Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.

Respondent

FACTUM OF GRANT THORNTON LIMITED,

(in its capacity as Receiver and Trustee)
(Hearing July 17, 2017)

July ^, 2017

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TO: **The Service List**

#2910049

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PART I - OVERVIEW

1. Grant Thornton Limited ("GTL", the "Receiver" or the "Trustee") is the Court-Appointed Receiver of 1299746 Ontario Inc. o/a Compuquest2000 ("Compuquest") and 2252709 Ontario Inc. ("225"), the Receiver of a real property municipally known as 7472 Ashburn Road, Whitby, Ontario (the "Ashburn Property") and Trustee in Bankruptcy of Compuquest and Gary Bodimeade ("Gary") personally.

2. The Receiver has brought a motion for the following relief:

(a) Approval of an Agreement of Purchase and Sale for the sale of the Ashburn Property (the "Ashburn Sale Agreement"), possession of the Ashburn Property, a vesting order and a sealing order pending closing;

(b) An Order discharging a construction lien registered against the Ashburn Property:

(c) An Order discharging a Certificate of Pending Litigation ("CPL") and an Order of the Honourable Mr. Justice Glustein dated August 9, 2017 (the "Glustein Order") registered by Dean Salem ("Salem") and Norris Technologies LLC ("Norris") against the Ashburn Property;

(d) A declaration that the RLOC Agreements (as hereinafter defined) executed between Gary and his wife Aimee Bodimeade ("Aimee") in favour of Salem and Norris are void and unenforceable against the Receiver and Trustee;

(e) Dismissal of an Application bearing Commercial List Court File No. CV-17-11698-00CL (the "Norris Application").

3. Canadian Imperial Bank of Commerce ("CIBC") supports the relief sought in this motion. Salem and Norris do not oppose approval of the Ashburn Sale Agreement, the vesting order or the discharge of the CPL and Glustein Order from title for the purpose of facilitating the sale, provided that their rights, if any, to claim an equitable mortgage over the proceeds are preserved. Salem and Norris oppose the

declaratory relief sought in this motion and dismissal of the Norris Application. They seek an adjournment of this relief.

4. The Receiver and Aimee oppose the adjournment request. Aimee seeks a determination of her entitlement to a distribution of funds from the proceeds of sale.

5. Aimee's entitlement to any proceeds depends on:

(a) The Receiver's right to trace Compuquest assets and funds into the Ashburn Property;

(b) The determination of the respective rights and interests of Aimee and Gary (as vested in the Trustee) in the Ashburn Property;

(c) The claim of Salem and Norris to an equitable mortgage.

6. Aimee has advised that she will oppose the sale approval and vesting order unless she is entitled to a distribution of funds from the proceeds of sale.

7. All interested parties agreed that the Ashburn Property must be sold and consented to the appointment of GTL as Receiver. CIBC holds a first mortgage over the Ashburn Property. The Receiver has already traced over $1 million of Compuquest funds directly into the Ashburn Property. The Receiver's investigation is incomplete. Aimee cannot afford to reside in or maintain the property. The Receiver carried out a marketing process, with Aimee's cooperation, and entered into the Ashburn Sale Agreement with a *bona fide* purchaser on terms and conditions that all affected parties agree is fair and reasonable. If the sale approval, possession and vesting order are not granted, then the sale will be lost, to the detriment of all stakeholders.

PART II - SUMMARY OF FACTS

CIBC Financing to Compuquest

8. The background facts are taken largely from CIBC's Application Record seeking the appointment of GTL as Receiver and have not been contested.

9. Commencing in 2008, CIBC provided credit facilities to Compuquest and, later, 225. Gary on behalf of Compuquest executed a Security Agreement in favour of CIBC dated November 21, 2008.[1]

10. According to Compuquest's May 31, 2015 review engagement financial statements prepared by Alan Hogan ("Hogan") of Turner Moore LLP, Compuquest had $2,705,143 of accounts receivable and $2,397,177 of inventory as well as $432,618 of property, plant and equipment as of May 31, 2015.[2]

11. In February 2016, CIBC became concerned about the operation of Compuquest's account at CIBC. Among other things, CIBC's Fraud, Loss Prevention & Investigations department identified unusual activity in Compuquest's accounts, including circular transactions with an individual named Dean Salem ("Salem").[3]

12. On February 25, 2016, management of Compuquest's accounts was transferred to CIBC's Special Loans department.[4]

13. On March 24, 2016, CIBC, through counsel, issued formal demand letters to Compuquest and Gary.[5]

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[1] CIBC Application Record, including the Affidavit of Douglas MacLaine sworn April 28, 2016 (Receiver's Fifth Report, Appendix 13)
[2] Receiver's Second Report dated November 24, 2016, Appendix 31
[3] CIBC Application Record
[4] CIBC Application Record

14. On April 12, 2016, Gary/Compuquest consented to the appointment of GTL as consultant.[6]

15. On April 15, 2016, GTL visited Compuquest's premises and discovered inventory on hand had a value of less than $50,000.[7]

16. On April 28, 2016, CIBC issued an Application Record to appoint GTL as Interim Receiver.[8]

17. CIBC initially sought to appoint the Interim Receiver without notice. The matter was adjourned to April 29, 2016 to provide notice to Gary. After receiving notice, Gary caused Compuquest to pay USD$16,000 to 2401484 Ontario Inc. ("240") and USD$75,000 to an individual named Jay Clausner ("Clausner").[9]

18. On April 29, 2016, by Order of Madam Justice Mesbur, GTL was appointed as Interim Receiver of Compuquest and 225.[10]

19. On May 3, 2016, CIBC issued bankruptcy applications against each of Compuquest and Gary.[11]

20. On May 13, 2016, GTL issued its First Report as Interim Receiver. GTL reported that there had been limited business for several months, limited inventory and minimal accounts receivable.[12]

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[5] CIBC Application Record
[6] CIBC Application Record
[7] CIBC Application Record
[8] CIBC Application Record
[9] Second Report at paras. 62-63
[10] Second Report, Appendix 2
[11] Second Report, Appendix 4

21. On May 17, 2016, by Order of Mr. Justice Newbould, GTL was appointed as Receiver of Compuquest and 225.[13]

22. On May 25, 2016, Bankruptcy Orders were issued against Compuquest and Gary.[14]

23. On June 1, 2016, GTL as Trustee registered Gary's Bankruptcy Order against the Ashburn Property, which was the matrimonial home of Gary and his wife, Aimee Bodimeade ("Aimee").[15]

24. On the Receiver's appointment, there was virtually no accounts receivable and no inventory. There has been no realization from accounts receivable. The Receiver has realized only $120,000.00 from an online auction that included all inventory, furniture and equipment of Compuquest.[16]

The Ashburn Property

25. On September 28, 2007, the Ashburn Property was purchased in Aimee's name for $638,000.[17] Gary and Aimee financed the purchase using approximately $230,000 from the proceeds of sale of their former home, the title to which property they held jointly.[18]

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[12] Second Report, Appendix 3
[13] Second Report, Appendix 1
[14] Second Report, Appendix 4
[15] Second Report, Appendix 15
[16] Second Report at paras. 56-57.
[17] Second Report at para. 20.
[18] Third Report of the Receiver dated January 11, 2017, Appendix 3.

26. In addition, they sought and received mortgage financing from Bank of Nova Scotia ("BNS").[19] Title to the Ashburn Property was registered in Aimee's name on September 28, 2007.[20] Both Aimee and Gary were listed on the mortgage documentation with BNS.[21]

27. Since 2007, the Ashburn Property has been subject to significant improvements, including, without limitation, the construction of:

(a) an approximately 5,680 square foot two-storey detached residential dwelling, excluding the basement;

(b) an approximately 3,196 square foot finished basement with dance studio, family room, gym, bedroom and three piece bathroom;

(c) an outdoor pool with pool house;

(d) an approximately 800 square foot heated and insulated RV garage;

(e) an approximately 11,000 square foot equestrian barn complete with riding centre and stalls for 14 horses; and

(f) an approximately 2,400 square foot insulated hay/equipment barn.[22]

Gary's Criminal Past

28. In 1993, Gary was convicted of fraud.[23]

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[19] Affidavit of Aimee Bodimeade sworn January 6, 2017 ("Aimee Affidavit") at para. 3, Exhibits A and B.
[20] Second Report at para. 14.
[21] Aimee's Affidavit at Exhibit D; Exhibit 1 to Aimee's cross-examination; Gary's January 13, 2017 cross-examination at Q. 18.
[22] Second report at para 15.

29. On or about September 12, 2005, Gary and his twin brother, Alan Bodimeade, were charged with defrauding Royal Bank of Canada ("RBC") between September 1, 2002 and April 30, 2004.[24]

30. On September 12, 2006, Gary pleaded guilty to laundering proceeds of crime contrary to the *Criminal Code of Canada* and received two years' probation.[25]

31. While he was on probation for the money-laundering charge, Gary applied for and obtained a pardon in respect of his 1993 fraud conviction.[26]

32. Gary was also sued by RBC. He borrowed money from Aimee's father to settle the lawsuit.[27]

33. Aimee knew that Gary had been arrested for fraud and money-laundering.[28]

34. Aimee's June 20, 2017 affidavit addresses why title to the Ashburn Property was taken in her name:

> After Gary was charged with fraud, I felt that I had to protect my children and myself from further financial instability of Gary.[29]

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[23] Affidavit of Gary Bodimeade sworn June 7, 2017; Fifth Report of the Receiver dated June 19, 2017, paras. 21-23
[24] Second Report, Appendix 32
[25] Second Report, Appendix 32
[26] Fourth Report of the Receiver dated June 9, 2107
[27] Examination of Gary Bodimeade February 22, 2017, Qs. 102-124
[28] Cross-examination of Aimee, Qs. 421-429
[29] Affidavit of Aimee Bodimeade sworn June 20, 2017, para. 3

The Receiver's Investigation

35. After its appointment, the Receiver identified a chain of emails dated April 6, 2016 between Gary, Aimee and Hogan (Compuquest's accountant), in which Gary admitted that "*everything*" was paid for with Compuquest funds. In the context of this email chain, "*everything*" appeared to refer to the construction of the new house, the barns, and eleven horses, among other things.[30]

36. The Receiver also found an email in Compuquest's records where Gary estimated the cost of the improvements to the Ashburn Property as follows:[31]

Home	$1,400,000
Finished Basement	$135,000
Pool	$65,000
Landscaping	$55,000
SUV Garage	$135,000
Equestrian Barn	$1,200,000
Hay/Equipment Barn	$75,000
Total	**$3,065,000.00**

37. As a result of these improvements, the estimated value of the Ashburn Property as at April 11, 2016 was $3,700,000.[32]

38. The Receiver conducted an investigation into the use of Compuquest funds during the period for which records were available from CIBC (after 2008). The

[30] Second Report at para. 32, Appendix 19.
[31] Third Report at 24, Appendix 4.
[32] Second Report at para 16, Appendix 9.

Receiver traced approximately $1 million of Compuquest's funds during this time period (i.e. after 2008) directly into the Ashburn Property.[33]

39. The Receiver also identified many other suspicious payments and transactions during this time period, including:

(a) $885,000 paid to Craig Pinfold and/or his company, Pinfold and Associates Inc. ("Pinfold");

(b) $80,000 in cheques made payable to Clausner and/or his company, "Virtual Technology", but which identified Pinfold in the memo box of the cheques;[34]

(c) $1,219,530.19 in payments to either Clausner, his wife Kara Clausner, 240, or Clausner's company Total Cart Solutions Inc.[35]

(d) $1,184,699.00 in payments to Virtual Technology, as well as $322,278.00 in further payments to Pinfold, $398,509.56 to Clausner and $5,000 to Kara Clausner;[36]

(e) Down payments and lease payments for leased vehicles (including many luxury vehicles) totalling $1,759,994.53;[37]

(f) Personal cheques to Aimee totalling $138,800 for the period 2009 to 2013;

(g) Personal cheques to Gary totalling $88,000 for 2013;

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[33] Second Report; Third Report, Appendix 5
[34] Second Report at paras. 42-43, Appendix 25.
[35] Second Report at para. 65, Appendix 34.
[36] Third Report at para. 61-63, Appendices 14,15
[37] Third Report at para. 47, Appendix 8.

(h) Payments to “CASH” totalling $122,957.37 for the period 2009 to 2013;[38]

(i) Numerous additional payments by Compuquest in the nature of personal expenses, including retail purchases, insurance, utilities, telephone and cable, credit cards, and ATM cash withdrawals;[39]

(j) Preferential payments to Salem and Norris in the period leading up to the appointment of the Interim Receiver on April 29, 2016, including payment of net proceeds from the sale of a 2014 Kingaire Motorhome in the amount of USD$255,881.77, which Gary diverted to an account set up in Compuquest’s name at The Toronto-Dominion Bank and then wired to Norris.[40]

40. Aimee has been out of the workforce since 1999. She was not involved in the day to day business of Compuquest.[41] She never looked at or asked to see Compuquest’s financial statements and she had no idea what kind of income Compuquest had.[42] Aimee admitted on her cross-examination:

> A. To be honest, I didn't really...I mean, I didn't work. I stayed home. Gary provided for us. He gave me a certain amount of money, and that...everything else was his responsibility.[43]

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[38] Third Report at paras. 50-52, Appendices 9-11.
[39] Third Report at para 45, Appendix 7.
[40] Second Report at para. 51.
[41] Affidavit of Aimee Bodimeade sworn June 20, 2017, paras. 4 and 5
[42] Cross-examination of Aimee Bodimeade January 13, 2017, Qs. 541-432,
[43] Cross-examination of Aimee Bodimeade January 13, 2017, Q. 533

41. Aimee admitted that Gary had "BMWs, he had Lamborghinis, Porsche, Mercedes, Aston Martin, Audi."[44]

42. The Receiver's investigation into the diversion of Compuquest's assets, including the use of funds to construct the Ashburn Property, is ongoing.

GTL's Appointment as Receiver of the Ashburn Property

43. After learning of the diversion of Compuquest's funds into the Ashburn Property, CIBC brought a motion originally returnable on November 30, 2016 to appoint GTL as Receiver of the Ashburn Property. The Receiver filed its Second and Third Reports in support of this motion.[45]

44. On November 30, 2016, CIBC's motion was adjourned to January 25, 2017 pending delivery of responding material and cross-examinations. Aimee and Gary were given the opportunity to ask questions about the Second Report, after which they both filed affidavits and were cross-examined on their affidavits.[46]

45. On January 25, 2017, Madam Justice Conway appointed GTL as Receiver of the Ashburn Property on terms negotiated between CIBC/GTL and Aimee. Gary, Salem and Norris did not oppose the appointment.

[44] Cross-examination of Aimee Bodimeade January 13, 2017, Q. 536
[45] Second and Third Reports
[46] Transcript of Gary's January 13, 2017 examination

Issues with Salem and Norris

46. On December 31, 2015, Gary signed a Revolving Line of Credit Agreement (the "RLOC Agreement") with Salem/Norris.[47]

47. On February 4, 2016, Gary registered notice of his spousal interest on title to the Ashburn Property.[48] Gary's interest in the Ashburn Property has vested in the Trustee.[49]

48. On March 3, 2016, Aimee signed a modified form of RLOC Agreement with Salem/Norris, which was limited to "*Gary's share*" of the Ashburn Property.[50]

49. Aimee signed the RLOC because Gary told her that if she did not, he would no longer be able to support her.[51] When Gary later asked her to sign mortgage documentation relating to the Aimee/Norris RLOC, she refused because, in her view she had not agreed to mortgage the Ashburn Property.[52]

50. After Gary's bankruptcy, Salem and Norris brought the Norris Application against Aimee seeking declaratory relief for an interest in the Ashburn Property. On June 30, 2016, Salem and Norris obtained and registered an *ex parte* CPL on title to the Ashburn Property.[53]

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[47] Second Report at Appendix 27.
[48] Second Report at para. 13.
[49] Third Report at paras 15-16.
[50] Second Report, Appendix 28.
[51] Aimee's Transcript at Q. 253.
[52] Aimee's Transcript at Q.263-265.
[53] Second Report at para. 27, Appendix 16

51. GTL as Trustee was not served with the Norris Application or any other materials in advance of or after the registration of the CPL, despite having an interest registered on title to the Ashburn Property.[54]

52. On July 29, 2016, Salem and Norris filed unsecured proofs of claim in each of Gary's and Compuquest's bankruptcies. Salem claimed USD$106,200.00 and Norris claimed USD $697,385.49 pursuant to the RLOC Agreement.[55]

53. On August 12, 2016, Salem and Norris obtained and registered the Glustein Order on title to the Ashburn Property, again without notice to the Trustee.[56]

54. By Order of Mr. Justice Hainey dated November 30, 2016, the Norris Application was transferred to the Commercial List, to be dealt with in conjunction with this proceeding.

The Receiver's Examination of Gary

55. On February 22, 2017, pursuant to an Order of Mr. Justice Hainey dated February 21, 2017, the Receiver examined Gary in respect of the assets, operations and receivership of Compuquest and 225, the bankruptcies of Compuquest and Gary personally, the Ashburn Property and the Norris Application.[57]

56. Gary testified, among other things, that:

(a) He dropped out of high school in Grade 11;

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[54] Second Report at para. 28, Appendix 17
[55] Second Report at para. 46, Appendix 26
[56] Second Report at paras. 29-30, Appendix 18
[57] Order of Mr. Justice Hainey dated February 21, 2017

(b) Clausner was a friend from high school;

(c) Over the years, both Clausner and Pinfold were loaning money to Compuquest because of Compuquest's "cash flow constraints";

(d) Gary has no records of any of the transactions with Clausner or Pinfold;

(e) When asked how he kept track of the transactions, Gary responded: "I probably had a spreadsheet. Again, I don't recall off the top of my head."

(f) Hogan was preparing Compuquest's review engagement financial statements and providing the monthly statements of inventory and accounts receivable to CIBC;

(g) In 2013, Compuquest purportedly had a server crash and lost all of its records;

(h) Until 2013, Compuquest's main supplier (95%) was HP Financial Services ("HP"). Compuquest was getting virtually all of HP's off-lease desktop computers;

(i) In September 2013, Gary's contact at HP was let go: "There was accusations that he was being paid off to do certain business"; Gary admitted that he would "send him on a trip or send him a bottle of booze". When asked what kind of trip, Gary answered: "I don't recall.· I believe maybe Mexico. I'm not sure. It's a long time ago";

(j) In January 2014, HP cut off Compuquest. After Compuquest was cut off, Gary introduced HP to Salem/Norris, who began purchasing the product from HP and supplying it to Compuquest for a share of the profits;

(k) Up until 2014, Gary and Aimee did their personal banking at BNS. In 2014, BNS advised Gary they weren't interested in his business any more. Gary believed it was because of "having large amounts of money through PayPal transactions deposited into my personal account";

(l) In 2015, Compuquest's line of credit with CIBC was increased to $1.7 million; the line of credit was never repaid;

(m) In early 2016, Compuquest and Salem were writing cheques back and forth. Salem was providing pre-signed cheques to Gary, and Gary would fill in the dates and amounts of the cheques;

(n) In February 2016, Compuquest's accounts were flagged by CIBC for suspected cheque-kiting. CIBC told Gary they didn't want his business anymore;

(o) After this, both Gary and Dean retained Fogler Rubinoff to act for them: "At the time, it was considered that they would be acting together, yes.";

(p) Compuquest was leasing personal luxury vehicles for Gary and Aimee, as well as purchasing the horses, providing personal services through Compuquest staff and paying for their personal expenses;

(q) On the day of GTL's appointment as Interim Receiver, Gary told Pfaff Leasing of the receivership and arranged for them to pick up all vehicles leased by Compuquest, including turning over the keys to them;

(r) Since his bankruptcy, Gary has worked for Phase5 Solutions, which was purportedly started by his public school friend, Brad Fisher;

(s) All of Phase5 Solutions' employees (other than Brad Fisher) are former Compuquest employees;

(t) At the time of his examination, Gary was still driving the same BMW that Compuquest had been leasing for him before his bankruptcy – but which is now being leased by Phase5 Solutions;

(u) Phase5 Solutions purchases product from Norris.[58]

Scheduling of the July 17, 2017 Motion

57. On February 24, 2017, immediately following Gary's examination, the Receiver advised counsel for Salem and Norris that it would be scheduling a motion to discharge the CPL and Glustein Order from title to the Ashburn Property for the following reasons, among others:

(a) Salem and Norris had not provided proof of delivery of products after 2015 and the Receiver did not find any meaningful inventory or accounts receivable;

[58] Transcript of Gary's February 22, 2017 examination and exhibits thereto.

(b) Salem and Norris were at best unsecured creditors of Gary and Compuquest;

(c) Aimee signed the RLOC Agreement on the express understanding and representation that it would only apply to Gary's share of the Ashburn Property;

(d) The Norris Application was brought and the CPL and Glustein Order were obtained in violation of the stay of proceedings under the *Bankruptcy and Insolvency Act* ("BIA").[59]

58. On April 17, 2017, the Receiver followed up to schedule the motion and provided Gary's transcript and the exhibits to his examination. The follow up email set out the evidence being relied upon by the Receiver, including:

(a) Aimee did not execute a personal guarantee in favour of Norris/Salem;

(b) Both Gary and Compuquest were insolvent at the time of the RLOC Agreement;

(c) The Norris Application was issued and the CPL and Glustein Order were obtained and registered in the face of the bankruptcy order and are void against the Trustee.[60]

59. The Receiver advised of urgency in having these matters determined and stated:

[59] Receiver's Fifth Report dated June 19, 2017, Appendix 25
[60] Receiver's Fifth Report dated June 19, 2017, Appendix 25

> You are already aware of the evidence. I can't see any conceivable basis for your client to seek priority over either the Receiver or the Trustee and it is unclear on what basis your client is claiming against Aimee. So I don't think this will be lengthy or complicated.[61]

60. The motion was scheduled for July 17, 2017. The Receiver agreed to provide an additional report and requested the following for this purpose:

> 1. Any additional documents supporting the shipping of product in 2016.
> 2. Particulars of Norris's relationship with CQ2K Computer Sales Inc. (Phase5 IT Solutions).[62]

61. On May 15, 2017 and June 3, 2017, the Receiver followed up for this information. Partial responses were provided on June 6 and 7, 2017.[63]

62. On June 8, 2017, Gary brought a motion for an Order permanently expunging any materials related to the fraud and money-laundering charges laid against him in 2005, his guilty plea, conditional discharge and probation order. This motion was heard on an urgent basis on June 13, 2017 and dismissed.[64]

63. Thereafter, the Receiver completed and served its Fifth Report dated June 19, 2017, which compiled various evidence that had been filed as well as including some additional details.

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[61] Receiver's Fifth Report dated June 19, 2017, Appendix 25
[62] Receiver's Fifth Report dated June 19, 2017, Appendix 25
[63] Receiver's Fifth Report dated June 19, 2017, paras 88-94. Appendices 25 and 26
[64] Receiver's Fifth Report dated June 19, 2017, paras. 21-23

64. On June 23, 2017, in response to the Receiver's motion, Salem and Norris resubmitted their claims as secured proofs of claim, claiming a mortgage over the Ashburn Property in the amount of $1,500,000.[65]

65. On June 27, 2017, Salem and Norris submitted approximately 130 MB of documents to the Receiver's counsel in support of the quantification of their proofs of claim.[66]

66. The Receiver and Salem/Norris agreed to submit the issue of Salem/Norris's secured claim(s) seeking a mortgage over the Ashburn Property for determination on July 17, 2017 and to defer the issue of quantification.[67]

67. On July 7, 2017, counsel for Salem/Norris unilaterally scheduled a 9:30 appointment for July 12, 2017 seeking to reschedule the July 17, 2017 hearing.[68]

PART III - STATEMENT OF ISSUES, LAW & ARGUMENT

Approval of the Ashburn Sale Agreement

68. This is addressed in paragraphs 29-40 of the Receiver's Fifth Report and the confidential appendices.

69. The Receiver initiated a competitive bid process for a listing agreement. The Receiver listed the Ashburn Property with an agent experienced in this type of property, with Aimee's express approval. The Ashburn Property was well exposed to the market through the Multiple Listing Service, there were multiple showings and

[65] Receiver's Sixth Report dated July 6, 2017, para. 20, Appendix 5
[66] Receiver's Sixth Report dated July 6, 2017, para. 22
[67] Receiver's Sixth Report dated July 6, 2017, paras. 23-24
[68] 9:30 Request Form

offers, the price is within range of the appraised value and the agreement is conditional only on court approval.

70. Nobody has taken issue with the sale price or terms. There is no reason not to approve the Ashburn Sale Agreement.

71. The closing requires the Receiver to deliver vacant possession and a vesting order.

72. The Receiver requests a sealing order over the confidential appendices only to protect this information until closing.

Discharge of the Construction Lien(s)

73. The Receiver served notice of this motion on Scott Reed. The construction liens were paid in full. Indeed, Compuquest paid a fee to Reed's lawyer to discharge the liens, which was never done. The Receiver seeks to discharge these registrations.

Discharge of the CPL and Glustein Order

74. Salem and Norris consent to the discharge. The only issue is whether the discharge is without prejudice to the rights of Salem and Norris to seek an equitable mortgage over the interests of Aimee and/or Gary in the Ashburn Property.

75. Salem and Norris have been fully aware of the issues on this motion since at least February 24, 2017. They did not purport to file "secured" claims in the estates of Gary and Compuquest until after the Receiver delivered its Fifth Report.

76. Mr. Justice Wilton-Siegel explained the concept of an "equitable mortgage" in *Ontario Securities Commission v Kotton*, 2017 ONSC 1379 (CanLII):

> [10] The parties agree that the decision of the Court of Appeal in Elias Markets Ltd., Re, 2006 CanLII 31904 (ON CA), [2006] O.J. No. 3689 at paras. 63-65 sets out the applicable principles pertaining to equitable mortgages:
>
> An equitable mortgage is distinct from a legal mortgage. "An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property": A.H. Oosterhoff & W.B. Rayner, Anger and Honsberger: Law of Real Property, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.
>
> The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law
>
> In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

77. Salem/Norris and Aimee did not have a common intention to mortgage Aimee's interest in the Ashburn Property. Andrea Robertson's letter of March 3, 2016 clearly set out Aimee's understanding and condition that the proposed mortgage would only encumber "Gary's share" of the Ashburn Property. The Receiver found an email in Compuquest's records showing that Gary forwarded Ms. Robertson's letter to Salem before agreeing in writing to this condition.

78. While the documents (the RLOC Agreement, as well as the March 3, 2016 letter and emails) appear to evidence a common intention among Gary, Aimee and Salem/Norris to encumber "Gary's share" of the Ashburn Property, this cannot form the basis for an "equitable mortgage" over Gary's interest in the Ashburn Property, in priority to the Trustee. To the contrary, this "common intention" violated the preference and transfer at undervalue provisions of the BIA.

79. Section 95 of the BIA provides as follows:

> **Preferences**
>
> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
>
> **Preference presumed**
>
> **(2)** If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made,

> incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

80. The date of the initial bankruptcy event with respect to Gary is May 3, 2016, the date CIBC filed the bankruptcy application against Gary.[69] Aimee executed the RLOC Agreement on March 3, 2016, and Gary consented in writing to Aimee's terms on March 3, 2016, only two months before the initial bankruptcy event. As such, to the extent that the RLOC Agreement could be construed as a conveyance or the creation of an "equitable mortgage", it is void against the Trustee.

81. The question whether Salem and Norris have a valid unsecured claim in the estates of Compuquest and Gary is a separate matter. This will require a consideration of voluminous evidence including:

(a) Records supplied by Salem and Norris after the Receiver brought this motion;

(b) Whether Gary was personally responsible for Compuquest's obligations to Salem and/or Norris prior to executing the RLOC Agreement on December 31, 2015;

(c) Major discrepancies between Compuquest's records and the spreadsheets provided by Salem/Norris;

(d) The nature of the purported "line of credit" provided by Salem;

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[69] "**date of the initial bankruptcy event**, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be: … (d) the first application for a bankruptcy order against the person …"

(e) Evidence of circular transactions in Compuquest's accounts;

(f) Evidence that Gary and Salem were not dealing at arm's length;[70]

(g) Evidence that the indebtedness to Norris declined after December 31, 2015;

(h) Proof of deliveries after December 31, 2015;

(i) Norris's relationship with CQ2K.

82. It is unnecessary to consider these matters unless until there are funds available in the bankruptcy estates of either Compuquest[71] or Gary.

Aimee's Request for Distribution of Funds

83. It is respectfully submitted that Aimee's request for distribution of funds from the sale of the Ashburn Property is premature.

84. Salem and Norris brought the Norris Application over a year ago. Aimee is the sole respondent in the Norris Application. She could at any time have filed responding material and moved for the discharge of the CPL and determination of her rights *vis a vis* Salem and Norris. She never did so. She did not even oppose the Glustein Order, albeit it was granted without prejudice to her rights.

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[70] For example, the circular cheque transactions flagged by CIBC's fraud group, the fact that Salem was coaching Gary on his responses to CIBC, the fact that Salem and Gary jointly retained Fogler to represent them and claim privilege over their communications

[71] This is highly unlikely, as the claims of secured creditors, including CIBC, exceed any potential recovery

85. It appears from the emails attached as Exhibit "H" to Aimee's affidavit that she and Salem were in fact working together as of August/September 2016.

86. In an email dated September 1, 2016, Salem wrote:

> Regarding the trustees – they do not have the ability to help you in any way – financially or otherwise. The trustees have only 1 interest – to secure money for the bankruptcy. Every dollar they secure is 1 less dollar you and your family will receive. You can speak to them at your discretion, but I would not advise it. They have caused enough damage already. …
>
> Unfortunately, I do not have all the answers and I have to consult with my attorneys to devise the best strategy to move forward. I know and understand the situation and I have asked the questions to ask to get us there. As soon as I receive answers, we will be able to set a sound plan in motion.

87. The receivership order was granted without prejudice to Aimee's right to address distribution of funds on the sale approval motion. In light of this condition, the Receiver attempted to deal with Salem's and Norris's claims expeditiously. Unfortunately, and despite the Receiver's efforts, the claims have not yet been determined.

88. Until the claims of Salem and Norris to an equitable mortgage over the Ashburn Property are finally determined, including any appeal rights, the Receiver is not in a position to consider any distribution of sale proceeds to Aimee. Even then, the distribution of funds will require either a final determination or a consensual resolution of the claims of the Receiver and the Trustee to an interest in the Ashburn Property.

89. The Receiver has made it very clear that, following the determination of the claims of Salem and Norris, it is prepared to enter into negotiations with Aimee with

a view to achieving a consensual resolution of the interests of the Receiver, the Trustee and Aimee to the net sale proceeds. Such resolution must take into consideration the rights of Compuquest's and Gary's secured and unsecured creditors.

PART IV - ORDER REQUESTED

90. It is respectfully requested that the relief sought in the Receiver's Amended Notice of Motion be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2017.

Catherine Francis

Catherine Francis

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B E T W E E N

CANADIAN IMPERIAL BANK OF COMMERCE	-and-	1299746 ONTARIO INC. o/a COMPUQUEST2000, et al.
Applicant		Respondents

Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM

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