Claim in that proceeding.

3. At paragraphs 15 to 19 of the Notice of Civil Claim it alleges that Unique, or someone on behalf of Unique signed false statutory declarations that they had paid all subtrades under them and as a result received progress draws. A claim for punitive damages and a breach of the statutory trust imposed under s. 10 of the B.C. *Builders Lien Act* are advanced, as well as a declaration at para 20(g) that under s. 178 of the *Bankruptcy and Insolvency Act* that the sum of $38,115 and related liabilities are not dischargeable through bankruptcy.

4. Attached as **Exhibit "B"** to this Affidavit is a copy of the Response to Civil Claim filed on behalf of Unique on or about 25/SEP/2020. It alleges a number of sets offs and

damages that were not particularized at that time – see in particular paragraphs 13 and 18 of said document.

5. As a result of various difficulties in obtaining particulars of the claims of set off and damages, coupled with difficulties in having Unique meet the timelines set out in the B.C. Supreme Court Civil Rules, an application was brought, for among other things, compelling Unique to provide particulars of their claims for damages and/or set-off. Attached as **Exhibit "C"** to this Affidavit is a copy of A1's Notice of Application in relation to same.

6. At the hearing of this Application two of Mrs. Manjinder Kaur Sodhi's affidavits were read in support (as well as other material). This included her second affidavit and her third affidavit. Mrs. Sodhi is presently not in the Lower Mainland, but she remains the paralegal to Mikhael Magaril. Her second affidavit in the A1 Action is attached as **Exhibit "D"** to this Affidavit, and her third affidavit in the A1 action is attached as **Exhibit "E"** to this Affidavit. They contain e-mail exchanges that relate to issues related to timelines, refusal to attend at an examination for discovery, and exchanging documents. I verily believe the information contained in those affidavits to be true

7. I have been told by Mikhael Magaril, and verily believe to be true, that on 05/NOV/2020, when the aforementioned application was heard, Unique was ordered to provide particulars of its claim to damages and set off on or about 26/NOV/2020, and that a copy of that order was never entered.

8. The Plaintiff's list of documents in the A1 Action was created and served on or about 04/NOV/2020. In British Columbia, a party is only obliged to produce a list of its documents, and only upon request is required to provide the documents that are not claimed as being protected by one or more forms of privilege.

9. Attached as **Exhibit "F"** to this Affidavit is a copy of the particulars provided by Unique on or about 26/NOV/2020.

10. On or about 09/DEC/2020 counsel for Unique represented that he was still working on his client's list of documents and expected them to be done within the next couple of weeks. Attached as **Exhibit "G"** to this Affidavit is a copy of that e-mail.

11. On or about 07/JAN/2021 correspondence was sent to Unique requesting the Defendant's List of Documents. The correspondence also contained assertions by Mr. Magaril as to his recollection as to what was communicated to the presider by Mr. McGovern, and asking if his recollection is correct. Attached as **Exhibit "H"** to this Affidavit is a copy of that correspondence dated 07/JAN/2021. In response, Mr. McGovern emailed back on 08/JAN/2021 and indicated that Unique has filed a Notice of Intention to make a Proposal. Attached as **Exhibit "I"** to this Affidavit is a copy of that e-mail.

12. Attached as **Exhibit "J"** to this Affidavit is a copy of an e-mail chain between Messrs. Magaril and Bissell ending on 14/JAN/2021 discussing in part reasons for why the stay should be lifted in respect of the A1 Action, which include that the relief sought included a s. 178 declaration, that it would reveal the persons who signed the false statutory declarations and have personal liability to A1, and allow a proper assessment of liability and damages, including determining whether A1 is entitled to special costs.

13. Attached as **Exhibit "K"** to this Affidavit is a copy of correspondence sent on 05/FEB/2021 to counsel for the proposal trustee. It addressed in greater substance the position of A1 that Unique had sworn false statutory declarations as corroborated by correspondence from the strata property's lawyer confirming the holdback was released and there was a certificate of completion, and that A1 has been unable because of Unique's failure to abide by the Supreme Court Civil Rules, and unilateral action to block an examination for discovery, to identify other potential defendants who may have liability (and thus increase the *pro rata* share of other creditors). It also complains that continued delay increases the risk of dissipation of assets held by other prospective Defendants and that the unliquidated damages cannot be quantified. Lastly, it asserts that notice of any extension of the time to file a proposal and corresponding stay have not been sent to our office.

14. Attached as **Exhibit "L"** to this Affidavit is a copy of an e-mail chain between various counsel that formed part of the enclosures in the previous letter marked as **Exhibit K**. It contains assertions by the strata property's lawyer that the holdback was released and there was a certificate of completion issued. Despite request, financial information for Unique as well as the statutory declarations themselves have been refused or neglected to be provided.

15. Attached as **Exhibit "M"** to this Affidavit is a copy of correspondence between Messrs. Magaril, McGovern, and Bissell after our office was alerted on 12/MAR/2021 that there was a motion returnable on 17/MAR/2021 to extend the stay for a second time. Among other things it queries why service was not effected on A1 for even the first motion to extend the time to file a proposal. The response does not directly answer that question.

16. To date, Unique has never provided its list of documents, nor any documents. Nor did Unique file an Application Response or any affidavit in support when the matter was heard in chambers on 05/NOV/2020.

AFFIRMED BEFORE ME)
In the City of Surrey, Province)
of British Columbia)
On 15/MAR/2021)
)
)
A commissioner for taking)
Affidavits for British Columbia)

Alanna Sophia G. Disini

Mikhael Magaril
Lawyer
c/o Bear Creek Law LLP
Suite 220 10524 King George Blvd.,
Surrey, BC, V3T 2X2
Expiry: n/a

Original filed 23/JUL/2020
Amended as of Right: Rule 6-1(1)(a)

No. S-207317
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

A-1 WINDOW MFG LTD.

Plaintiff

And:

UNIQUE RESTORATION LTD.

Defendant

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiffs,

(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

PART 1: STATEMENT OF FACTS

The Relevant Parties

1. The Plaintiff A-1 Window Mfg. Ltd. ("**A-1**") is a company duly incorporated pursuant to the laws of British Columbia and carries on business in British Columbia. Its registered office is located at 220 – 7565 132nd Street, in Surrey, B.C.

2. A-1 is in the business of manufacturing and installing windows for residential and commercial buildings. For the purposes of this action the address for service of A-1 is:

   c/o Bear Creek Law LLP
   Attention: Mikhael Magaril
   Suite 220 – 10524 King George Blvd
   Surrey, B.C. V3T 2X2

3. The Defendant Unique Restoration Ltd. ("**Unique**") is an extra-provincial company, incorporated in Ontario, and has the following address for service for its Attorney:

   c/o McMillian LLP
   1500 – 1055 West Georgia Street,
   Vancouver, BC, V6E 4N7

4. Unique is in the business of building maintenance and restoration, mainly servicing multi-unit residential, commercial, and institutional sectors, within the provinces of Ontario and British Columbia.

The Property

5. A-1 was contracted by Unique to perform work at #105 – 995 Roche Point Drive, North Vancouver, BC, V7H 2X4. with PID 013-138-936 and legal description as:

   STRATA LOT 5 DISTRICT LOT 622 STRATA PLAN VR 2356 TOGETHER WITH AN INTEREST IN THE COMMON PROPERTY IN PROPORTION TO THE UNIT ENTITLEMENT OF THE STRATA LOT AS SHOWN ON FORM 1

   (the "**Property**")

The Agreement

6. In around May 2019, Unique engaged A-1 as a subcontractor, to supply materials and install windows at the south-east corner of the Property.

7. On or around 13/MAY/2019, A-1 provided a quote for the manufacture and installation of several 350 series thermally broken aluminum windows to the Property. The initial price quoted was $59,600 which included both the supply of material and the labour to install the windows (the "**First Quote**"). In addition, GST would be charged to Unique, which would bring the total amount to $62,508.

8. It was term of the Agreement that any arrears would accrue interest at the rate of 2% per month, compounded monthly, and equivalent to 26.82% per year.

9. On or about 17/SEP/2019, Unique asked A-1 to perform further work on the Property such as providing materials and labour for finishing on the windows. A-1 agreed and informed Unique that the additional work would cost $6,500 plus GST in addition to the price of the First Quote. A-1 then issued a revised quote to Unique for $66,100 plus GST (the "**Revised Quote**"). The total amount of the invoice to be paid was $69,405 inclusive of GST.

10. On 27/SEP/2019, Unique paid A-1 a deposit of $31,290, towards the Revised Quote, leaving a balance of $38,115 to be paid.

11. Between July 2019 and January 2020, A-1 performed under its agreement with Unique and attended the Property to install and manufacture the windows.

12. In accordance with the terms of the agreement A-1 performed the services it was contracted to provide in a good and workmanlike manner to the Property.

13. The balance of $38,115 became due and payable when A-1 provided invoice number 20020404 to the Defendants for that amount on or about 04/FEB/2020 (the "**Final Invoice**").

14. In breach of its agreement, Unique has refused or neglected to make payment, despite demand. There remains due and owing to A-1 from Unique for the work it has completed in the sum of $38,115.

Chasing the Holdback and Punitive Damages

15. Unbeknown to A-1 at the time, Unique, or someone on behalf of Unique but with Unique's knowledge, was signing statutory declarations and declaring to the general contractor and/or owner that they had paid all subtrades under them. At all material times Unique knew that such statements were false as they had not paid A-1, and perhaps other subtrades.

16. Unique benefited from making such false statutory declarations as it caused subsequent monies to be advanced to them on the strength of the false declaration – namely that there would be no lien claimants.

17. The filing of a false statutory declaration justifies an award of punitive damages.

18. A-1 is a subcontractor, and Unique is a contractor as that term is defined in the *Builders Lien Act*. The funds that Unique received on account of its contract constitutes trust funds in favour of A-1.

19. Unique violated the statutory trust imposed under s. 10 of the *Builders Lien Act* by misappropriating the funds it received without paying A-1.

PART 2: RELIEF SOUGHT

20. A-1, claims against Unique the following:

    a. Judgment in the sum of $38,115 plus general damages for breach of contract;

    ~~b. In the alternative, damages for unjust enrichment on a *quantum meruit* against Unique;~~

    c. Punitive damages for filing a false statutory declaration;

    d. An accounting or tracing of all funds that Unique obtained in relation to the contract under which A-1 was hired as a subcontractor;

    e. pre-judgment interest to be set at the contractual interest at the rate of 2% per month, equivalent to 26.82% per annum, from the date of the Final Invoice, until judgment;

    f. post-judgment interest at the rate of 26.82% per year;

    g. A declaration that under s. 178 of the *Bankruptcy and Insolvency Act* the amount of $38,115 and all interest and costs arises from Unique's embezzlement or

misappropriation while acting in a fiduciary capacity such that the debt is not releaed by any bankruptcy proceeding that Unique may commence;

h. Costs; and

i. Such further and other relief as the nature of this case may require and this Honourable Court may deem proper.

PART 3: LEGAL BASIS

21. A-1 performed work in relation to the work on the Property pursuant to an agreement with Unique. A-1 relies on the law of contracts.

~~22. In the alternative, Unique has unjustly enriched A-1 from the services performed under the contract.~~

23. Unique had a trust obligation under s. 10 of the *Builders Lien Act* to pay its subcontractors and not use the money in a way inconsistent with that statutory trust. It did not do so. That constitutes both embezzlement and misappropriation.

24. As Unique was the trustee of a statutory trust, they were acting in fiduciary capacity.

25. Section 178 of the *Bankruptcy and Insolvency Act* provides that debts arising from embezzlement, or misappropriation while acting in a fiduciary capacity are not dischargeable through a bankruptcy proceeding.

26. Swearing false statutory declarations justifies punitive damages. It is conduct worthy or rebuke.

The Plaintiffs' address for service:

c/o Bear Creek Law LLP
Attention: Mikhael Magaril
Suite #220 – 10524 King George Boulevard
Surrey, B.C. V3T 2X2

Fax number address for service: (604) 259-6202 (please also serve by e-mail)
E-Mail address for service: mmagaril@bearcreeklaw.com (please also serve by fax)

Place of trial: New Westminster, British Columbia

The address of the registry is:

Law Courts, Begbie Square
651 Carnarvon Street

New Westminster, B.C. V3M 1C9

Dated: ~~22/JUL/2020~~ 11/AUG/2020

"Mikhael Magaril"

Signature of lawyer for the Plaintiff
Mikhael Magaril

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Plaintiff manufactures and installs windows. It did not get paid in full for materials and services performed.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

[ ] a motor vehicle accident

[ ] medical malpractice

[ ] another cause

A dispute concerning:

[ ] contaminated sites

[ ] construction defects

[ ] real property (real estate)

[ ] personal property

[X] the provision of goods or services or other general commercial matters

[ ] investment losses

[ ] the lending of money

[ ] an employment relationship

[ ] a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[ ] a class action

[ ] maritime law

[ ] aboriginal law

[ ] constitutional law

[ ] conflict of laws

[X] none of the above

[ ] do not know

Part 4:

FORM 2 (Rule 3-3 (1))

No. S- 207317
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

A-1 WINDOW MFG. LTD.

Plaintiff

AND:

UNIQUE RESTORATION LTD.

Defendant

RESPONSE TO CIVIL CLAIM

Filed by: Rory McGovern of Rory McGovern Professional Corporation, counsel to Unique Restoration LTD. (the "Defendant")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 - Defendant's Response to Facts

1. The fact alleged in paragraph 3 of Part 1 of the Amended Notice of Civil Claim is admitted.

2. The facts alleged in paragraph 4,5,6,7,8,9,10,11,12,13,14,15, 16, 17, 18, 19, of Part 1 of the Notice of Civil Claim are denied.

3. The facts alleged in paragraph 1,2 of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 - Defendant's Version of Facts

1. The defendant, Unique Restoration Inc., is a corporation incorporated under the laws of the province of Ontario and is extra-provincially registered in British Columbia.

2. The plaintiff, A-1 Window Mfg. Ltd., is a corporation incorporated under the laws of the province of British Columbia with its principal place of business located in Surrey, British Columbia.

This is Exhibit "B" referred to in the
Affidavit of Alanna Sophia G Disini
sworn this 15th day of March 2021

A Commissioner for taking Affidavits
within British Columbia.

3. On or about May, 2019 Unique entered into a contract (the "**Contract**") with the plaintiff to install windows at a project site located at 995 Roche Point Rd in North Vancouver B.C. (the "**Project Site**").

4. The terms of the Contract required the plaintiff to install the windows in accordance with all applicable standards as required by law in British Columbia and as directed by the Owner's engineer in respect of the project.

5. Between October 2, 2019 and January 24, 2020, three separate tests were conducted on the windows installed by the plaintiff in order to ensure that the windows met the requirements of the Owner's engineer and the laws of British Columbia (the "**Quality Control Tests**").

6. The windows that were installed by the plaintiff failed the Quality Control Tests repeatedly which caused delay on the project that was the subject of the Contract.

7. In connection with the plaintiff's failures of the Quality Control Tests, Unique repeatedly had to attend at the site to correct various deficiencies as a result of the plaintiff's poor quality workmanship in respect of the installation of the windows.

8. In addition to the Quality Control Tests that were failed by the plaintiff, Unique had to attend at the Project Site multiple times between January 24, 2020 and April 14, 2020 to review and repair deficient flashing and sealant work performed by the plaintiff (the "**Deficient Flashing and Sealant Work**"), which the plaintiff was required to complete pursuant to the terms of the Contract in accordance with all applicable standards and requirements as set out above in paragraph 4 above.

9. With respect to paragraph 9 of the Amended Notice of Civil Claim, Unique denies that the plaintiff performed any additional work apart from the work set out in the Contract.

10. With respect to paragraph 14 of the Amended Notice of Civil Claim, Unique denies that it refused or neglected to pay the Final Invoice. Rather, Unique had a legitimate claim for set off for the entire amount of the invoice or more than the value of the Final Invoice and the plaintiff was aware of Unique's position.

11. With respect to paragraph 15 of the Amended Notice of Civil Claim, Unique denies that it ever knowingly executed or authorized the execution of a false statutory declaration in connection with the work done on the Project Site by the plaintiff.

12. Unique denies that the plaintiff is entitled to an award of punitive damages.

Damages Suffered by Unique and Set-off

13. Unique suffered damages associated in connection with the failed Quality Control Tests and the Deficient Flashing and Sealant Work, the full particulars of which will be provided prior to trial.

14. Unique repeatedly advised the plaintiff of the problems associated with the plaintiff's workmanship and the plaintiff was aware that Unique had suffered damages in connection with the plaintiff's workmanship at all material times.

15. At all material times, the plaintiff was well aware that its entitlement to any payments in respect of the alleged invoices was disputed by the defendants due to Unique's damages associated with the plaintiff's failure to perform the work contemplated by the Contract in a good and workmanlike manner, as pled herein.

16. Specifically Unique suffered damages in connection with the costs associated with having its staff re-attend at the Project Site to correct the work improperly carried out by the plaintiff. In addition, Unique was required to pay a chargeback from JRS Engineering in the amount of $13,124.59 as a result of the multiple retesting that had to be done on the Windows.

17. As such, Unique is entitled to set off any damages it sustained as a result of the plaintiff's failure to complete the work under the Contract in a good and workmanlike manner as against any amounts found to be justly owing to the under the Contract.

18. Unique further reserves its right to plead a counterclaim in respect of the damages caused by the plaintiff when the full particulars of Unique's damages become known.

19. Further particulars of Unique's damages will be provided prior to trial.

Division 3 - Additional Facts

1. Unique reserves the right to refer to additional facts as they become known to the Defendant.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant opposes the granting of the relief sought in paragraph 20 of Part 2 of the Notice of Civil Claim.

2. In addition, the Defendant opposes the pre-judgment garnishment order sought and obtained by the plaintiff in connection with this proceeding.

Part 3: LEGAL BASIS

1. Except as expressly admitted herein, Unique denies each and every allegation of fact contained in the Amended Notice of Civil Claim.

2. Unique puts the plaintiff to the strict proof of all facts alleged in the Amended Notice of Civil Claim.

3. Unique pleads a defence of set-off in respect of the amounts claimed by the plaintiff in the civil claim and states that Unique is not justly indebted to the plaintiff as a result of taking into account Unique's right of set-off.

4. In fact, as set out above, after the particulars of Unique's damages become known, Unique reserves its right to plead a counterclaim against the Plaintiff to satisfy any amounts that are justly owing to Unique in respect of the damages it as sustained.

Defendant's address for service: c/o Rory McGovern
Rory McGovern PC
Lawyer
133 Richmond St. Suite 200
Toronto Ontario M5H 2L3

Fax number address for service (if any): (647) 559-9694

E-mail address for service (if any): rory@rorymcgovernpc.com

Date: September 24, 2020

Signature of ☐ Defendant
☒ Lawyer for Defendant

Rory McGovern

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the Court otherwise orders, each party of record to an Action must, within 35 days after the end of the pleading period,

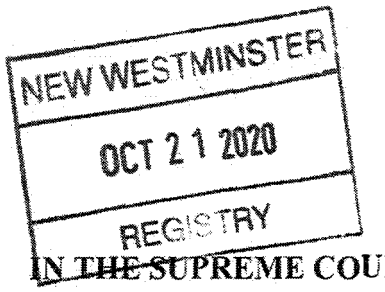
(a) prepare a List of Documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Form 32
Rule 8-1(4)



No. 207317
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

A-1 WINDOW MFG LTD.

Plaintiff

And

UNIQUE RESTORATION LTD.

Defendant

NOTICE OF APPLICATION

Name of Applicant: A-1 Window Mfg Ltd., who can be reached for the telephone chambers hearing as follows:

c/o Bear Creek Law LLP
Attention: Mikhael Magaril
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2
Email: mmagaril@bearcreeklaw.com
Cell Phone: (604) 612-1524
Office Direct: (604) 259-6203

This is Exhibit "C" referred to in the Affidavit of Arianna Sophia G Divini sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

TAKE NOTICE that an application will be made by the Applicant to the presiding master or judge at the courthouse at 651 Carnarvon Street, New Westminster, B.C. V3M 1C9 on an *ex parte* basis on 05/NOV/2020 at 9:45 AM by telephone for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the Defendant file and serve a Notice of Address for Service in Form 9 that contains an accessible address for service, as that term is defined in Rule 1-1(1) within five (5) days.
2. That the Defendant serve a list of full particulars of their claim of damages and/or set-off, including without limitation the damages claimed in paragraphs 13-19 of the Response to Civil Claim filed in this matter.
3. Costs, in any event of the cause, and payable forthwith.

Part 2: FACTUAL BASIS

What the case is about

1. The Plaintiff is a B.C. Company that is in the business of manufacturing and installing windows for residential and commercial buildings.

2. The Corporate Defendant is in the business of building maintenance and restoration, mainly servicing multi-unit residential, commercial, and institutional sectors, within the provinces of Ontario and British Columbia.

3. The Plaintiff commenced this action for breach of contract and unjust enrichment. There is also related relief sought as a result of both the alleged false statutory declarations and what appears to be misappropriation of the holdback contrary to s. 10 of the *Builders Lien Act*

4. In around May 2019, the parties entered into an agreement, whereby the Defendant contracted the Plaintiff to supply materials and install several 350 series thermally broken aluminum windows at a property located #105 – 995 Roche Point Drive, North Vancouver, BC, V7H 2X4 (the "**Property**").

Kaler #1 at Para 4

5. On or about 13/MAY/2019, the Plaintiff provided an initial quote for the work to the Property of $62,580 (inclusive of GST).

Kaler #1 at Para 6

6. On or about 17/SEP/2019, the Defendant engaged the Plaintiff to undertake further work and the Plaintiff issued the Defendant an invoice taking into account the additional work for $6500 plus GST. The total amount owed by the Defendant came to $69,405 inclusive of GST.

Kaler #1 at Para 7 and 8

7. On 27/SEP/2019, the Defendant paid the Plaintiff a deposit of $31,290, towards the account, leaving an outstanding balance of $38,115.

Kaler #1 at Para 9 and 10

8. From July 2019 and January 2020, the Plaintiff workers attended the Property to carry out the work.

Kaler #1 at Para 7

9. The balance of $38,115 became due and payable when A-1 provided a final invoice to the Defendants for that amount on or about 04/FEB/2020.

Kaler #1 at Para 12

10. On 29/SEP/2020 correspondence was sent to Defendant's counsel that made a demand for particulars and demanded that counsel provide an accessible address for service.

Sodhi #1 at Exhibits B and C

11. Correspondence by Defendant's counsel indicated that particulars should be able to be provided by 16/OCT/2020. That day came and went.

Sodhi #1 at Exhibit A

12. The lack of providing particulars is compounded by the inability of counsel to provide a timely response as to where is the Plaintiff's money. This was requested multiple times on 03/SEP/2020, 09/SEP/2020, and a second time on 09/SEP/2020.

Sodhi #1 at Exhibit D

Part 3: LEGAL BASIS

Address for Service

13. Rule 4-1(1) requires that if a party is represented by a lawyer, that must they have an accessible address that is the lawyer's office. The mandatory requirements of such an address are amplified in Rule 4-1(3) which uses the words "required" to describe the address in subrule 4-1(1).

14. An accessible address is defined in Rule 1-1(1) as follows: "accessible address" means an address that describes a unique and identifiable location in British Columbia that is accessible to the public during normal business hours for the delivery of documents.

15. While e-mail may be fine for many aspects of a case, there are many aspects in which a party may wish to instead serve in person or have other need of a physical location within 30 km of the registry. For instance the inspection of physical documents – to which the Plaintiff is entitled to under Rule 7-1(15) and the exchange of physical binders such as for trial or in advance of examinations for discovery, become far more costly if the Defendant's address for service is in Ontario. The presumptive rule for discoveries is that the Defendant is entitled to be examined at his lawyer's office – which would greatly increase the cost to the Plaintiff or his lawyer to attend in person. Further, if there are large affidavits or materials to serve it is neither farfetched nor fanciful for such materials to be unable to be delivered by e-mail nor by fax.

Particulars

16. In large part, this is a liquidated claim by the Plaintiff. For reasons that have been slow to develop the Defendant has now responded as to where A-1's money is by suggesting that

there is an amorphous nebula of damages that justify it not paying anything further. However the defence of set-off is one that the Defendant Unique must prove. A-1 is entitled to know the case it must defend against in term's of Unique's assertions of deficiencies, damages, or other forms of set-off.

17. One can see that currently the particularized claim for damages and set off is only $13,124.59 – leaving the reader and the Court to question why the sum of $18,165.41 – representing the uncontested price for the quote less Unique's one and only claim for set-off – has not been paid to A-1.

18. The concerns about knowing the substance to answer have been articulated in other cases such as *Sidhu v. Hiebert*, 2018 BCSC 401, *Strata Plan BCS 1348 v WVC Phase III Limited Partnership* 2016 BSC 10524 at para 10, and *Amezcua v. Norlander*, 2012 BCSC 12 at para 13.

Costs

19. Costs should be granted in any event of the cause and payable forthwith because the issue of dealing with an address for service is independent of ultimate success at trial, and the answer is clear and largely that aspect of the application should never have been required to be brought.

Part 4: MATERIAL TO BE RELIED ON

20. The Notice of Civil Claim in this action filed on 23/JUL/2020;
21. The 1st Affidavit of Sarabjit Singh Kaler filed on 23/JUL/2020;
22. The Response to Civil Claim filed on 25/SEP/2020;
23. The 1st Affidavit of Manjinder Kaur Sodhi filed on ~~20~~ 21/OCT/2020;

The applicant estimates that the application will take 10 minutes.

[X] This matter is within the jurisdiction of a master.

[] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 21/OCT/2020

Signature of Mikhael Magaril
Lawyer for the Applicant

To be completed by the court only: Order made [ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application [ ] with the following variations and additional terms: _____ Date [*day/month/year*] Signature of [ ] Judge [ ] Master

Vancouver

03-Nov-20 REGISTRY

This is Exhibit "D" referred to in the Affidavit of Manjinder Sophia Sodhi sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

This is the 2nd Affidavit of Manjinder Kaur Sodhi and it was made on 28/OCT/2020

No.: 207317
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

A-1 WINDOW MFG LTD.

Plaintiff

And

UNIQUE RESTORATION LTD.

Defendant

AFFIDAVIT

I, Manjinder Kaur Sodhi, paralegal of Bear Creek Law LLP, located at Suite 220 – 10524 King George Boulevard, Surrey, B.C. AFFIRM THAT:

1. I am a paralegal to Mikhael Magaril, counsel for the Plaintiff in this action and as such have personal knowledge of the facts deposed to herein save and except where otherwise noted.

2. I make this affidavit in place of my 1st Affidavit filed on 21/OCT/2020, in order to provide better exhibit copies. Otherwise, this Affidavit is the same as my 1st Affidavit.

3. Attached as **Exhibit "A"** to this Affidavit is a copy of an e-mail exchange between myself and Messrs. Magaril and McGovern between 29/SEP/2020 and 06/OCT/2020.

4. Attached as **Exhibit "B"** to this Affidavit is a copy of a letter dated 29/SEP/2020 that I sent to Mr. McGovern by e-mail in regard to his office not being a proper address for service.

5. Attached as **Exhibit "C"** to this Affidavit is another letter dated 29/SEP/2020 that provides the Plaintiff's demand for particulars.

6. Attached as **Exhibit "D"** to this Affidavit is a copy of e-mail correspondence between Messrs. Magaril and McGovern beginning on 03/SEP/2020 and ending on 10/SEP/2020.

AFFIRMED in City of Surrey)
in the Province of British Columbia,)
on 28/OCT/2020)
)
A Commissioner for taking)
Affidavits for British Columbia

Manjinder Kaur Sodhi

MIKHAEL MAGARIL
Barrister & Solicitor
Bear Creek Law LLP
Suite 220 - 10524 King George Boulevard
Surrey, B.C. V3T 2X2
Tel: 604-259-6200 Fax: 604-259-6202

(1)

Rosie Sodhi

From: Rory McGovern <rory@rorymcgovernpc.com>
Sent: October 6, 2020 9:29 AM
To: mmagaril@bearcreeklaw.com; Rosie Sodhi
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Mr. Magaril,

My client needs some more time to provide the particulars you have requested. Generally, I expect that we should be able to provide same by the end of next week. If you would like to discuss this matter further, I am happy to arrange a call.

Regards,

This is Exhibit " A " referred to in the Affidavit of Navinder Sodhi sworn this 28th day of October 2020

A Commissioner for taking Affidavits within British Columbia

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200
Toronto, Ontario, Canada M5H 2L3

C **416-938-7679**
F **647-559-9694**

From: mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Tuesday, September 29, 2020 5:51 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Hi Rory,

To the best of my knowledge, no money was paid into Court. I would be largely perplexed by such an action. However your client can instruct you as they see fit.

Your time limit to file a counterclaim has unfortunately ran out. You should consult the civil rules for the time limit for bringing a counterclaim.

While I appreciate you may be a sole practitioner, my client's legitimate queries have largely been ignored. I do not foresee obtaining instructions to extend time, particularly in light of what may be described as a lackadaisical approach to filing your Response to Civil Claim.

Regards,

Mikhael

On 09/29/2020 1:43 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:

Dear Ms. Sodhi,

I have been tied up on other matters the last several days and will respond to yours and Mr. Magaril's correspondence fulsomely in due course. So that you are aware, I am a sole practitioner and have several time sensitive matters that will be occupying my time for the rest of this week, at least.

As I previously advised Mr. Magaril, I need some time to investigate this matter thoroughly and may consider amending my client's response as well as initiating a counterclaim against your client. In addition, my client will be moving to set aside the pre-judgment garnishing order and materials in connection with same will be served in due course.

For purposes of service, you can serve any documents at this email address, as is clearly set out in the filed response to civil claim, which is attached for your convenience.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

(5)

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: September 29, 2020 12:24 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: mmagaril@bearcreeklaw.com
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

We write with reference to the above, and attach correspondence for your attention.

Kind regards

Rosie Sodhi

Paralegal to Mikhael Magaril

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 676-9409

fax: (604) 259-6202

BearCreekLaw.com

Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

BearCreekLaw.com

CONFIDENTIALITY NOTICE

This communication, and any attachments, contain privileged and confidential information and are intended only for the use of the addressee. Any dissemination, distribution, copying, action or omission taken in reliance on the contents of this communication by anyone other than intended recipient is strictly prohibited. If you have received this communication in error please immediately delete the message without saving, copying or disclosing it and notify the sender at the above e-mail address. Thank you.

(5)

BEAR CREEK LAW LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Phone: (604) 259-6200
Fax: (604) 259-6202
BearCreekLaw.com

Vincent Guo B.Sc., J.D.
VGuo@BearCreekLaw.com

Mikhael Magaril* B.Sc., J.D.
MMagaril@BearCreekLaw.com

September 29, 2020

PERSONAL AND CONFIDENTIAL

Rory McGovern Professional Corporation
133 Richmond Street West,
Suite 200, Toronto
Ontario, Canada, M5H 2L3

Via e-mail: rory@rorymcgovernpc.com

Dear Mr. McGovern,

RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.
Vancouver Supreme Court Action: S-207317

We write with reference to the above, and our recent exchange of e-mail correspondence.

In the first instance, we would be grateful if you could provide a filed copy of the Response to Civil Claim as a matter of urgency.

Please find enclosed our formal demand under the Rules for particulars relating to your client's damages. If these particulars are not forthcoming, we would like to bring an application forthwith.

We also note following receipt of your unfiled copy that you have failed to properly provide an address for service. In short, your address is not an "accessible address" as defined under Rule 1-1(1) as it falls outside British Columbia. In the event you fail to remedy this within 10 days receipt of this correspondence we will also be applying for an order in this regard.

We take this opportunity in asking for your client's dates of availability to attend examination for discovery. Please provide your list of availability so that we may correspond accordingly to set a date in the near future.

We look forward to hearing from you in due course.

Yours truly,

pp X Rosie Sodhi
Rosie Sodhi
Paralegal

This is Exhibit "R" referred to in the
Affidavit of Mengnesh Sodhi
sworn this 28th day of October 2020

A Commissioner for taking Affidavits
within British Columbia.

* Practicing through Magaril Law Corporation

(6)

BEAR CREEK LAW LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Phone: (604) 259-6200
Fax: (604) 259-6202
BearCreekLaw.com

Vincent Guo B.Sc., J.D.
VGuo@BearCreekLaw.com

Mikhael Magaril* B.Sc., J.D.
MMagaril@BearCreekLaw.com

September 29, 2020

PERSONAL AND CONFIDENTIAL

Rory McGovern Professional Corporation
133 Richmond Street West,
Suite 200, Toronto
Ontario, Canada, M5H 2L3

Via e-mail: rory@rorymcgovernpc.com

Attention: Rory McGovern

Dear Mr. McGovern,

RE: A-1 Windows MFGG Ltd. v. Unique Restoration Ltd.
Vancouver Supreme Court Action: S-207317
Request for Particulars

We write to request that you provide particulars for your Response to Civil Claim under Rule 3-7(23). Presently your Response to Civil Claim states that words to the effect that Unique's claim for set off / damages will be provided prior to trial, with one exception actually being particularized. In our opinion your Response to Civil Claim lacks critical details. If Unique did suffer any damages surely it would have some way to quantify it. It is likely that Unique did not.

Therefore, pursuant to Rule 3-7(20)(b) we respectfully request that you provide all particulars of Unique's damages and claims of set-off.

As you are aware, Rule 3-7(20)(b) requires that particulars must be served within 10 days after a demand is made in writing.

In the event you oppose our demand to produce particulars please advise us accordingly, and we will seek to find a mutually convenient date to bring an application for same.

Yours truly,

pp X Rosie Sodhi
Rosie Sodhi
Paralegal

This is Exhibit "C" referred to in the Affidavit of Rosie Sodhi sworn this 28th day of October 2020

A Commissioner for taking Affidavits within British Columbia.

* Practicing through Magaril Law Corporation

(7)

Rosie Sodhi

From: Rory McGovern <rory@rorymcgovernpc.com>
Sent: September 10, 2020 1:18 PM
To: MMagaril@BearCreekLaw.com; rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com
Subject: RE: A-1 Windowns MFG Ltd. v. Unique Restoration Ltd. - Garnishment

Dear Mr. Magaril,

I will be serving and filing a response on behalf of my client by the end of next week as I am tied up on other matters for the next several days. Notwithstanding this, please kindly send an affidavit of service in respect of this matter at your earliest possible convenience as I need to know when the document was actually served. Your email below is not an affidavit of service and McMillan never advised when the document was formally served.

From my end, I was not aware of this claim and neither was my client until August 26. I assume that McMillan would have sent it to my client on the date that it was served but I am not certain as to the date of service right now as you have refused to provide me with an affidavit of service. Assuming this was served on August 26, I should have until September 16 to serve Unique's defence. At this time, I am simply asking for a couple more days until the 18th so I can conduct a proper investigation of this matter and avoid unnecessary motions to amend Unique's defence later.

With respect to your other comment regarding my "shifting position", as I advised, I have only recently been retained by Unique and I was not aware that McMillan was listed as its attorney for service in B.C., hence my confusion and prior position. Given that my client's files are "in transition" from McMillan, my familiarity with Unique's matters is limited at the present time and so I would appreciate a little more professional courtesy in allowing me to get up to speed.

If you would like to discuss this further, I can make myself available at your convenience.

Regards,

This is Exhibit " D " referred to in the
Affidavit of Meynelle Sodhi
sworn this 28th day of October 2020

A Commissioner for taking Affidavits
within British Columbia.

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200
Toronto, Ontario, Canada M5H 2L3

C **416-938-7679**
F **647-559-9694**

From: MMagaril@BearCreekLaw.com <MMagaril@BearCreekLaw.com>
Sent: September 9, 2020 6:42 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windowns MFG Ltd. v. Unique Restoration Ltd. - Garnishment

Hi Rory,

I'm sorry but I've advised you that I will be attending to obtain default twice or more now. You cannot block that by simply alluding vaguely to a complaint about unethical conduct. I've explained the basis for needing to rush in this case. Vague assertions of a defence are not particularly compelling. Where is my client's money?

Your client was served on 14/AUG/2020 at approximately 2:20 PM local time.

I'm also perplexed that your client did not get an e-mail or any information from McMillan as to when they were served. Your client would have likely got a date stamped copy of my cover letter which indicates it was served on 14/AUG/2020.

In fact I think I will prepare a release for your client to sign so I can ask McMillan what information it provided to your client in terms of when it received it as your client's attorney in BC.

I also note your position has fundamentally shifted from stating that McMillan was somehow not authorized to accept service - to now suggesting that I am somehow obliged to provide you an affidavit of service.

I again ask - where is my client's money.

Regards,

Mikhael

> On 09/09/2020 3:24 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Mr. Magaril,
>
> The position you are taking in respect of this matter is unreasonable. As I advised, I have only been recently retained by Unique and McMillan is no longer its counsel. I simply want to review an affidavit of service so that I can obtain instructions and file a response within the time frame under the rules in B.C. My client will be defending this proceeding.
>
> In order to know what needs to be done, I need to understand when you served the documentation on McMillan as I obviously did not see it immediately and neither did my client. The date of correspondence is not necessarily the same as the date of service for purposes of responding to a proceeding, as you should be well aware. Refusing to provide an affidavit of service and then noting my client in default when it will be defending this proceeding is not consistent with your obligations under the Rules of Professional Conduct.
>
> If you proceed to file for default without even providing me with the basic information as to when you say Unique was served, I will rely on this correspondence when my client seeks costs.

If you have any questions, I can make myself available tomorrow for a call.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

From: MMagaril@BearCreekLaw.com <MMagaril@BearCreekLaw.com>
Sent: September 9, 2020 5:31 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windowns MFG Ltd. v. Unique Restoration Ltd. - Garnishment

Hi Rory,

You are completely incorrect - McMillan is publically listed through an extraprovincial company summary as the attorney for Unique. I'm specifically allowed to serve them there - that is the entire point of having a local contact for an extraprovincially registered corporation.

An affidavit of service will be provided at the same time as when I go to submit my application for default judgment. Your client would certainly have information from McMillan provided to them as to

when they were served. I indicated on my letter to McMillan - which your client surely got - that I would be taking default at the first available opportunity unless my client otherwise agrees to stop time as it were. My client does not agree and I repeated this to you in my e-mail.

Further, I note that you say you have an absence of instructions and I have not received any response to my earlier question of where is my client's money. I see no reason whatsoever to delay taking default.

Regards,

Mikhael

> On 09/09/2020 11:22 AM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Dear Mr. Magaril,
>
> My apologies for the delayed response, your initial email was in my junk email and I found it yesterday. I have moved your address to the list of trusted emails and I apologize for the delay in responding.
>
> With respect to your email, I need to see the affidavit of service in respect of this proceeding. In connection with this and to my knowledge, McMillan LLP did not have any authorization to accept service and is no longer acting for Unique. I intended to discuss this matter with you in connection with the call I proposed in my original email.
>
> At the present time, I do not even have instructions from my client on this matter and am not even aware of the timeline to file a response as a result of the confusion regarding service. In my view, moving for default in the circumstances would not be advisable.
>
> I am available to discuss this further if you have any questions.

(10)

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

From: MMagaril@BearCreekLaw.com <MMagaril@BearCreekLaw.com>
Sent: September 3, 2020 5:39 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; vguo@BearCreekLaw.com
Subject: Re: A-1 Windowns MFG Ltd. v. Unique Restoration Ltd. - Garnishment

Hi Rory,

I have a decision tmrw at 9 AM PST. Perhaps we can chat around 1 PM my time?

Will it be a productive conversation where you can state where my client's money is? If not then I'm not particularly inclined to have such a conversation and will continue to seek default at the first opportunity.

Usually I would extend the common courtesy for you to get up to speed and take time before filing a response. However what I've been told is that your client has effectively

sworn false statutory declarations saying all subs underneath him in the construction chain have been paid - when he knew that was not the case. In my experience delay in such circumstances is inadvisable as it ruins the prospect of collection - so regrettably I need your Response to Civil Claim to be filed within the time limits otherwise I will take default.

Regards,

Mikhael

> On 09/03/2020 12:43 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Dear Messrs. Guo and Magaril,
>
> I am counsel to Unique Restoration in connection with the above noted matter. Your correspondence dated August 14, 2020 was forwarded to me by Unique's former counsel at McMillan LLP. I would like to set up a call to discuss this matter and would appreciate you providing me with some time to get up to speed on this matter, seek instructions and advise as to my client's position.
>
> I can make myself available tomorrow at your convenience.
>
> Regards,
>
> **Rory McGovern**
>
> RORY MCGOVERN PROFESSIONAL CORPORATION
> **133 Richmond Street West, Suite 200**
>
> **Toronto, Ontario, Canada M5H 2L3**

Vancouver
03-Nov-20
REGISTRY

This is Exhibit "E" referred to in the Affidavit of Alanna Sophia G Dizon sworn this 16TH day of March 2021

A Commissioner for taking Affidavits within British Columbia.

This is the 3rd Affidavit of Manjinder Kaur Sodhi and it was made on 03/NOV/2020

No.: 207317
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

A-1 WINDOW MFG LTD.

Plaintiff

And

UNIQUE RESTORATION LTD.

Defendant

AFFIDAVIT

I, Manjinder Kaur Sodhi, paralegal of Bear Creek Law LLP, located at Suite 220 – 10524 King George Boulevard, Surrey, B.C. AFFIRM THAT:

1. I am a paralegal to Mikhael Magaril, counsel for the Plaintiff in this action and as such have personal knowledge of the facts deposed to herein save and except where otherwise noted.

2. Attached as **Exhibit "A"** to this Affidavit is a copy of an e-mail exchange between myself and Messrs. Magaril and McGovern between 21/OCT/2020 and 26/OCT/2020.

3. Attached as **Exhibit "B"** to this Affidavit is a copy of an e-mail exchange between myself and Messrs. Magaril and McGovern dated 28/OCT/2020.

4. Mr. McGovern did not agree to change the date of the Notice of Application hearing by a few days, he also did not provide any future dates of availability for the hearing to be reset.

AFFIRMED in the City of Surrey)
in the Province of British Columbia,)
on 03/NOV/2020)
)
)
A Commissioner for taking)
Affidavits for British Columbia

Manjinder Kaur Sodhi

MIKHAEL MAGARIL
Barrister & Solicitor
Bear Creek Law LLP
Suite 220 - 10524 King George Boulevard
Surrey, B.C. V3T 2X2
Tel: 604-259-6200 Fax: 604-259-6[illegible]

(1)

Rosie Sodhi

From: mmagaril@bearcreeklaw.com
Sent: October 26, 2020 11:53 AM
To: Rory McGovern; Rosie Sodhi
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

I think Rosie and myself should have been more clear when we used the words if you truly couldn't make it. We will move the date if you had a scheduling conflict. From the sounds of it, the application isn't even opposed except that you want to give a longer date and my client isn't agreeable to it.

I've also had no comment from yourself as to the portion of my NoA that seeks an order for you to comply with the requirement to provide an accessible address.

I can move the application back a couple of days but your client is not able to unilaterally set its own deadlines when there are clearly applicable timelines in the Rules.

Also you do not in any way have the ability to stop your client from getting examined. There are additional remedies that are available against a party who refuses to be examined and I think you should review them prior to giving your client what is extremely likely poor advice.

Our appointment to discover your client will follow shortly.

Regards,

Mikhael

On 10/26/2020 10:52 AM Rory McGovern <rory@rorymcgovernpc.com> wrote:

This is Exhibit " A " referred to in the Affidavit of Manjinder kaur Sodhi sworn this 3rd day of November 2020

A Commissioner for taking Affidavits within British Columbia.

Mr. Magaril,

You should not be troubled. You have completely misrepresented or misunderstood my email. I advised you that I would not be able to attend court on this matter until the end of November. I am not able to attend court on the 5th of November because I have motions on the 2nd and 3rd and other time sensitive matters for a period of time after that. Further, you are bringing a particulars motion after I have already advised you that it is unnecessary and that I will provide you with the necessary particulars after I have a chance to investigate this matter, collect documents and interview witnesses. I have even suggested a date by which those steps could be completed.

My client will not sit for any kind of examination until I have completed my investigation of this matter. As I also advised, my client may commence an action against your client depending on the outcome of my investigation.

(2)

With respect to the innuendo that I have somehow misrepresented anything with respect to Unique's lawyers, I have made no such misrepresentation. Prior to me being retained, McMillan LLP acted for Unique for all of its matters in B.C.. I am not sure if they would have any documents related to this matter but I will need to make inquiries because it is likely that they do.

The tone of your various emails continue to be condescending, unprofessional and includes innuendos about my own integrity. I suggest you find a better way to communicate going forward.

When your assistant first sent the email about the November 5 date, she asked if this date truly does not work for me. I advised her that it didn't and have explained why. The date still does not work for me and in any case, for the reasons set out herein, the application is unnecessary, will be a waste of judicial resources and of our clients' money. I encourage you to reconsider your approach to this issue.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C **416-938-7679**

F **647-559-9694**

From: mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Monday, October 26, 2020 1:20 PM

To: Rory McGovern <rory@rorymcgovernpc.com>; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

I'm deeply troubled. You represented to myself that you were not available for the balance of November. This appears to be false. You are also available on the returnable date despite an earlier message that appears to have conveyed the opposite. The time that it took myself to draft the application was approximately 20 minutes.

My client is not prepared to consent to this schedule at all. He has the option to fast track this matter and get a trial date within 4 months.

It seems like you are available generally after November 15th. I want to examine your client on the week of November 23rd. Most people are doing XFDs by zoom, particularly given the rising COVID cases.

My client has no sympathy for documents being in two different provinces. They can use email. They are only 3 hours apart.

Also for some reason my recollection is that you represented that Unique previously did not know about this claim until X date - when you were retained. Why would their former lawyers - whom you stated did not have instruction to accept service - have documents?

I also want to have a trial in February at the latest. Please provide your available dates.

Regards,

Mikhael

On 10/26/2020 8:42 AM Rory McGovern <rory@rorymcgovernpc.com> wrote:

Dear Mr. Magaril,

I have two motions on November 2nd and 3rd as well as other time sensitive matters that need to be completed by the 15th of November. I simply do not have the time to prepare for your application, which application is unnecessary. I would suggest that we agree to a tentative timetable for the delivery of particulars and documents, that way you can move this action along. The fact is, my client's documents and witnesses are in two different provinces and there may be some documents that Unique's former counsel has which I will need to obtain. These steps will take time and I want to ensure that I present my client's case and documents properly. As such, see my proposed timetable below:

1. November 30, 2020: Delivery of documents and particulars for the response to civil claim;
2. January/February 2021: Discoveries
3. Late spring/early summer 2021: trial

I trust you will find the above fair and reasonable in the circumstances.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

From: mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Thursday, October 22, 2020 3:40 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

Can you articulate the nature of scheduling conflict that prevents you from appearing on 05/NOV/2020 or for the entire month of November. Such a delay is completely unacceptable. My client won't agree to reschedule in a pure factual vacuum.

I want to do examinations for discovery and set down a trial date immediately. Please provide your earliest availability.

Regards,

Mikhael

> On 10/22/2020 9:56 AM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Dear Mr. Magaril,
>
> November 5th does not work for an application. I would not be able to attend court on this matter until the end of November. In any case, the application is unnecessary as it is our intention to provide particulars as soon as my investigation is complete. The delay in this regard relates to the fact that my client's documents/potential witnesses are located in

multiple places and I have not yet spoken with everyone I need to in respect of this matter. With respect to the nature of the application, please find my comments below. With respect to the formal filing of a notice of address for service, I have confirmed with you that you can serve any documents related to this matter to me at this email address. I will try and finalize the form with the B.C. courts by the end of this week.

With respect to your repeated question, "Where is my client's money"? My client disputes that it owes your client any money, as set out in the response to civil claim. In fact, my client may have a claim against your client, which may be fully articulated after I have concluded my investigation. I am not sure why you believe repeating this rhetorical question in emails, pleadings etc. is a useful exercise.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C **416-938-7679**

F **647-559-9694**

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: October 21, 2020 4:17 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: mmagaril@bearcreeklaw.com
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

We write with reference to the above, and attach by way of service upon you, Notice of Application and 1st Affidavit of Manjinder Kaur Sodhi both filed at New Westminster Supreme Court today.

You will note that we have scheduled the hearing application to take place on 05/NOV/2020. If this date does not truly work for you please let us know at your earliest convenience and we will take the appropriate steps to change it.

We look forward to hearing from you in due course.

Kind regards

Rosie Sodhi

Paralegal to Mikhael Magaril

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 676-9409

fax: (604) 259-6202

BearCreekLaw.com

(8)

Rosie Sodhi

From: mmagaril@bearcreeklaw.com
Sent: October 28, 2020 8:48 PM
To: Rory McGovern; Rosie Sodhi
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

Rest assured my client is able to use the time limits set out in the rules to advance their case efficiently. In the absence of agreement the rules govern. I believe that a fast 5 or 10 minute application is the best way to move this forward. I note that realistically you could have provided an application response in the time that you've spent writing to myself.

If you are concerned about your client's ability to comply with a Court order then I think that is all the more reason to get a court order. I'm asking for particulars as to the claims of set off / damages. This should be well known already. This claim is not stale dated. I'm unable to truly understand why there needs to be so much delay. Any amounts paid

You continue to refuse to provide any response to the issue of an accessible address for reasons that remain unknown to myself.

As discussed already, my client will set down an examination for discovery in the week of November 23rd. I'm not aware of any juristic basis on which you can unilaterally refuse to comply with it, without incurring significant exposure to adverse consequences.

This is Exhibit "B" referred to in the Affidavit of Manjinder Kaur Sodhi sworn this 3rd day of November 2020

A Commissioner for taking Affidavits within British Columbia.

Regards,

Mikhael

On 10/28/2020 7:58 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:

Mr. Magaril,

In my view, our duties as lawyers is to ensure that court time is used efficiently and to the extent possible, resolve the issues between our clients without resort to the courts. I am sensitive to your client's desire to advance this proceeding but I have been very honest about the difficulties that my client will have in meeting your proposed timelines. Part of those difficulties relate to my rather crazy schedule for the next little while but rest assured, as I am busy on other things, my client will be using its best efforts to locate documents/witnesses etc. to advance this matter.

In light of the foregoing, I suggested setting a timetable for discovery/particulars (given that in my client's case those two aspects will be inextricably intertwined) so that your client could advance its action efficiently. I provided you with a date upon which I would provide you with both. I will not allow a court order to be entered as against my client when between my schedule and some of the challenges

(9)

given that Unique's documents are in multiple places, I am concerned about compliance. As such, I would invite you to provide a response to my suggested timeline and we can resolve this professionally and without wasting the court's time. If you fail to do so, I will be requesting the same timetable from the court and will be relying on all of our correspondence at the hearing.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C **416-938-7679**

F **647-559-9694**

From: mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Wednesday, October 28, 2020 10:38 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

Thanks for your e-mail. As I indicated later I was willing to push back the hearing date a couple of days. You did not reply. I assume nothing short of getting a hearing date in November would be acceptable.

(10)

I'm not sure if we are required to play ping pong as it were with respect to a timetable. What I continue to seek is 10 days from the order, which would take you to approximately November 15th. By that point it would be approximately 2 months after you filed your response to civil claim, and perhaps 2.5-3 months since you've had the file.

You also do nothing to address my prayer for relief seeking an accessible address as required by the rules.

All of the above must be considered in light of you earlier representing you had no availability in the month of November, and that you would unilaterally prevent a discovery.

Regards,

Mikhael

> On 10/28/2020 5:24 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Dear Mr. Magaril,
>
> As I previously advised, the November 5 date does not work for me and I may not have any time to prepare materials. As I advised, I have two motion dates on November 2 and 3 which I am preparing for, along with other time sensitive matters over the next several days. I accepted your initial offer to reschedule the hearing and now you have reneged on that unilateral offer. I have provided you with a reasonable timeline for the delivery of particulars (and documents) based on the inquiries that I have made to date and you have rejected same and failed to propose any reasonable counter-offer for a timetable. You and your client don't seem to be willing to compromise at all, despite being advised of mine and my clients' limitations and challenges at this point. Rather than drafting additional affidavits, perhaps it would be a better use of resources to propose a reasonable timetable and then a consent order which we can discuss and I can get instructions on. I would rather proceed in this way rather than waste the scarce judicial resources of the B.C. Courts.
>
> Regards,

(10)

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: Wednesday, October 28, 2020 8:06 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: mmagaril@bearcreeklaw.com
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

I write with reference to the above, and attach by way of service an unfiled copy of 2nd Affidavit of Manjinder Sodhi, e-filed on CSO today.

Please note that this affidavit is in support of our recent Notice of Application, filed on 21/OCT/2020. It is almost identical to the 1st Affidavit of Manjinder Sodhi, but with better exhibit copies.

I will forward a filed copy once we are in receipt of the same.

November 26, 2020

Via email to mmagaril@BearkCreekLaw.com

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

This is Exhibit "F" referred to in the Affidavit of Alanna Sophia G Disnat sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

Dear Mr. Magaril:

Re: A-1 Windows MFG Ltd. V. Unique Restoration Ltd., Vancouver Supreme Court Action S-207317 (the "**Action**") – Request for Particulars

Further to our previous correspondence, please find below particulars of my clients claims of set off as against your client. The particulars set out below set out my understanding of the defences for set off only and are without prejudice to my clients rights to bring a claim against your client for the consequential damages Unique suffered in connection with your client's alleged negligence and its breaches of the contract between our clients.

1. **During the time period of October 2nd 2019 – January 24th 2020 there were 3 separate failed window tests. Each failed test required multiple site visits and meetings with the consultant / A1 to review and correct the work.**
   - 39 hours of Unique Restoration site personal time @ $65.00 per hour ($2,535.00)
   - 19 hours of Unique Restoration office management time @ 110.00 per hour ($2,090.00)
   - Charge back from JRS Engineering for multiple re-testing and consulting fees ($13,124.59)
2. **During the time period of January 24th 2020 – April 14th 2020 there were multiple site visits required to review and repair deficient flashing and sealant work which was included in A1 windows contract:**
   - 52 hours of Unique Restoration site personal time @ $65.00 per hour ($3,380.00)
   - 27 hours of Unique Restoration office management time @ $110.00 per hour ($2,970.00)
3. **During the time period of October 2nd 2019 – April 14th 2020 there was cartage and fuel costs associated with A1 windows overall deficient work**
   - Fuel costs and vehicle expenses ($1,600.00)

The total amount of Unique's claim for set off at this time is $25,699.59 but it does not include any additional amounts that may be properly charged in respect of the labour time expended by

Unique's employees. If further particulars become available, I will provide them to you as soon as possible.

With respect to the exchange of documents, Unique has some preliminary documents that it will disclose. I believe it may be productive to have a call and discuss scheduling the exchange of productions as I have not received anything from your client as of today's date.

Regards,

Rory McGovern

Mikhael Magaril

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: December 9, 2020 12:53 PM
To: 'Rory McGovern'
Cc: mmagaril@bearcreeklaw.com
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Good afternoon Mr. McGovern,

Further to your email, please see below a link containing all the documents referred to in the PLoD.

http://gofile.me/4bwlq/51cdtNk56

If you have any issues accessing the documents please contact our office.

Kind regards

Rosie

This is Exhibit "G" referred to in the Affidavit of Arianna Sophia G Disini sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

From: Rory McGovern <rory@rorymcgovernpc.com>
Sent: December 9, 2020 9:02 AM
To: mmagaril@bearcreeklaw.com; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. Magaril and Ms. Sodhi,

I spoke with Mr. Magaril the other day and confirm that I have received your client's list of documents. I am working on my client's list, which should be done within the next couple of weeks. In connection with this matter, please kindly provide me with access to all of the documents that are listed on your client's list of documents. I am fine to receive them through a cloud link or in a zip file, depending on the size. Please don't hesitate to contact me if you have any questions.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
25 Adelaide St. E, Suite 1910
Toronto, Ontario, M5C 3A1

C 416-938-7679
F 647-559-9694

From: mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Wednesday, November 4, 2020 10:13 PM
To: Rory McGovern <rory@rorymcgovernpc.com>; Rosie Sodhi <rsodhi@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Hi Rory,

The hearing is "scheduled" for 945 AM. Did you get the call in instructions? Check in is 945 and then the master usually comes in at 10 and it proceeds by shortest time estimate to longest. We should be heard maybe at around 10:45 or so - depending on the list. You have to keep your phone on mute.

The procedure is indeed different. If you want something you need to include it in an affidavit. I included several emails showing your concerns about scheduling and a definite timeline as a courtesy to you.

I'm not sure on what basis the Court would grant costs unless you are successful in having my relief be tossed but you can certainly make your pitch.

As I have indicated and set out in my NoA - an accessible address for service is required for the rules and an e-mail can be an alternative form of service, but not as a primary. You may wish to review the legal basis of my NoA which sets out my argument for granting such relief.

Regards,

Mikhael

> On 11/04/2020 4:05 PM Rory McGovern <rory@rorymcgovernpc.com> wrote:
>
> Dear Mr. Magaril,
>
> Please advise what time the hearing is tomorrow so that I can attend on behalf of my client. As I previously advised you, I have been in court for the last several days and did not have sufficient time to prepare a responding application record. I note that you left out some correspondence which is pertinent to this matter, including correspondence that we exchanged last week. Perhaps procedure is different in B.C. but in Ontario, all pertinent correspondence that would give the court a full appreciation of the facts is to be included in records with respect to these types of motions.
>
> I will be advising the court tomorrow that I provided you with a reasonable timetable for this matter and that you insisted on proceeding with this motion anyway. If the opportunity arises, I will seek costs.
>
> Please advise me of the time of the hearing as soon as possible. The form 9 has been filed with the court and to reiterate for a third time, you can serve any materials at this email address or at the address below. At the present time, I am in the middle of moving offices so I will advise you of my new address in due course.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
133 Richmond Street West, Suite 200

Toronto, Ontario, Canada M5H 2L3

C 416-938-7679

F 647-559-9694

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: Tuesday, November 3, 2020 6:24 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: mmagaril@bearcreeklaw.com
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.

Dear Mr. McGovern,

I write with reference to the above, and attach by way of service upon you the following:

1. 2nd Affidavit of Manjinder Sodhi **filed** on 03/NOV/2020;
2. 3rd Affidavit of Manjinder Sodhi **filed** on 03/NOV/2020;

3. Index for the Application Record.

We confirm that the Application Record was filed in Court today, in advance of the hearing on 05/NOV/2020. If you have any queries relating to the above, please do not hesitate to contact me.

Yours truly,

Rosie Sodhi

Paralegal to Mikhael Magaril

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 676-9409

fax: (604) 259-6202

BearCreekLaw.com

Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

BearCreekLaw.com

BEAR CREEK LAW LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Phone: (604) 259-6200
Fax: (604) 259-6202
BearCreekLaw.com

Vincent Guo B.Sc., J.D.
VGuo@BearCreekLaw.com

Mikhael Magaril* B.Sc., J.D.
MMagaril@BearCreekLaw.com

January 07, 2021

PERSONAL AND CONFIDENTIAL

Via e-mail: rory@rorymcgovernpc.com

This is Exhibit "H" referred to in the Affidavit of Arianna Sophia G Disini sworn this 15th day of March, 2021

A Commissioner for taking Affidavits within British Columbia.

Rory McGovern Professional Corporation
133 Richmond Street West,
Suite 200, Toronto
Ontario, Canada, M5H 2L3

Attention: Rory McGovern

Dear Mr. McGovern,

RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd.
Vancouver Supreme Court Action: S-207317
Request for List of Documents

We write with reference to the above.

Despite sending several reminders, and the Plaintiff's List of Documents to you on 06/NOV/2020, we are yet to receive your List of Documents. The actual documents set out in the Plaintiff's List of Documents were sent to you on 09/DEC/2020.

It is my recollection that at the hearing before the presider on 05/NOV/2020, you informed the court that the documents and particulars would go hand in hand. My further recollection is that you made a statement to the effect that you would need to obtain and review your client's documents before you would be in a position to provide particulars.

At this juncture I am not particularly interested in ordering the transcripts, however could you kindly confirm this if my recollection is accurate? You of course did provide the particulars ordered by the date set out in the court's reasons so do believe you have the documents.

We ask that you provide your client's List of Documents by close of business on 21/JAN/2021, and ideally as well the actual documents themselves.

* Practicing through Magaril Law Corporation

If we do not hear from you by that date, we will bring an application to compel production of the list of documents. We would seek costs in any event of the cause summarily assessed and payable forthwith in any event of the cause.

Yours truly,

X Mikhael Magaril HSMFTW

Digitally signed by Mikhael Magaril HSMFTW
Date: 2021.01.07 15:12:16 -08'00'

Mikhael Magaril
Barrister & Solicitor

Mikhael Magaril

From: Rory McGovern <rory@rorymcgovernpc.com>
Sent: January 8, 2021 11:32 AM
To: Rosie Sodhi
Cc: 'Mikhael Magaril'; Brendan Bissell
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317
Attachments: Certificate for the Notice of Intention - 32-2701357.pdf

Dear Mr. Magaril,

This is to advise you that Unique Restoration Ltd. has filed a notice of intention to make a proposal under Section 50.4 of the Bankruptcy and Insolvency Act. A copy of the notice of intention is attached. As such, all proceedings against Unique are stayed. I have cc'd Brendan Bissell, counsel to the proposal trustee hereon.

Regards,

This is Exhibit " 1 " referred to in the Affidavit of Alanna Sophia G Disini sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
25 Adelaide St. E, Suite 1910
Toronto, Ontario, M5C 3A1

C 416-938-7679
F 647-559-9694

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: Thursday, January 7, 2021 6:22 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>
Subject: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Dear Mr. McGovern,

Please see attached correspondence for your kind attention.

Yours truly,

Rosie Sodhi
Paralegal to Mikhael Magaril

Bear Creek Law LLP
Suite 220 - 10524 King George Boulevard
Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours
dir: (604) 676-9409
fax: (604) 259-6202

BearCreekLaw.com

Mikhael Magaril

From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: January 14, 2021 3:32 PM
To: 'Brendan Bissell'
Subject: FW: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

This is Exhibit "J" referred to in the Affidavit of Marina Sophia G Dasini sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

Just resending

From: Mikhael Magaril [mailto:mmagaril@bearcreeklaw.com]
Sent: January 12, 2021 10:27 AM
To: 'Brendan Bissell' <bissell@gsnh.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Dear Brendan,

I'm just following up re a time to chat tomorrow. Does 3 PM my time / noon yours work?

From: Mikhael Magaril [mailto:mmagaril@bearcreeklaw.com]
Sent: January 11, 2021 10:34 AM
To: 'Brendan Bissell' <bissell@gsnh.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Brendan,

Can we arrange a time on Wednesday – say 3 PM your time / noon mine?

On second blush, I would imagine that a stay should be lifted to also properly assess liability and damages so my client's properly calculated claim can obtain proceeds from the proposal on a *pari passu* distribution.

My client has a claim for punitive damages, has a claim for special costs, and alternatively would be entitled to normal scale B costs, and the quantum of my client's claim is disputed by way of a partial plea of set off by Unique, which my client disputes.

My understanding is that when a trustee – whether in a bankruptcy or NOI proceedings – is unable to themselves assess damages then they support the lifting of a stay to have the matter properly adjudicated. This won't give my client a leg up on collections as they don't have judgment nor a security interest, and pre-judgment garnishment didn't result in any funds being remitted into court (likely because the corp is insolvent and had no money in its bank account).

From: Brendan Bissell [mailto:bissell@gsnh.com]
Sent: January 8, 2021 1:15 PM
To: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Thanks for asking, but the practice in the Ontario insolvency bar seems to be that copying the court appointed officer on correspondence among counsel is not anything amiss. It's probably fair to say that they are a bit more familiar with the court process than your average party. So please feel free to do so here.

Let's speak next week as you suggest. Have a nice weekend in the interim.

Regards,
Brendan

R. Brendan Bissell

GSNH
GOLDMAN SLOAN NASH & HABER LLP
BARRISTERS & SOLICITORS
dedicated to your success

Suite 1600 | 480 University Avenue | Toronto ON | M5G 1V2

Direct 416 597 6489 | Fax 416 597 3370 | Mobile: 416 992 4979 | www.gsnh.com

Assistant | Karen Jones | 416 597 9922 ext. 101 | jones@gsnh.com

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From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: January 8, 2021 4:13 PM
To: Brendan Bissell <bissell@gsnh.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Also – do you want me to reply all so the trustee can read? I forgot to ask and I need your blessing before I can communicate in such a way with the trustee if you are on for them

---

From: Brendan Bissell [mailto:bissell@gsnh.com]
Sent: January 8, 2021 12:50 PM
To: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Cc: 'Hans Rizarri - Crowe Soberman Inc.' <Hans.Rizarri@CroweSoberman.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Thanks for the email, Mikhael. We will consider this a bit further on our end. At first blush, I'm not sure that the s. 178 claims necessarily would get the benefit of a lift stay right now, at least insofar as the company is concerned, which is the only defendant in your proceeding at present.

I suggest that we all take a step back and give some thought to the most efficient and economical way to resolve the various claims against, and by, the company. From a high level, it is the proposal trustee's understanding that the claims by the company (on the project where your client supplied, and perhaps another in Ontario) may represent the only likely way for creditors to recover anything. If so, then some thought will be required to ensure that steps being taken do not unduly undermine attempts to make recovery there.

A flurry of motions at the outset before you, we, and the other stakeholders have had a chance to consider the overall complexion of this matter may be counterproductive. I also note that it does not seem like anything is changing terribly quickly at all, which would seem to augur in favour of some time to consider things.

Either a proposal or a motion to extend the NOI proceedings will be necessary on or before February 3 in this matter. I wonder if that may be the better time to deal with any concerns like this rather than pre-emptive motions?

Happy to discuss further of course. We will be in the Ontario Superior Court (Commercial List) in this matter, which (heavily) emphasizes that counsel should attempt to discuss and narrow/resolve issues before bringing them before the Court, so some time spent reviewing and discussing this further may not be misplaced.

Regards,
Brendan

R. Brendan Bissell

GSNH
GOLDMAN SLOAN NASH & HABER LLP
BARRISTERS & SOLICITORS
dedicated to your success

Suite 1600 | 480 University Avenue | Toronto ON | M5G 1V2

Direct 416 597 6489 | Fax 416 597 3370 | Mobile: 416 992 4979 | www.gsnh.com

Assistant | Karen Jones | 416 597 9922 ext. 101 | jones@gsnh.com

---

From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: January 8, 2021 3:36 PM
To: Brendan Bissell <bissell@gsnh.com>
Cc: 'Hans Rizarri - Crowe Soberman Inc.' <Hans.Rizarri@CroweSoberman.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Sorry I misread that completely.

Brendan,

I enclose a copy of our amended NoCC. We sought relief in the nature of a s. 178 declaration based upon the filing of false stat decs and breach of the statutory trust imposed under BC's Builders Lien Act – essentially embezzlement and such.

Looking over the file I view Rory's actions as having the effect to largely delay this matter. He has prevented my client's right to conduct discoveries, failed to produce documents, and required us to attend court to obtain orders because of constant lapses in commitments by him in providing materials to move this file forward. I will need to look into this a bit more, but I can certainly imagine the constellation of factors in this case allows a review of the payments to him, particularly in light of the lack of result achieved. I would also imagine my client could get a s. 38 assignment of Unique's right to tax Mr. McGovern's legal fees in BC given that he was counsel for an action in BC, for a contractual dispute executed in BC involving BC property. But let's leave that for now.

In light of the claims made by my client I would imagine that a lift of the stay would be granted, and further would reveal the persons who signed the false stat decs whom would have personal liability towards mine.

Regards,

Mikhael

From: Brendan Bissell [mailto:bissell@gsnh.com]
Sent: January 8, 2021 12:08 PM

To: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Cc: Hans Rizarri - Crowe Soberman Inc. (Hans.Rizarri@CroweSoberman.com) <Hans.Rizarri@CroweSoberman.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Mikhael: It is Brendan for future reference.

There is no creditors package yet as this is only a NOI proceeding so far. A package would normally only be prepared and distributed at the time of the making of a proposal.

The proposal trustee's understanding is that Rory has been providing services to the company and that in fact his services may be an important component of a possible proposal to creditors in that the claims by the company may represent the most feasible way to get payment to unsecured creditors. I will discuss your request with the proposal trustee (copied) but expect that provision of A/R will not be happening in the near future. Certainly the provision of invoices with solicitor/client details is out of the question.

At this point it also seems that any attempt to lift the stay insofar as the company is concerned would be counterproductive to an orderly restructuring. If I'm missing something I would be happy to discuss, but if not then I would discourage you from seeking such steps at this time.

Regards,

R. Brendan Bissell

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Direct 416 597 6489 | Fax 416 597 3370 | Mobile: 416 992 4979 | www.gsnh.com

Assistant | Karen Jones | 416 597 9922 ext. 101 | jones@gsnh.com

---

From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: January 8, 2021 2:59 PM
To: Brendan Bissell <bissell@gsnh.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Brenda,

Can you please provide me the creditor's package? I will be seeking to lift the stay and would likely be seeking to set aside payments made to Mr. McGovern as being preferential in all of the circumstances and would appreciate having his invoices and details of any AR as soon as practicable.

Regards,

Mikhael

From: Rory McGovern [mailto:rory@rorymcgovernpc.com]
Sent: January 8, 2021 11:32 AM
To: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Cc: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>; Brendan Bissell <bissell@gsnh.com>
Subject: RE: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Dear Mr. Magaril,

This is to advise you that Unique Restoration Ltd. has filed a notice of intention to make a proposal under Section 50.4 of the Bankruptcy and Insolvency Act. A copy of the notice of intention is attached. As such, all proceedings against Unique are stayed. I have cc'd Brendan Bissell, counsel to the proposal trustee hereon.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
25 Adelaide St. E, Suite 1910
Toronto, Ontario, M5C 3A1

C 416-938-7679
F 647-559-9694

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: Thursday, January 7, 2021 6:22 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>
Subject: A-1 Windows MFG Ltd. v. Unique Restoration Ltd. Vancouver Supreme Court Action: S-207317

Dear Mr. McGovern,

Please see attached correspondence for your kind attention.

Yours truly,

Rosie Sodhi
Paralegal to Mikhael Magaril

Bear Creek Law LLP
Suite 220 - 10524 King George Boulevard
Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours
dir: (604) 676-9409
fax: (604) 259-6202

CONFIDENTIALITY NOTICE

BEAR CREEK LAW LLP
Suite 220 – 10524 King George Blvd
Surrey, B.C. V3T 2X2

Phone: (604) 259-6200
Fax: (604) 259-6202
BearCreekLaw.com

Vincent Guo* B.Sc., J.D.
VGuo@BearCreekLaw.com

Mikhael Magaril* B.Sc., J.D.
MMagaril@BearCreekLaw.com

February 05, 2021

PERSONAL AND CONFIDENTIAL

Via e-mail: bissell@gsnh.com and *via facsimile*: (416) 597-3370

Goldman Sloan Nash & Haber LLP
Attention: Brendan Bissell
Suite 1600 – 480 University Avenue
Toronto, Ontario M5G 1V2

This is Exhibit "K" referred to in the
Affidavit of Alanna Sophia G Disini
sworn this 15th day of March 2021

A Commissioner for taking Affidavits
within British Columbia.

Dear Mr. Bissell,

Re: Unique Restoration Ltd.'s Notice of Intention to Make a Proposal
Re: Extension of Time Presumably Granted

As you are aware, I am the lawyer for A-1 Window Mfg. Ltd. ("**A1**"), a B.C. company that was subcontracted under Unique Restoration Ltd. ("**Unique**") on a building envelope remediation in North Vancouver, B.C. As discussed previously, A1 has an outstanding action against Unique for non-payment on that project, and alleges breaches of the statutory trust under the *Builders Lien Act* (BC) and seeks in the pleadings a s. 178 declaration that any indebtedness survives any bankruptcy that Unique may be assigned, or assign itself into.

We have had some conversations on this matter already by phone and by e-mail. I wish to document some of those conversations, and expand on them. I am not suggesting that the below is a *verbatim* account by any means.

I have had a fair bit of resistance from Unique's lawyer in the action between A1 and Unique such that I had to bring an application for particulars because Unique's assertions of set-off and deficiencies were unable to be ascertained. Unique's lawyer, Mr. McGovern refused to allow me to discover his client. To put it in the vernacular, I think there has been deliberate foot dragging.

We proceeded to chambers and were successful. Particulars were ordered to be provided on a date in the future taking into account Mr. McGovern's verbal representations that he would need to review Unique's documents to produce those particulars and essentially that the documents would be provided in tandem. Unique did not produce any documents. It is in default of its obligation to produce documents well before filing a Notice of Intention to Make a Proposal on 04/JAN/2021.

* Practising through a personal law corporation

Despite demands, copies of statutory declarations signed by Unique (which would need to be executed before progress draws are released) have not been produced. Similarly, financial records showing payments coming in, and out have not been produced.

Since A1 has not been paid by Unique, it is believed that any such statutory declarations sworn by A1 would have been incorrect – however we lack confirmation that such statutory declarations have indeed been sworn. Of course, if no such statutory declarations have been sworn then our theory falls apart. However it was communicated to myself by counsel for the strata corporation that Unique has been paid in full. Mr. Alex Chang of Lesperance Mednes Lawyers, counsel for the strata corporation, communicated to myself that there was a certificate of completion posted on 04/FEB/2020 and that JRS (whom I understand to be the payment certifier) released the holdback on 23/MAR/2020 and that it sent the payment to Unique. Since it appears that Unique got the holdback (i.e. the last 10%) and there was a certificate of completion, it would follow that Unique got paid in full. I enclose a copy of that correspondence for your benefit.

As a result, A1 is put into a difficult situation in that it may have a valid claim for knowing assistance / knowing receipt against a director, officer, employee, or agent of Unique that was involved in what we believe to be the making of incorrect statutory declarations, as well as misappropriation / conversion of the holdback funds that are subject to a statutory trust pursuant to s. 10 of the *Builders Lien Act* (BC). However, because of Unique's dilatory approach to the litigation, A1 is unable to identify other potential Defendants who may share liability. This is prejudicial. Surely it would be to the benefit of Unique's creditors if A1 can find a remedy to satisfy its claim elsewhere and increase the *pro rata* share of all other unsecured creditor's distribution.

It is also materially prejudicial to A1to prolong the stay as it increases the risk of dissipation of assets held by those other prospective Defendants – particularly since we have still not been given any records related to statutory declarations or the flow of funds from the subject construction project. In addition, with the stay continuing, A1 is not able to proceed to court to quantify any unliquidated claims, such as for punitive damages that may arise if it could prove that there were false statutory declarations made. Lastly, A1's claims that arise out of a breach of the statutory trust under s. 10 of the *Builders Lien Act*, are ones that if proven would survive bankruptcy

I am also a bit surprised in that I wasn't given notice of any application or motion to extend the time to make a proposal. I was frankly quite excited to appear in commercial court in Ontario. I had voiced opposition right from the outset and made myself known but I cannot locate any materials being sent either to myself, or to my client.

Can you please advise if the time to make a proposal was extended? Was it made on an *ex parte* basis? If not, can you please advise where the materials were sent to and by what method? If it did proceed *ex parte* can you please advise myself as to whether my concerns that we've previously had over e-mail and by phone were articulated before the presider?

Yours truly,

X Mikhael Magaril HSMFTW

Digitally signed by Mikhael Magaril HSMFTW
Date: 2021.02.05 13:58:56 -08'00'

Mikhael Magaril
Barrister and Solicitor

Mikhael Magaril

From: Alex Chang <ajc@lmlaw.ca>
Sent: August 18, 2020 12:37 PM
To: mmagaril@bearcreeklaw.com mmagaril@bearcreeklaw.com
Cc: rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com
Subject: RE: Betty Downing Suite

Hi Mikhael,

I do not know who JRS or Unique's counsel may be or if they even have counsel concerning this matter.

I have asked my client if they have the stat decs but it may be faster if your client asked JRS.

I believe my client paid by cheques but I have asked them to confirm if they have any banking information anyway. If they do have any banking information, I don't expect my client would oppose providing it in principle, but I am unclear if PIPA would allow them to do so absent an active claim.

Regards,

This is Exhibit " L " referred to in the
Affidavit of Alanna Sophia G Disini
sworn this 15th day of March 2021

A Commissioner for taking Affidavits
within British Columbia.

Alex J. Chang
Associate

550 – 900 Howe Street
Vancouver, BC V6Z 2M4

d 604 685 1255
t 604 685 3567
f 604 685 7505

e ajc@lmlaw.ca
w lmlaw.ca

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From: mmagaril@bearcreeklaw.com mmagaril@bearcreeklaw.com <mmagaril@bearcreeklaw.com>
Sent: Wednesday, August 12, 2020 2:24 PM
To: Alex Chang <ajc@lmlaw.ca>; Kirsten Tiemann <KTiemann@jenablaw.com>; Charles Grossholz <Charles.Grossholz@associa.ca>
Cc: Faith Hayman <FHayman@haymanlaw.com>; Ann Barclay <annlkbarclay@shaw.ca>; rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com <rsodhi@bearcreeklaw.com>
Subject: RE: Betty Downing Suite

Hi Alex,

I want to follow up on the below email. Can I please have a response to my queries perhaps by this weeks' end?

Regards,

Mikhael

On August 6, 2020 2:35 PM Mikhael Magaril <mmagaril@bearcreeklaw.com> wrote:

Thanks Alex,

Yep it's late. We will get them off soon - likely next week. No further action is needed on your part and we will send you the notice of registration when that is done.

Do you know if JRS has counsel? Or if Unique has counsel?

Can you please also provide me all copies of stat decs executed by or on behalf of Unique? Or does only JRS have copies of those?

Do you happen to have any banking information for Unique?

My client realizes that it's fight will be with Unique but I'm sure you recognize that if your client has documents that would be material to its claim that mine could bring an application in chambers for those documents at some great inconvenience to both parties.

Regards,

Mikhael

On August 6, 2020 1:51 PM Alex Chang <ajc@lmlaw.ca> wrote:

Hi Mikhael,

Further to our discussion last week, I have attached a copy of the certificate of completion dated February 4, 2020, which my client confirms was delivered and posted per s. 7. Since the lien was clearly registered late, please confirm that you will remove the lien from Ms. Downing's strata lot as soon as possible.

My client also confirms that JRS certified the release of the holdback on March 23, 2020 and that it sent the payment to Unique in the normal course before A1 had raised any issues concerning Unique with my client or JRS. Thus, there is no basis for a Shimco Lien or for a claim of "knowing assistance" against the strata corporation.

Regards,

Alex J. Chang
Associate

550 – 900 Howe Street
Vancouver, BC V6Z 2M4

d 604 685 1255

t 604 685 3567
f 604 685 7505

e ajc@lmlaw.ca
w lmlaw.ca

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From: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>
Sent: Friday, July 31, 2020 2:14 PM
To: Alex Chang <ajc@lmlaw.ca>; Kirsten Tiemann <KTiemann@jenablaw.com>; Charles Grossholz <Charles.Grossholz@associa.ca>
Cc: Faith Hayman <FHayman@haymanlaw.com>; Ann Barclay <annlkbarclay@shaw.ca>; rsodhi@bearcreeklaw.com rsodhi@bearcreeklaw.com <rsodhi@bearcreeklaw.com>
Subject: RE: Betty Downing Suite

Hi Alex,

Thanks for putting it in writing. As discussed my client has made a request under s. 7 of the BLA to JRS for a copy of the certificate of completion, as well as copies of all statutory declarations signed by Unique indicating that all of their

subs / material suppliers have been paid. There has been no response. Likewise we have requested now multiple times information if the holdback has been released and again there has been no response.

It appears that Unique is a bit of a rogue and has been swearing false stat decs. We have conveyed this information to all parties. If holdback funds have been released since my client putting that position out there, it would likely attract liability under the tort of "knowing assistance".

Perhaps you would have more luck in inquiring about the holdback as if it has not been disbursed then my client is within the 1 year period to do a *Shimco* lien.

Regards,

Mikhael

On July 31, 2020 2:02 PM Alex Chang <ajc@lmlaw.ca> wrote:

Kirsten and Faith,

My client and JRS walked the exterior of the building to review the flashing deficiencies and the window sash reinstallation and reports that, except for a small piece of flashing that needs to be caulked, the work was acceptable. A1, who was on site this week, did advise JRS that they are missing a restricter that prevents the window from opening wider than code allows. JRS will be coordinating with A1 to return and install these and notify Ann regarding access. Please note that while these pieces do need to be installed, I am advised that there is apparently no aesthetic impact or visible latch missing. Strata will be pushing A1/JRS to complete this asap.

Mikhael,

Further to our discussion, I will speak to my client and JRS about providing the certificate of completion. As I understand it, the certificate of completion was issued in February, such that the 45 day deadline to file a lien expired on or around March 21, 2020, under s. 20 of the *Builders Lien Act*. A lien filed on June 23, 2020, would certainly be late.

Regards,

Alex J. Chang
Associate

550 – 900 Howe Street
Vancouver, BC V6Z 2M4

d 604 685 1255

t 604 685 3567
f 604 685 7505

e ajc@lmlaw.ca
w lmlaw.ca

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From: Kirsten Tiemann <KTiemann@jenablaw.com>
Sent: Thursday, July 30, 2020 10:48 AM
To: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>; 'Charles Grossholz' <Charles.Grossholz@associa.ca>; Alex Chang <ajc@lmlaw.ca>
Cc: 'Faith Hayman' <FHayman@haymanlaw.com>; 'Ann Barclay' <annlkbarclay@shaw.ca>
Subject: RE: Betty Downing Suite

Thank you Mickhael! I'll let her know.

Kirsten

From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: Thursday, July 30, 2020 10:46 AM
To: Kirsten Tiemann <KTiemann@jenablaw.com>; 'Charles Grossholz' <Charles.Grossholz@associa.ca>; ajc@lmlaw.ca
Cc: 'Faith Hayman' <FHayman@haymanlaw.com>; 'Ann Barclay' <annlkbarclay@shaw.ca>
Subject: RE: Betty Downing Suite

I got confirmation my client will get in contact with Ann and coordinate repairs / maintenance next week

Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

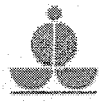
BearCreekLaw.com

From: Kirsten Tiemann [mailto:KTiemann@jenablaw.com]
Sent: July 30, 2020 9:08 AM
To: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>; 'Charles Grossholz' <Charles.Grossholz@associa.ca>; 'ajc@lmlaw.ca' <ajc@lmlaw.ca>
Cc: 'Faith Hayman' <FHayman@haymanlaw.com>; 'Ann Barclay' <annlkbarclay@shaw.ca>
Subject: Betty Downing Suite

Good Morning,

I was just contacted by Ann Barclay who noticed that the two windows in the kitchen that were replaced yesterday are missing the latch on each so the window can't fly open. Please advise when A1 can return and add the latches so that Ann can make herself available to let them in.

Yours truly;



Kirsten Tiemann

Paralegal

JENAB & COMPANY LAW CORPORATION

220 - 545 Clyde Avenue

West Vancouver, BC V7T 1C5

Tel: 604 925-6005 (Ext. 104) Fax: 604 925-6007
E-mail: KTiemann@jenablaw.com

Website: www.jenablaw.com

Twitter: @ZahraJenab

Facebook: Jenab & Company Law Corporation

Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

BearCreekLaw.com

Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

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Yours truly,

Mikhael Magaril

Mikhael Magaril B.Sc., J.D.

Bear Creek Law LLP

Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours

dir: (604) 259-6203

fax: (604) 259-6202

BearCreekLaw.com

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Mikhael Magaril

From: Brendan Bissell <bissell@gsnh.com>
Sent: March 13, 2021 1:55 PM
To: Mikhael Magaril; 'Rory McGovern'; 'Rosie Sodhi'
Cc: Hans Rizarri - Crowe Soberman Inc. (Hans.Rizarri@CroweSoberman.com)
Subject: RE: In the Matter of a Notice of Intention by Unique Restoration Ltd. Ontario Superior Court of Justice Estate No.: 32-2701357 Request for Immediate Response as to Lack of Service on A-1 Windows

Mikhael: Before responding in any detail to your questions, let me first note that this form of purported interrogation by email is rather antithetical to the type of behaviour that is expected of counsel before the Commercial List.

Further, one of the maxims on the Commercial List is "common sense". In this case, we have Unique as an obviously insolvent company with only one real asset, being its claims against the owner in the Starlight litigation. Your client is owed at most something like $40,000 out of a total amount owed to creditors in excess of $2 million beyond the mortgagees on the commercial property that is now in receivership. Having a claim worth $40,000 dictate the course of an insolvency proceeding with creditors owed 50 times that amount as well as personal liability for principals of the debtor as guarantors and under provincial construction legislation would be a strange proposition.

I am not going to get into a war of correspondence. There is ample reason why the Starlight litigation is proceeding in civil court rather than in the claims process under the BIA, including that Unique is prosecuting its multimillion dollar counterclaim so any claims that Starlight may have by way of set off or counterclaim should also be addressed in that same proceeding rather than separately under the BIA claims process. By contrast, a $40,000 construction claim by your client and any set off that Unique may have against it are much more suited to the BIA claims process, which would be administered by the trustee either under a proposal or in a bankruptcy.

I decline to provide any assurances as to what position the trustee may take on claims by or against Unique. No claims have been filed against Unique, so it would be premature to comment on any of that. As for claims by Unique, it remains in possession of its assets, including those claims, so it is not for the trustee to make any determinations on those matters at this time. Further, even if the trustee does become possessed of those claims, it would be inappropriate to prejudge how they should be handled.

I suggest that you consider a further point in how you intend to deal with this matter on March 17. Namely, Unique is going to have to make a proposal to creditors at some point. The creditors will therefore have their say, through a vote, on what should happen under the double voting formula in the BIA. So the point for you to consider is whether, and if so how, A-1 is prejudiced by the continuation of the NOI proceedings while that proposal is formulated through discussions with creditors and the proposal trustee? I say that, because I will be very strongly suggesting to the Court on March 17 that I see no prejudice, and that the interests of all creditors are better served by letting Unique stay in control of the Starlight litigation rather than any alternatives (including a s. 38 order, which by its very nature disincentivizes a creditor from seeking recovery of more than its claim and carriage costs against the defendant, whereas Unique has every interest to extract the maximum recovery out of the defendant).

Regards,

This is Exhibit "M" referred to in the Affidavit of Alanna Sophia G Disini sworn this 15th day of March 2021

A Commissioner for taking Affidavits within British Columbia.

R. Brendan Bissell

GSNH
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BARRISTERS & SOLICITORS
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Suite 1600 | 480 University Avenue | Toronto ON | M5G 1V2

Direct 416 597 6489 | Fax 416 597 3370 | Mobile: 416 992 4979 | www.gsnh.com

Assistant | Karen Jones | 416 597 9922 ext. 101 | jones@gsnh.com

From: Mikhael Magaril <mmagaril@bearcreeklaw.com>
Sent: March 13, 2021 2:43 PM
To: 'Rory McGovern' <rory@rorymcgovernpc.com>; 'Rosie Sodhi' <rsodhi@bearcreeklaw.com>
Cc: Brendan Bissell <bissell@gsnh.com>
Subject: RE: In the Matter of a Notice of Intention by Unique Restoration Ltd. Ontario Superior Court of Justice Estate No.: 32-2701357 Request for Immediate Response as to Lack of Service on A-1 Windows

Dear Mr. McGovern,

Thank you.

This doesn't answer the questions I posited in my previous e-mail. They are repeated, and expanded significantly below. I request an answer before Monday.

1) Could either of you kindly articulate why Starlight is getting the stay lifted in respect of its claim? I see that Unique has a counterclaim, but with all due respect because Unique is a Defendant the lifting of the stay will increase Unique's liabilities because of the increased liability for costs (and Starlight appears to have an indemnity term in the contract with Unique). See also para 1(c)(j) of the relief sought portion of the Notice of Civil Claim. I think the creditors should have a say / vote as to whether the prospects of recovery in that

1.1) How will Unique survive an application to post security for costs in the Starlight action?

2) Mr. McGovern has previously articulated that Unique has a counterclaim against A-1. Mr. McGovern can you confirm? Was that communicated to the trustee? Why isn't that counterclaim being explored? Why doesn't it form part of the trustee's report as part of Unique's assets? Why isn't the action against A-1 similarly seeking the removal of the stay so Unique can advance a counterclaim? Was the assertion of a counterclaim just a fiction all along?

3) Why was A-1 not served with the first motion to extend time to file a proposal? I see that you mention A-1's claim in your client's affidavit and you were counsel for Unique in A-1's action. What happened?

4) At paragraphs 21 and 27 of Mr. LeBlanc's 10/MAR/2021 affidavit it indicates that it is unlikely that any creditor will seek a s. 38 order allowing it to prosecute the Starlight Action and that Mr. McGovern is doing so at discounted and flexible rates. What are those discounted and flexible rates? What are the regular rates? I imagine my client would want me to take an assignment pursuant to s. 38 of the BIA and to have myself prosecute it instead of Mr. McGovern.

Even without a s. 38 assignment I think there's very much a question of who should have carriage of Unique's counterclaim. The evidence adduced as to work done is not particularly impressive. I note that there are numerous other creditors who have more to lose, and who are represented by able and competent counsel who all have experience in construction litigation.

5) Who would be paying Unique's legal fees to advance its counterclaim? Is it on contingency?

6) Can I please have confirmation that the trustee does not want to advance Unique's counterclaim in the Starlight proceeding?

7) Can I please have confirmation that the trustee does not want to advance Unique's alleged counterclaim in the A-1 proceeding?

8) Mr. McGovern, in the A-1 proceeding can you confirm that you told the presider (I believe it was Master Vos) during our application that the documents and the particulars of Unique's claim of set-off will go hand-in-hand, or words to that effect?

9) Regardless of the answer to the above, Mr. McGovern why have you failed to produce Unique's list of documents in the A-1 proceeding as set out in the B.C. Supreme Court Civil Rules? That was producible within 35 days of when pleadings closed and well before the filing of the NOI on or about 04/JAN/2021

10) At whose initiation was the Case Planning Conference brought in the Starlight Action?

11) It appears Unique was unable to meet the deadline set out in the Rules for production of its list of documents in the Starlight Action, and instead hangs its hat on the fact that it eventually managed to comply with the CPC Order. Is this a fair summation? I note that Unique was initially represented by Daniel Shouldice of McMillan LLP. I also note that Mr. Shouldice appeared on behalf of Unique at the CPC in the Starlight action as reflected in the preamble. That hearing was on 26/AUG/2019 and required under step 2 of the CPC order for delivery of lists of documents to be done by 15/SEP/2019. Are you suggesting that in that 3 week period you became counsel and helped Unique produce its list of documents? Can I please have a copy of Unique's first list of documents in the Starlight proceeding?

12) I notice at para 56 to 58 of the Starlight Notice of Civil Claim it alleges that Unique obtained progress payments and provided statutory declarations that were false as it had said it paid all of its subcontractors when that was not the case. This sounds an awful like what my client is alleging – this appears to almost be your client's *modus operandi*. This is very concerning.

13) It appears as though Unique got paid in full in respect of the project involving A-1 Windows. Is this correct? I'm sure you reviewed s. 10 of the BC *Builders Lien Act* with your client. It creates a statutory trust in favour of the subcontractors. Where did the money go? Who signed the statutory declarations to allow the progress draws to be paid out?

I would appreciate a very timely response to these questions. I will talk my clients instructions accordingly.

Regards,

Mikhael

From: Rory McGovern [mailto:rory@rorymcgovernpc.com]
Sent: March 13, 2021 8:39 AM
To: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Cc: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>; bissell@gsnh.com
Subject: RE: In the Matter of a Notice of Intention by Unique Restoration Ltd. Ontario Superior Court of Justice Estate No.: 32-2701357 Request for Immediate Response as to Lack of Service on A-1 Windows

Dear Mr. Magaril,

My understanding is that you were provided with the motion record by the Trustee yesterday. You have now been added to the service list and you have my apologies for the slight delay in receiving Unique's materials. As you will note, I included you on the service list when I advised counsel yesterday that Unique's motion record has been uploaded into caselines.

You are free to attend at the hearing on the 17th but I would ask that you let me know what position your client will be taking prior to same as there are only 15 minutes allocated to the hearing. The commercial list in Ontario functions based on the "3Cs" which are cooperation, communication and common sense. Also, on the commercial list, email is used to communicate among counsel. As such, please ensure that you use email as your means of correspondence rather than fax. I am happy to discuss this further with you and I suggest we have a chat before the 17th to resolve any issues that may be resolvable prior to the hearing. The Trustee's counsel should also be on that call.

I have also reviewed your correspondence dated February 5, 2021 that was sent to the Trustee and note that I disagree with your characterization of various matters but I will not address my concerns with you at this point. As you are aware, prior to Unique's filing of the NOI, particulars in connection with my client's claim for set off were provided to you in accordance with Master Taylor's endorsement. I have attached my letter dated November 26 for your convenience. The NOI stayed your client's action which is why no steps have been taken in your client's proceeding since January 4, 2021.

It is my expectation that at some point during this process, a claims process will be administered in connection with Unique's proposal to its creditors. As such, your client will likely have an opportunity to submit its claim at a later point in time along with Unique's other creditors. As I noted above, if you are planning on seeking specific relief at the hearing on the 17th, please ensure you communicate with myself and Mr. Bissell beforehand.

Regards,

Rory McGovern

RORY MCGOVERN PROFESSIONAL CORPORATION
25 Adelaide St. E, Suite 1910
Toronto, Ontario, M5C 3A1

C 416-938-7679
F 647-559-9694

From: Rosie Sodhi <rsodhi@bearcreeklaw.com>
Sent: Friday, March 12, 2021 2:35 PM
To: Rory McGovern <rory@rorymcgovernpc.com>
Cc: 'Mikhael Magaril' <mmagaril@bearcreeklaw.com>; bissell@gsnh.com
Subject: In the Matter of a Notice of Intention by Unique Restoration Ltd. Ontario Superior Court of Justice Estate No.: 32-2701357 Request for Immediate Response as to Lack of Service on A-1 Windows

Dear Mr. McGovern,

Please see attached correspondence and enclosure on behalf of Mikhael Magaril.

Rosie Sodhi
Paralegal to Mikhael Magaril

Bear Creek Law LLP
Suite 220 - 10524 King George Boulevard

Surrey, B.C. V3T 2X2

tel: (604) 259-6200 Available 24-Hours
dir: (604) 676-9409
fax: (604) 259-6202

BearCreekLaw.com

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

ESTATE NO. 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

1st AFFIDAVIT OF ALANNA SOPHIA G. DISINI

AFFIRMED ON 15/MAR/2021

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Mikhael Magaril (LSBC 511386)
Tel: (604) 259-6200
Fax: (604) 259-6202
Email: MMagaril@BearCreekLaw.com
Lawyer for A-1 Window Mfg. Ltd.

TAB 3

Estate No: 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MADAM	)	WEDNESDAY, THE 17th
	)	
JUSTICE GILMORE	)	DAY OF MARCH, 2021

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

ORDER

(PARTIAL LIFTING OF STAY)

THIS MOTION by A-1 Window Mfg. Ltd. ("**A1**") for an order granting a partial lifting of the stay of proceedings was heard this day by videoconference due to COVID-19.

ON READING the factum of A1 and on hearing the submissions of counsel for A1, counsel for Unique Restoration Ltd. ("**Unique**"), and counsel for Crowe Soberman Inc., in its capacity as the trustee of the proposal of Unique (the "**Proposal Trustee**"), as well as those other parties present, as indicated in the counsel slip, no other parties being present although duly served as appears from the affidavit of service filed:

1. **THIS COURT ORDERS** that the stay imposed by s. 69(1) of the *Bankruptcy and Insolvency Act* ("**BIA**") in these Notice of Intention proceedings, and any subsequent stay imposed by s. 69.1 of the BIA, is lifted for the purpose of permitting A1 to continue the prosecution of its action bearing British Columbia Supreme Court action number S-207317 from the Vancouver registry (the "**A1 Action**") against the Debtor, and any director of the Debtor that is added, in the A1 Action for purposes of proving any claim as against the Debtor or its directors, as to liability and quantum, provided, however, that absent any further Order of this Court A1 shall take no steps to execute any judgment against the Debtor, or its directors, outside of these proceedings in respect of the Debtor under the BIA.

2. **THIS COURT ORDERS** that A1 is not entitled to any relief as against the Proposal Trustee, or any trustee in bankruptcy that may be appointed for the Debtor, absent further Order of this Court.

3. **THIS COURT ORDERS** that this Order is effective from today's date and is not required to be issued or entered.

_____

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

ESTATE NO. 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

ORDER

(Partial Lifting of Stay)

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Mikhael Magaril (LSBC 511386)
Tel: (604) 259-6200
Fax: (604) 259-6202
Email: MMagaril@BearCreekLaw.com
Lawyer for A-1 Window Mfg. Ltd.

TAB 4

382231 Ontario Ltd. v. Wilanour Resources Ltd.

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Anderson J.

October 29, 1982.

[1982] O.J. No. 2432 | 43 C.B.R. (N.S.) 153

Between 382231 Ontario Limited, and Wilanour Resources Limited, Canadian Imperial Bank of Commerce and The Clarkson Company Limited

(15 paras.)

APPLICATIONS for order that action be stayed against one defendant and be dismissed against co-defendant or, alternatively, for order extending time for appearance and defence.

Cases cited:

Trusts & Guar. Co. v. Brenner, [1933] S.C.R. 656, 15 C.B.R. 112, [1933] 4 D.L.R. 273.

Statutes cited:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 49, 186.

Counsel

J. Rook, for the applicants. J. Harris, for the respondent. J. Richler, for The Canadian Imperial Bank of Commerce.

ANDERSON J.

1 There are before me for disposition two motions, both for the same relief: an order that the proceedings in the above action be permanently stayed against the defendant Wilanour Resources Limited pursuant to s. 49 of the Bankruptcy Act ("the Act"), and be dismissed as against the defendant The Clarkson Company Limited, pursuant to s. 186 of the Act or in the alternative, for an order extending the time for appearance and delivery of defence. The fact that two motions are brought, one in the action and one in the bankruptcy proceedings, is attributable to uncertainty on the part of the solicitors for the applicant concerning the appropriate forum for such a motion, that is, whether it should be before a judge of this court sitting in his ordinary capacity, or as a judge in bankruptcy.

2 The applications involve the related questions of whether the claims in the action are claims provable in bankruptcy, and claims against the trustee, which cannot be brought other than with leave and, if so, whether leave

should be granted. There is no formal motion for leave but the issue was argued before me as though there had been.

3 For convenience of reference, the statement of claim is attached as App. A to these reasons and the relevant provisions of the Bankruptcy Act, as Sched. B. Clarkson is trustee under a proposal made by Wilanour.

4 Counsel for Canadian Imperial Bank of Commerce took no position in the argument save to associate himself with the submissions made by counsel for Wilanour.

5 In my respectful view, solicitors and counsel for all parties have allowed themselves to be preoccupied with technicalities to the point where practical realities have been overlooked.

6 The relevant provisions of the Act must, of course, be read in context and having in mind the purposes of the Act. Foremost among these is the orderly distribution of the assets of an insolvent debtor rateably among his creditors. It is obvious that a multiplicity of claims by creditors, asserted all in separate proceedings according to the usual processes of the courts, would be wasteful and burdensome; hence the provision in s. 49 preventing actions without leave. Instead, the creditor is ordinarily required to proceed according to the summary provisions of the Bankruptcy Act.

7 Likewise, s. 186 prevents actions against the trustee other than by leave. The section is intended to protect those charged with the administration of the Act from actions or other proceedings save such as have the sanction of the court.

8 It was argued with much force by counsel on behalf of the respondent that the claims in the action fell entirely outside the ambit of the Act. It was submitted that the claims asserted against the applicant Wilanour were not claims provable in bankruptcy within the meaning of the Act and were not affected by s. 49. It was also contended that the claims against the trustee were not with respect to its activities qua trustee and that, therefore, the action was unaffected by s. 186.

9 I think there is considerable health in the arguments advanced on behalf of the respondent. An examination of the statement of claim shows how far removed in character are the claims against Wilanour from those which are usually asserted in a bankruptcy, and that the claim against Clarkson is extraordinary in its nature. If I felt it obligatory to make a determination on the issue, I would accept those submissions and dispose of the matter accordingly. Having regard to practical considerations, I do not consider it obligatory to do so. For that reason I do not propose to consider in detail, for example, the sections of the Act which delineate what claims are provable.

10 Whether the claims asserted in the action are or are not such as to fall within the scope of the Act, they are plainly claims of a nature which cannot be disposed of in any summary fashion. Some proceeding analogous to an action, involving pleadings, production, discovery and trial, appears inevitable. Nor does it seem in any way reasonable to anticipate that if a stay were granted, or this action dismissed as against Clarkson, that the claims would disappear. That being the case, it would seem unreasonable to stay or dismiss the action and require that it be reconstituted in a slightly different form which, in all probability, would in any event result in a trial before a High Court judge. All that would result would be a tactical victory for one party, a tactical reverse for another, and a substantial increment of costs. It seems obvious to me that the proper course is to grant leave for the action to proceed.

11 Counsel for the respondent appeared reluctant to accept the possibility that leave was the appropriate solution to the dilemma. It was not entirely clear to me why this was so as I cannot see that anything material is affected by it except possibly some disposition of costs.

12 There is authority that insofar as leave is required under s. 49 of the Act, it can be granted nunc pro tunc, see Trusts & Guar. Co. v. Brenner, [1933] S.C.R. 656 at 663, 15 C.B.R. 112, [1933] 4 D.L.R. 273. As to the action if by s. 186, it was contended that the absence of leave rendered the action a nullity and, therefore, that leave nunc pro

tunc could not be granted. No authority was cited for that proposition and I do not find it tenable. I recognize the difference in language between s. 49 and s. 186, but I am not persuaded that the effect is so materially different.

13 I would make an order granting leave, nunc pro tune. Time for appearance and defence is extended to 8th November 1982. If I should have been under a misapprehension concerning the position of counsel for the applicant as to a formal motion for leave, or should a longer period for defence be requisite, I may be spoken to.

14 As to the appropriate forum for motions such as these, it seems to me that they ought to be brought in the bankruptcy court and that the motion would be appropriately styled both in the action and in the bankruptcy proceedings. In that way, any possible outcome of the motion can be effectually dealt with at one time.

15 There will be no order as to costs.

Appendix A

STATEMENT OF CLAIM

(Writ issued the 26th day of August, 1982)

1. The Plaintiff is a limited company incorporated pursuant to the laws of the Province of Ontario and was at all material times the owner of certain real property and appurtenant mineral claims near Red Lake, Ontario, all of which will be referred to hereinafter as "the Buffalo site".
2. The Defendant Wilanour Resources Limited ("Wilanour") is a limited company incorporated under the laws of the province of Ontario and carried on business in mining exploration and development. At all material times, Wilanour had certain rights to explore and develop the Buffalo site upon certain conditions as set out in a written agreement between the Plaintiff and Wilanour dated the 27th day of October, 1980 ("the Agreement"). The Plaintiff will be introducing the agreement at the trial of this action for its full terms and the effect thereof.
3. The Defendant Canadian Imperial Bank of Commerce ("the C.I.B.C.") is a chartered bank doing business throughout Canada and, in particular, at its Main Branch at the Commerce Court, in the City of Toronto. The C.I.B.C. is the principal banker for Wilanour and claims to be a secured creditor for an amount in excess of $8,000,000.00.
4. The Defendant the Clarkson Company Limited ("Clarkson") is a corporation federally licensed [sic] as a Trustee in Bankruptcy and has been acting in concert with the C.I.B.C. and under its directions to liquidate the assets of Wilanour in which the Plaintiff has a beneficial interest. The circumstances surrounding these activities as well as the consequences following from them will be set out more fully below.
5. During the currency of the agreement and pursuant to its terms, the Plaintiff elected to continue its participation in the Buffalo site on the basis of a 10% undivided non-assessable interest in the Buffalo site including assets on it or assets used in connection with it.
6. The election was made by the Plaintiff on or about November 13, 1981. Wilanour failed to disclose to the Plaintiff that, by a debenture registered on September 3, 1981 with the Ministry of Consumer and Commercial Relations ("the Debenture") it had purported to give the C.I.B.C. security over all of its assets including those on the Buffalo site.
7. The Plaintiff claims that the Debenture contravenes the Agreement, and, in particular, clause 23(9) thereof and is null and void and of no effect against the Plaintiff.
8. The Plaintiff further claims that the Debenture contravenes the Assignments and Preferences Act, R.S.O. 1980, Chapter 33, and was moreover given to secure past indebtedness only and is null and void and of no effect.

9. Despite its obligation under the Agreement to make full disclosure to the Plaintiff of its financial affairs, Wilanour has failed to do so and has in fact deliberately misled the Plaintiff into a belief that the Buffalo site was completely unencumbered, and that the financial records would be forthcoming.

10. The Plaintiff has since discovered that, commencing early in 1982, Wilanour has ceased all operations at the Buffalo site, has surreptitiously removed from the Buffalo site all moveable assets in which the Plaintiff claims its 10% undivided interest under the Agreement, has flooded the mine and filled in the pit at the Buffalo site, has acquiesced in and cooperated with the C.I.B.C. and Clarkson in a sale of all assets of Wilanour.

11. The C.I.B.C. claims title to all assets under the Debenture, although the Debenture is invalid for the reasons set out in paragraphs 7 and 8 above and although it purports not to have caused its supposed floating charge security to crystallize.

12. Clarkson has sold and is selling all assets on behalf of the C.I.B.C. and is providing the C.I.B.C. with 50% of the proceeds of sale.

13. Wilanour made an interim proposal to its creditors in June, 1982, and attempted to keep this from the Plaintiff. The interim proposal and supporting materials disclosed a deficit of approximately $15,000,000.00 and further confirmed that operations at the Buffalo site had been terminated.

14. The Plaintiff claims that acts of Wilanour, Clarkson and the C.I.B.C. constitute breaches of trust and conversion of property in which the Plaintiff has a beneficial interest.

15. The Plaintiff claims that the acts of Wilanour constitute an abandonment of its rights under the Agreement and the Plaintiff claims that by reason of the abandonment the Buffalo site and those moveable assets remaining on it have reverted to the Plaintiff. The Plaintiff claims that Wilanour is obliged to reconvey its interest in the Buffalo site and the assets to it forthwith at Wilanour's expense pursuant to the Agreement and, in particular, Clause 11 thereof.

16. The Plaintiff therefore claims against Wilanour:

    (a) a declaration that it has abandoned its rights under the Agreement;

    (b) a mandatory injunction requiring it to execute a reconveyance to the Plaintiff of its rights to the Buffalo site;

    (c) a mandatory injunction requiring it to deliver up to the Plaintiff full reports on any mining operations it may have conducted and full financial statements as required under the Agreement;

    (d) delivery up of title documents to the Buffalo site;

    (e) a certificate of lis pendens with respect to the Buffalo site more particularly described as follows: "Mining rights to those Parcels registered in the Land Titles Division for the Land Registry Office at Kenora, in the Register for the District of Patricia, as follows: 256, 353, 354 to 364, inclusive, 1351 to 1363 inclusive."

Against Wilanour and the C.I.B.C.:

    (f) a declaration that the Debenture is null, void and of no effect;

    (g) a declaration that the C.I.B.C. has no title to any of the assets supposedly the subject matter of the Debenture;

Against C.I.B.C. and Clarkson:

    (h) damages and punitive damages in the amount of $100,000,000.00 for breach of trust;

    (i) damages and punitive damages in the amount of $100,000,000.00 for conversion;

(j) an injunction and an interim and interlocutory injunction restraining them from any further breaches of trust and/or conversion;

(k) a tracing of all assets taken by them in breach of trust and/or conversion;

(l) repayment of any monies received from sales of assets sold in breach of trust and/or conversion;

Against Clarkson:

(m) damages and punitive damages in the amount of $100,000,000.00 for trespass;

Against all Defendants:

(n) its costs of this action on a solicitor and client basis;

(o) such further and other relief as this Honorable Court deems just.

17. The Plaintiff proposes that the trial of this action take place in the City of Toronto in the Judicial District of York.

DELIVERED at Toronto this 26th day of August, 1982 by Messrs. Laskin, Jack & Harris, 70 Bond Street, Suite 300, Toronto, Ontario, M5B 1X3, Solicitors for the Plaintiff.

Schedule B

BANKRUPTCY ACT

49.(1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose...

186. Except by leave of the court no action lies against the Superintendent, an official receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

End of Document

TAB 5

First Choice Capital Fund Ltd. v. First Canadian Capital Corp.

Saskatchewan Judgments

Saskatchewan Court of Queen's Bench

In Bankruptcy

Judicial Centre of Saskatoon

Baynton J.

February 26, 1999.

Q.B. No. 1757 of 1996 J.C.S.

Court No. 4984

Estate No. 025613

[1999] S.J. No. 153 | ***178 Sask.R. 100*** | 10 C.B.R. (4th) 277 | 87 A.C.W.S. (3d) 221 | 1999 CanLII 12563

IN THE MATTER OF the bankruptcy of Delbert George Blewett AND IN THE MATTER OF the bankruptcy of First Candaian Capital Corporation Between First Choice Capital Fund Ltd. et al., applicants (defendants), and First Canadian Capital Corporation et al., defendants

(9 pp.)

Case Summary

Bankruptcy — Creditors — Priorities — Proceeds of litigation — Actions against bankrupt — Leave to commence action or lifting of stay — Discharge of debtor — Liabilities not released by discharge — Act of fraud of debtor.

Applications by First Choice Capital Fund to lift a stay of its action against Blewett and First Canadian Capital, and for priority to Blewett's estate in any proceeds realized from the prosecution of the action. Blewett and First Canadian had both declared bankruptcy. First Canadian had been discharged. They were defendants, among others, in a civil action commenced by First Choice for damages respecting investment losses in excess of $40 million. Blewett was involved in the investment funds as a solicitor. He professional liability insurance through the Law Society of ***Saskatchewan***. He made an assignment in bankruptcy in May 1998 and appeared to have no assets to satisfy any judgment that First might obtain against him. First Choice alleged that First Canadian was liable for fraudulent misrepresentation respecting the management of the investment funds. First Choice sought a declaration pursuant to section 69.4 of the Bankruptcy and Insolvency Act that it could continue its action. It also sought declaratory relief that confirmed that it had priority to Blewett's bankruptcy estate to any proceeds of the action, including proceeds under the professional insurance policy.

HELD: Application allowed.

First Choice was entitled to an order lifting the stays effected by section 69.3 of the Act. It was permitted to continue its action against Blewett and First Canadian on the ground that these defendants were necessary for the complete adjudication of its action against multiple defendants. First Canadian's discharge from bankruptcy did not release it from liability arising out of fraud. As well, the action involved unliquidated debts subject to complex proof and valuation of assets. First Choice was entitled to priority to Blewett's estate. Such an order did not prejudice Blewett's other creditors who did not have a professional negligence claim against Blewett.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1970, c. B-3, ss. 49, 95(2).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 69, 69.3, 69.4, 69.31, ***178***(1)(d).

Counsel

J.M. Lee and P.A. Beke for the applicants (plaintiffs). P.J. Gallet and T.J. Schonhoffer, for the defendant bankrupt Blewett. J.R. Beckman, Q.C. and C.A. Sloan, for the defendants Deloitte and Hicks. W.F.J. Hood, for the defendant Larry Machula. No one appearing for First Canadian Capital Corporation ("FCCC").

BAYNTON J.

THE APPLICATIONS

1 Two applications are brought to lift bankruptcy stays respecting the plaintiffs' action against Delbert George Blewett ("Blewett") and First Canadian Capital Corporation et al. ("FCCC"), and to grant the plaintiffs priority to Blewett's estate in any proceeds realized from the prosecution of the action. As the issues are similar, I will deal with them jointly.

FACTS

2 Blewett is one of several defendants in a complex civil action commenced by the plaintiff applicants to recover damages respecting investment losses in excess of $40,000,000. Blewett's alleged liability arises from his conduct and involvement in the investment funds as a solicitor. During the period of time in issue he was entitled to practice law in ***Saskatchewan*** and carried professional liability insurance through the Law Society of ***Saskatchewan***.

3 Blewett made an assignment into bankruptcy in British Columbia on May 19, 1998. He appears to have no assets to satisfy any judgment that the plaintiffs might obtain against him. The applicants seek a declaration pursuant to s. 69.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 ("BIA") that sections 69 to 69.31 inclusive no longer operate in respect of the plaintiffs so that they can continue to prosecute their civil action against the bankrupt. They also seek declaratory relief confirming that they have priority to Blewett's bankruptcy estate to any proceeds of the action including proceeds which may be payable under the professional insurance policy.

4 On December 18, 1998, Mr. Justice Vickers of the Supreme Court of British Columbia in Bankruptcy, ordered that the applicants' application for relief be remitted to be heard and decided by the Court of Queen's Bench for ***Saskatchewan*** in Bankruptcy.

5 FCCC is also a defendant in the action and its alleged liability arises from its conduct and involvement respecting the management of the investment funds. It is also bankrupt. A receiving order was issued against it on March 3, 1998, by the Court of Queen's Bench for ***Saskatchewan*** in Bankruptcy, and an appeal of that order was dismissed by the Court of Appeal on November 20, 1998.

ANALYSIS

a. Lifting of the Stays

6 I am satisfied that the conditions of s. 69.4 have been established by the applicants respecting each of the bankrupts and that they are entitled to an order lifting the stays effected by s. 69.3 of the BIA to permit them to continue with their action against the bankrupts. Section 69.4 provides as follows:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections, or
>
> (b) that it is equitable on other grounds to make such a declaration.

7 Registrar Ferron in Re Advocate Mines Ltd. (1985), 52 C.B.R.(N.S.) 277 (Ont. S.C.) sets out the following summary of the circumstances in which the courts have lifted a stay of proceedings:

> Section 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.
>
> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

8 Re Advocate Mines Ltd., supra, has been applied in ***Saskatchewan*** in Re Angelstad (1991), 4 C.B.R. (3d) 235 (***Sask***. Q.B.). The principles set out have not been changed by the amendments to the BIA which became effective November 30, 1992. Schroeder v. Schroeder (1993), 19 C.B.R. (3d) 316 (***Sask***. Q.B.).

9 Principle three is clearly applicable to Blewett and FCCC and entitle the applicants to a lift of the stays respecting these bankrupts. They are necessary parties for the complete adjudication of the matters at issue involving the other parties in the action. At least one of the other defendants has commenced his own action against Blewett alleging professional negligence. Another defendant maintains that the misrepresentations alleged by the plaintiffs were made by Blewett and FCCC. The claims against Blewett, FCCC and the other defendants are factually intertwined. To refuse to lift the stays would preclude the plaintiffs from having the bankrupts' liability determined, or at the least, where fraud is in issue, would lead to a multiplicity of proceedings. Re Wagman (1977), 23 C.B.R. (N.S.) 240 (Ont. S.C.); aff'd (1979), 28 C.B.R. (N.S.) 179 (Ont. C.A.). Shinkaruk v. Ecclesiastical Insurance Office Public Ltd. (1988), 69 C.B.R. (N.S.) 259 (***Sask***. Q.B.); Agricultural Credit Corp. of ***Saskatchewan*** v. Verwimp (1993), 15 C.B.R. (3d) 116 (***Sask***. Q.B.).

10 In the case of Blewett, it is obvious that his evidence to the civil action as a whole is important. This is a factor that can be taken into account by the court in determining if the bankrupt is a necessary party for the complete

adjudication of the matters at issue in the action. Agricultural Credit Corp. of ***Saskatchewan*** v. Verwimp, supra. Counsel should have the opportunity to examine Blewett for discovery. I am not convinced that the ability of counsel to examine him as a non-party under Rule 222A is a sufficient substitute, considering the cost implications of Rule 222A and in particular the prohibition under subsection five respecting the reading of the examination for discovery questions and answers into evidence at trial.

11 Principle four also applies to Blewett. The fact that the insurer has given a reservation of rights letter to Blewett or that Blewett has executed a non-waiver agreement, does not disentitle the plaintiffs from relying on principle four as grounds for a lifting of the stay. I reject the submission on behalf of Blewett that the case before me is distinguishable from Dutchak Estate v. Seidle, ***Sask***. Q.B., Q.B. 40/92 and Bankruptcy File No. 122, J.C. Yorkton and J.C. Regina, November 24, 1998, Dawson J. (as yet unreported). In that case Dawson J. lifted a stay against a bankrupt lawyer to permit the action against him to continue so that the plaintiffs could access his professional liability insurance. The nature of the insurance in that case is similar to that in the case before me. A lifting of the stay respecting the bankrupt does not in any way constitute a finding that the professional liability insurance policy proceeds are payable to the bankrupt's estate or that the insurer has no defence to a claim on the policy. That is a separate issue which may have to be determined in due course. The sole effect of the order is to permit the action against the bankrupt to continue despite his intervening bankruptcy.

12 Principles one and two also apply to FCCC. The plaintiffs allege fraud and fraudulent misrepresentation on the part of FCCC. A discharge does not release the bankrupt from liability arising out of fraud. Section ***178***(1)(d) and (e) provides as follows:

> ***178.(1)*** An order of discharge does not release the bankrupt from
>
> . . .
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;
>
> (e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

13 The action respecting FCCC also involves unliquidated debts subject to complex proof and valuation of assets. Aquino et al. v. First Choice Capital Fund Ltd. et al. (1995), 130 ***Sask***. R. 252 (***Sask***. Q.B.); rev'd in part at (1997), 148 ***Sask***. R. 288 (***Sask***. C.A.).

b. Priority to Blewett's Estate

14 I am also satisfied that the plaintiffs should have priority to Blewett's bankruptcy estate in any proceeds realized from their action. Such an order in no way prejudices Blewett's other creditors who do not have a professional negligence claim against Blewett. If the plaintiffs' action is successful and if they are successful in obtaining the proceeds of Blewett's professional insurance coverage, Blewett's bankruptcy estate would receive a windfall if it were entitled to share in these proceeds. As well, such a result would benefit a class of persons not entitled to insurance coverage at the expense of those who are so entitled. Professional liability coverage insures against the risk of financial loss by a client that is caused by the negligence of the insured lawyer. It does not insure against the risk of financial loss by non-client creditors caused by the insolvency of the lawyer.

15 A case directly on point and authority for a priority order is Re Major (1985), 54 C.B.R. (N.S.) 28 (B.C.S.C.) at pp. 34-35. See also Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc., (1991), 5 C.B.R. (3d) 227 (Alta. Q.B.). Master Funduk at p. 228 makes the observation that from a practical perspective, plaintiffs would not likely pursue their action unless they had some comfort that the proceeds they obtained are not siphoned off into the bankrupt's estate.

16 The only concern I have respecting the priority issue is that which was raised by counsel appearing on behalf of some of the other defendants. They too have claims against any proceeds realized from Blewett's professional

liability insurance policy. The question of priority between the plaintiffs and other claimants in the action before me and the claimants in any other action against Blewett for professional negligence, should not and need not be determined at this juncture. Granting the plaintiffs priority to Blewett's estate in bankruptcy adequately addresses their legitimate concerns at this stage of the proceedings.

CONCLUSION

17 It is ordered that the stay be lifted respecting each bankrupt in accordance with the terms of the amended draft orders submitted. It is also ordered that the plaintiffs have priority to Blewett's bankruptcy estate respecting any proceeds they realize from this action in accordance with the terms of the amended draft order submitted. The plaintiffs have withdrawn their application for costs so there is no order as to costs.

BAYNTON J.

End of Document

TAB 6

Advocate Mines Ltd. (Re)

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Registrar Ferron

July 17, 1984

Suit No. 31202288

[1984] O.J. No. 2330 | 52 C.B.R. (N.S.) 277 | 1984 CarswellOnt 156

Between Gerald Oxford, applicant, and Advocate Mines Limited, respondent

(12 paras.)

Counsel

M. Zigler, for the applicant, Gerald Oxford et al.

C.H. Morawetz, Q.C., for the trustee.

REGISTRAR FERRON

1 Section 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.

2 The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:

1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

3 The authority given by the court to an applicant creditor to commence or continue proceedings in the

circumstances referred to in items 2 to 5 is invariably limited to restrict or prohibit execution of any judgment obtained against the bankrupt.

4 The proceedings in the Court of Appeal of Newfoundland had their genesis in a determination and assessment made by the Director of Labour Standards under the Labour Standards Act. If the applicant on this motion is successful in the Court of Appeal in maintaining the determination and assessment of the director as varied by the District Court Judge, Advocate Mines Limited will be guilty of an offence liable to a fine and to an order enforcing the court's determination as a judgment. I say that the company will be guilty of an offence because, since it is operating under a proposal, it cannot comply with any determination made against it by the court without doing violence to the proposal. In this sense, the thrust of the proceedings is to defeat the proposal.

5 There is, in my opinion, no doubt that this is the type of proceeding to which s. 49(1) of the Bankruptcy Act applies and that by the terms of that section is stayed.

6 Three considerations militate against an order for leave to the applicant to proceed:

1. Any judgment obtained in the Newfoundland courts is not binding on the trustee, so that in that sense, the continuation of the proceedings in Newfoundland serves no purpose.
2. The proceedings are against the intent of the Act the effect of which would defeat the proposal which is binding upon the applicant.
3. Regardless of the outcome of the proceedings in Newfoundland, the very question now before the Court of Appeal of Newfoundland must be tried again in the Ontario bankruptcy court.

7 In January 1982 the applicant on his own behalf and on behalf of other employees of Advocate Mines Limited filed a proof of claim in the proposal in respect of the same claim which it seeks to establish in the courts of Newfoundland under the Labour Standards Act. That claim was filed after the director's determination for the amount which the director found was owing by the company to the employees by reason of the non-compliance with s. 53 of the Act.

8 That proof of claim was disallowed by the trustee and an appeal from that disallowance is now pending in the bankruptcy court.

9 To authorize the continuation of the proceedings in Newfoundland raises the danger of inconsistent findings in the parallel proceedings in the bankruptcy court.

10 It is clear that logic in the sense which I have heretofore used that word is not served in allowing the applicant to proceed.

11 The application is accordingly dismissed and leave under s. 49(1) is refused.

12 This is not a case for costs save and except the usual order with respect to the trustee's costs out of the assets of the estate.

REGISTRAR FERRON

End of Document

TAB 7

Bookman (c.o.b. Steven M. Bookman & Associates) (Re)

Ontario Judgments

Supreme Court of Ontario - High Court of Justice

In Bankruptcy

The Registrar Ferron

Heard: May 3, 1983.

Judgment: June 15, 1983.

No. 31-202343-T

[1983] O.J. No. 956 | 47 C.B.R. (N.S.) 144

IN THE MATTER OF the Bankruptcy of Steven M. Bookman carrying on business as Steven M. Bookman & Associates in the City of Toronto, in the Municipality of Metropolitan Toronto, in the Province of Ontario, and residing in the Town of Caledon, in the Regional Municipality of Peel

(12 pp.)

Counsel

H.R. Poultney, Q.C., for the bankrupt. E. Van Woudenberg, for the Continental Bank of Canada. R.L. Lee, for the defendant, The Guarantee Company of North America.

REGISTRAR FERRON

1 There are two applications before me. An application brought by The Guarantee Company of North America for leave to commence third party proceedings against the bankrupt and an application by the Continental Bank of Canada to commence an action against the bankrupt and to add the Trustee as a party defendant.

2 The plaintiff, in its action against the defendant, The Guarantee Company of North America, alleges that as a result of the bankrupt's fraudulent activities described in the Statement of Claim as a cheque-kiting scheme, it sustained a substantial loss and claims against the defendant to be indemnified under its bond with the defendant.

3 The defendant seeks to commence third party proceedings against the bankrupt for contribution and indemnification and asks leave to so proceed on the basis that the plaintiff's claim arises out of the activities of the bankrupt who is solely responsible for the bank's loss which gives rise to the claim under the bond. Counsel for the Bankrupt takes as one of his grounds for resisting the application, a position that there is no relationship between the defendant and the bankrupt and that on the authority of Chatham Motors Limited vs. Fidelity and Casualty Company of New York, 38 O.R. 2nd 1980, the defendant is not entitled to commence third party proceedings and leave accordingly should be refused.

4 The Chatham Motors decision was reversed on appeal but notwithstanding, it seems to me that on an application

for leave under Section 49(1) I need not, indeed, I should not, embark on an enquiry of whether the defendant is entitled to proceed by way of third party proceedings no more than I should, on an application by a plaintiff to proceed against a bankrupt to establish damages for negligence or fraud, assess the plaintiff's chances of success and based on my decision 'on that assessment. Whether the defendant has a right to take third party proceedings is for another Court.

5 Section 49(1) of the Bankruptcy Act provides that upon bankruptcy no creditor with a claim provable in bankruptcy shall commence or continue any action, execution or other proceedings for the claim against the bankrupt without the leave of the court. Save for that provision, creditors could, after bankruptcy, continue or commence actions against the bankrupt which would result in an intolerable situation from the standpoint of the trustee in his attempt to administer the estate and would run counter to the main object of the Act, namely the equal distribution of the bankrupts' estate amongst unsecured creditors.

6 Once, however, it is clear that the claim for which leave is sought is one which, if proved, survives the bankruptcy and that its prosecution will not interfere with the administration of the bankrupt estate or give the creditor an unfair advantage over the other creditors of the estate, then leave may, in proper cases, be given.

7 It was suggested in argument that leave should not be given because the defendant, if judgment is given against it, has a right to proceed for its subrogated claim against the bankrupt and that this is a sufficient remedy for the defendant. This would, however, result in an additional trial on virtually the same facts, additional costs and the danger of inconsistent findings.

8 Under all of the circumstances, in my opinion, this is a proper case for leave and accordingly, leave is given to the defendant, The Guarantee Company of North America, to commence third party proceedings against the bankrupt. Leave should also be given to The Continental Bank of Canada to proceed against Bookman in its action against the Bank of Nova Scotia for the reasons which I have expressed.

9 With respect to the second application, Bookman, in addition to all other considerations, seems clearly to me to be a necessary party for the complete adjudication of the plaintiff's claim. The civil court is, in my opinion, a better forum for establishing the plaintiff's claim against the bankrupt than proceedings under Section 95(2) of the Bankruptcy Act.

10 Nor do I accept as valid the argument of counsel for the bankrupt that the plaintiff, having proceeded by way of petition , has elected its remedy and is now precluded from proceeding against the bankrupt by Writ of Summons.

11 That is a proposition for which there is no authority. While the Bankruptcy Court has stayed or dismissed a petition where the petitioning creditor is concurrently proceeding to recover the debt alleged in the petition in another court, it has never been said that the petitioning creditor is precluded from so proceeding and in fact may do so once the proceedings in the other Court have been determined. Here the proceedings by way of petition have been determined and a receiving order issued.

12 In summary, there will be an order authorizing The Guarantee Company of North America to proceed against the bankrupt by way of third party proceedings and an order authorizing The Continental Bank of Canada to proceed with its action against the bankrupt.

End of Document

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF UNIQUE RESTORATION LTD. UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*

ESTATE NO. 32-2701357

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

RESPONDENT'S MOTION RECORD

(Second Extension of Time)

Bear Creek Law LLP
Suite 220 – 10524 King George Blvd.
Surrey, B.C. V3T 2X2

Mikhael Magaril (LSBC 511386)
Tel: (604) 259-6200
Fax: (604) 259-6202
Email: MMagaril@BearCreekLaw.com
Lawyer for A-1 Window Mfg. Ltd.