Court File No. /Estate No.: BK-22-00208582-OT-31

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY OF AIDEN PLETERSKI and AP PRIVATE EQUITY LIMITED, of the Town of Whitby, in the Province of Ontario

FACTUM OF THE TRUSTEE IN BANKRUPTCY,
GRANT THORNTON
(Motion returnable May 25, 2023)

May 19, 2023

Thornton Grout Finnigan LLP
Barristers and Solicitors
100 Wellington Street West
Suite 3200
Toronto, Ontario
M5K 1K7

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca
Tel: (416) 304-0060

Puya Fesharaki (LSO# 70588L)
Email: pfesharaki@tgf.ca
Tel: (416) 304-7979

Lawyer for Grant Thornton Limited, in its capacity as Trustee in Bankruptcy for the Estates of AP Private Equity Limited and Aiden Pleterski

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

Kelli Preston (LSO: 47467B)
Tel: (416) 446-3344
Email: kelli.preston@devrylaw.ca

Lawyer for 2649360 Ontario Inc.

AND TO: THE SERVICE LIST

AND TO: THIS HONOURABLE COURT

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FACTUM OF THE TRUSTEE IN BANKRUPTCY, GRANT THORNTON LIMITED (Motion returnable May 25, 2023)

PART I - NATURE OF THE MOTION

1. Grant Thornton Limited brings this motion in its capacity as the trustee in bankruptcy ("**Trustee**") of Aiden Pleterski ("**Pleterski**") and AP Private Equity Limited ("**AP**" and together with Pleterski, the "**Bankrupts**") for an order granting relief from forfeiture of the Westney Deposit (as defined below) pursuant to section 98 of the *Courts of Justice Act* (the "***CJA***").[1]

[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.98.

PART II - THE FACTS

2. In July of 2021, Colin Murphy ("**Murphy**") and Pleterski each individually signed 5-year rental agreements to rent commercial space located at 725 Westney Road in Ajax, Ontario (the "**Westney Property**") from 2649360 Ontario Inc. ("**264**").[2]

3. Approximately three months later, on October 26, 2021, Murphy and Pleterski both entered into an agreement to purchase the Westney Property from 264 for a purchase price of $5.5 million (the "**Agreement**"). The closing date for the transaction was scheduled for September 28, 2022.[3]

4. The Agreement called for a deposit of $500,000.00, which Pleterski paid entirely from his TD chequing account to Dream Home Realty Inc., Brokerage on October 27, 2021 (the "**Westney Deposit**"). At least 99.8% of the Westney Deposit was paid for with investor funds that were provided to Pleterski to invest in cryptocurrency and foreign exchange hedges.[4]

5. After learning of the Westney Deposit, the Trustee notified the real estate broker and counsel to 264 of its appointment and the estate's interest in the Westney Deposit.[5]

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[2] Third Report of the Trustee dated March 14, 2023 at para. 42 [Third Report].

[3] Third Report at para. 42; Agreement to Purchase the Westney Property dated October 26, 2021, attached as Appendix "P" to the Third Report, Trustee's Motion Record, Tab 2, p. 44.

[4] Third Report at para. 42-43; Bank draft payable from Pleterski's bank account for the Westney Deposit, attached as Appendix "Q" to the Third Report, Trustee's Motion Record, Tab 2, p.57; Account statements from August 25, 2021 to October 30, 2021, attached as Appendix "R" to the Third Report, Trustee's Motion Record, Tab 2, p. 59.

[5] Third Report at para. 44.

6. On September 13, 2022, counsel to 264 delivered an anticipatory breach letter to the Trustee, as the Trustee was unable to close the sale of the Westney Property. The Trustee was advised that 264 intended to re-list the Westney Property for sale.[6]

7. On November 24, 2022, 264 sold the Westney Property for $5.8 million. This purchase price is $300,000 more than what was originally offered by Murphy and Pleterski (the "**Surplus**").[7]

8. 264 has advised the Trustee that it incurred damages while Murphy and Pleterski rented the Westney Property and takes the position that it is entitled to retain the full amount of the Westney Deposit in addition to the Surplus. The proceeds from the sale of the Westney Property are being held in escrow by the listing agent until entitlement thereto can be determined.[8]

9. Since October 2022, the Trustee has made numerous attempts to come to a consensual resolution with 264 as to the entitlement to the Westney Deposit.[9]

10. In January of 2023, 264 provided the Trustee with support for $138,500 in repair costs in incurred in respect of the Westney Property. 264 has also asserted that it has incurred other repair costs, legal costs and rent (notwithstanding that Pleterski's lease provided for a one

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[6] Third Report at para. 44.

[7] Third Report at para. 45.

[8] Third Report at para. 45.

[9] Third Report at para. 46.

year rent free period). However, 264 has yet to demonstrate these costs to the Trustee. Based on the evidence that has been provided to the Trustee, it appears that 264 has not suffered any damages as the costs demonstrated of $138,500 are far less than the Surplus of $300,000. If 264 is entitled to keep the Westney Deposit funded by investors, it will have profited $661,500.[10]

PART III - ISSUES AND THE LAW

11. The sole issue to be decided on this motion is whether the Trustee is entitled to relief from forfeiture of the Westney Deposit.

A. THE COURT SHOULD GRANT THE TRUSTEE RELIEF FROM FORFEITURE OF THE WESTNEY DEPOSIT

12. Section 98 of the *CJA* provides that the court may grant relief against penalties and forfeiture on such terms as are considered just.[11]

13. The Ontario Court of Appeal in *Redstone Enterprises v. Simple Technology Inc*. ("***Redstone***") confirmed the two-part test to be applied by the court when deciding whether to exercise its discretion under section 98 of the *CJA*. The court must consider (i) whether the forfeited amount is out of all proportion to the damages suffered; and (ii) whether it would be unconscionable for the vendor to retain the benefit.[12]

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[10] Third Report at para. 46.

[11] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.98.

[12] *Redstone Enterprises v. Simple Technology Inc*., 2017 ONCA 282 at para. 15 [*Redstone*].

i. The forfeited amount is out of all proportion to the damages suffered

14. In *Redstone*, the buyer paid a $750,000 deposit to the vendor for a property. When the buyer failed to complete the transaction, the vendor applied for a declaration that it was entitled to retain the deposit, which was being held in trust.

15. The application judge granted partial relief from forfeiture and reduced the sum to be forfeited to $350,000. The vendor appealed.

16. On appeal, the court agreed with the buyer's position that "the record contained no evidence that the appellant had suffered any loss as a result of the respondent's breach of the agreement". The court concluded that "[s]ince the appellant provided no evidence of damages, it is fair to infer that it suffered none".[13]

17. Like *Redstone*, there is no evidence that 264 has suffered any loss as a result of the failure to close on the Westney Property. Any costs that 264 has demonstrated have been incurred have been more than mitigated by the Surplus. As such, 264 has suffered no damages.

[13] *Redstone* at para. 17.

ii. *It would be unconscionable for 264 to retain the deposit*

18. The law is clear that forfeiture will not be rendered unconscionable solely because the vendor has failed to prove damages.[14] The court must also consider other indicia of unconscionability.[15]

19. While the list of indica to be considered in the unconscionability analysis is never closed, precedent suggests that useful factors to consider include "inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach and the conduct of the parties".[16]

20. The test for relief from forfeiture requires a context specific analysis of the relevant factors as of the time the breach occurred, rather than the time at which the parties entered the contract.[17]

21. In *Redstone*, the court held that "the finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case".[18] The present case meets the threshold for a finding of unconscionability.

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[14] *Redstone* at para. 26; *Sinha v. Shabestari*, 2018 ONSC 298 at para. 56; *Iyer v. Pleasant Developments Inc.*, 2006 CanLII 10223 (ON SCDC) at para 7.

[15] *Redstone* at para. 26;

[16] *Redstone* at para. 30.

[17] *Redstone* at para. 30; *Kechnie v. Sun Life Assurance Co. of Canada*, 2016 ONCA 434 at paras. 21 and 24.

[18] *Redstone* at para. 25.

22. Unconscionability has been defined to mean "that which is contrary to the conscience of the court," and "something that is "shockingly unfair or unjust" and "not in keeping with a caring society".[19]

23. The present case is exceptional in that it involves two innocent parties. The court is not being asked to grant a breaching party relief from forfeiture at the expense of an innocent vendor. Rather, the court is being asked to grant relief from forfeiture for the benefit of the Bankrupts' innocent investors.

24. At least 99.8% of the Westney Deposit came from funds provided to Pleterski by investors. The investment agreements entered into with Pleterski state that investor funds are to be held with the broker MyFXChoice; the purpose of the investment was to invest in cryptocurrency and foreign exchange hedges. Pleterski was not authorized by his investors to use their money to finance the Westney Deposit.[20]

25. It would be unconscionable, unjust, and manifestly unfair for 264 to retain the Westney Deposit in addition to the Surplus at the expense of the Bankrupts' investors, most of whom will see minimal recovery from their investments.

26. Granting relief from forfeiture in this case would not unfairly enrich the Bankrupts' estate at the expense of the vendor. There is no evidence that 264 suffered any damages as a result

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[19] *Dar v. The Yards Corporation*, 2018 ONSC 5043 at para. 27, citing *Scheel v. Henkelman*, 2001 CanLII 24133 (ON CA) at para. 19.

[20] Third Report at para. 43; Account statements from August 25, 2021 to October 30, 2021, attached as Appendix "R" to the Third Report, Trustee's Motion Record, Tab 2, p. 59.

of the anticipatory breach, and in any event, 264 still stands to gain a significant profit from having sold the Westney Property for $300,000 more than the purchase price originally offered by Murphy and Pleterski. If 264 were permitted to keep the Surplus and the Westney Deposit, it would realize a profit of $661,500 in a situation where the Bankrupts' innocent investors will have minimal recoveries, resulting in an unconscionable outcome.

PART IV - RELIEF REQUESTED

27. For the reasons set forth herein, the Trustee respectfully seeks an order granting it relief from forfeiture pursuant to section 98 of the *CJA* and directing that the Westney Deposit be paid to the Trustee forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2023.

Thornton Grout Finnigan LLP
100 Wellington Street West – Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7
Tel: 416-304-1616

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Puya Fesharaki (LSO# 70588L)
Email: pfesharaki@tgf.ca
Tel: (416) 304-7979

Lawyers for Grant Thornton Limited, in its capacity as Trustee in Bankruptcy of the Estates of AP Private Equity Limited and Aiden Pleterski

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Dar v. The Yards Corporation*, 2018 ONSC 5043

2. *Iyer v. Pleasant Developments Inc.*, 2006 CanLII 10223 (ON SCDC)

3. *Kechnie v. Sun Life Assurance Co. of Canada*, 2016 ONCA 434

4. *Redstone Enterprises v. Simple Technology Inc., 2017 ONCA 282*

5. *Scheel v. Henkelman, 2001 CanLII 24133 (ON CA)*

6. *Sinha v. Shabestari*, 2018 ONSC 298

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C.43

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

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Thornton Grout Finnigan LLP
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TD West Tower, Toronto-Dominion Centre
Toronto, ON   M5K 1K7

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Puya Fesharaki (LSO# 70588L)
Email: pfesharaki@tgf.ca

Tel: (416) 304-1616
Fax: (416) 304-1313

Lawyers for Grant Thornton Limited, in its capacity as trustee in bankruptcy of the estates of Aiden Pleterski and AP Private Equity Limited