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 August 10, 2017)**

August 3, 2017


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TO: **The Service List**

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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. Canadian Imperial Bank of Commerce ("CIBC") is Compuquest's primary secured creditor, owed approximately $1,750,000. Gary guaranteed CIBC's debts. Business Development Bank of Canada ("BDC") is owed approximately $500,000.00 as

second-position secured creditor. CIBC obtained orders appointing GTL as Receiver of Compuquest, Trustee of Gary and Compuquest and Receiver of the Ashburn Property.

3. The Ashburn Property was purchased in 2007 with proceeds from Gary's and Aimee's previous jointly held matrimonial home and financing provided by Bank of Nova Scotia ("BNS") to Gary and Aimee as co-borrowers. The Bodimeades constructed a lavish new home, pool, RV garage, riding stable and barn at the Ashburn Property using Compuquest's funds. For a decade, the Bodimeades lived a luxurious lifestyle well above their means, including the purchase of show-horses and a fleet of high-end sports cars, recreational vehicles and other luxury vehicles.

4. Gary and Aimee separated in 2015. At the time, Compuquest was in severe financial difficulties, having racked up significant debt feeding their lavish lifestyle.

5. Norris was allegedly Compuquest's main supplier. Salem had a close relationship with Gary. Norris "blind-shipped" product to Compuquest, for a 3% fee. Salem also allegedly provided "loans" to Compuquest by way of circular cheque transactions. According to Salem's spreadsheets, he and Norris were owed USD $1,283,797.35 as of December 31, 2015.[1] These debts were not reflected in Compuquest's books.

6. Salem knew in 2015 that Compuquest was in trouble. On December 31, 2015, at Salem's request, Gary signed a Revolving Line of Credit ("RLOC") Agreement,

[1] Cross-examination of Dean Salem July 26, 2017.

purporting to personally guarantee Compuquest's debts to Norris and Salem and agreeing to transfer assets to Salem and Norris.

7. In January and February 2016, Gary and Salem were involved in circular cheque transactions in Compuquest's USD CIBC accounts. CIBC became concerned and placed a hold on funds. Gary and Salem were also running up Gary's Amex card and Salem was coaching Gary on his negotiations with Aimee and CIBC.[2]

8. On March 3, 2016, under pressure from Gary and Salem, Aimee signed a modified RLOC Agreement, in which she purportedly agreed to mortgage "Gary's share" of the Ashburn Property.

9. In March 2016, CIBC formally demanded its loans. In April 2016, CIBC appointed GTL to conduct a review of Compuquest and discovered that there had been no real business operations for months. GTL was appointed as Interim Receiver on April 29, 2016 and Receiver on May 17, 2016.

10. After its appointment, the Receiver learned that Gary had a history of financial crimes, including fraud and money-laundering. Aimee was aware of Gary's criminal history when they purchased the Ashburn Property. She turned a blind eye to the source of funds for their lavish lifestyle.

11. On May 3, 2016, CIBC issued bankruptcy applications against Gary and Compuquest. Gary immediately began operating a similar business under the name CQ2K Computer Sales Inc. operating as "Phase5 Solutions" ("CQ2K" or "Phase5"). CQ2K was incorporated on May 5, 2016, allegedly by a friend of Gary's. Norris is the

[2] These activities are documented in the Receiver's Second, Third, Fifth, Sixth and Seventh Reports

main supplier to CQ2K. The Receiver has been unable to obtain meaningful disclosure as to the disappearance of Compuquest's business and the operations of CQ2K.

12. Thus far, the Receiver has uncovered substantial evidence of fraud in Compuquest's operations, including the diversion of Compuquest's assets and funds to Gary and Aimee, false financial statements and financial records, potential customs fraud,[3] misrepresentations to creditors, circular cheque transactions and fraudulent conveyances and preferences.[4] The Receiver's investigation is incomplete.

13. The only meaningful asset to satisfy creditors' claims is the Ashburn Property.

14. Following Gary's bankruptcy, Salem and Norris issued an Application against Aimee now bearing Commercial List Court File No. CV-17-11698-00CL (the "Norris Application") and obtained an *ex parte* Certificate of Pending Litigation ("CPL") against the Ashburn Property. They also obtained an Order of Mr. Justice Glustein authorizing them to register a mortgage against the Ashburn Property (the "Glustein Order"), without prejudice to Aimee's rights in the Norris Application. They were unable to register the mortgage without Gary's consent, which right had vested in the Trustee.

15. GTL was appointed as Receiver of the Ashburn Property on January 25, 2017. After conducting an extensive marketing process, the Receiver brought a motion returnable on July 17, 2017 for the following relief:

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[3] Seventh Report, paras. 78-79
[4] These findings are documents in all of the Receiver's reports

(a) Approval of an Agreement of Purchase and Sale, 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 the CPL and Glustein Order;

(d) Dismissal of the Norris Application.

16. In response to this motion, Salem and Norris filed purported “secured claims” in the estates of Gary and Compuquest, claiming an “equitable mortgage” over the Ashburn Property. Rather than the Trustee issuing formal Notices of Disallowance, it was agreed that the validity of the secured claims would be addressed on the Receiver’s motion. The Receiver sought a declaration that the RLOC Agreements are void and unenforceable against the Receiver and Trustee.

17. On July 14, 2017, Salem delivered a 1,900 page responding motion record and Aimee delivered an affidavit opposing the sale of the Ashburn Property. Madam Justice Conway granted the relief sought in paragraphs 15(a), (b) and (c)[5] herein. Due to the late filing of Salem’s responding affidavit, the balance of the Receiver’s motion was adjourned to August 10, 2017, with cross-examinations of Aimee and Salem scheduled for July 24 and 26, 2017 respectively.

18. On July 20, 2017, Salem delivered a reply affidavit and Aimee delivered a cross-motion seeking the distribution of $1 million from the sale proceeds to her,

[5] The discharge of the CPL and Glustein Order was granted on consent, pending the substantive determination of the issues on August 10, 2017

supported by a further lengthy affidavit. Aimee's further record was not contemplated by the Order of Conway J. Cross-examinations of Aimee and Salem were held on July 24, 2017 and July 26, 2017 respectively.

19. The position of the Receiver and Trustee is that the claims of Salem and Norris have no merit. The RLOC Agreements were executed at a time when Gary and Compuquest were both insolvent, with the intention of preferring the interests of Salem and Norris over other creditors, and are void against the Trustee.

20. It is unclear whether Aimee's motion for the distribution of $1 million to her from the sale proceeds is being brought in collaboration with Salem and Norris. There is abundant evidence that Gary and Salem have been exercising extreme duress against Aimee since January 2016 to force her cooperation with their plans.

21. In any event, there has been no determination as to what, if any, equity Gary and Aimee have in the Ashburn Property. The CIBC first mortgage exceeds the amount of Gary's and Aimee's identified contributions to the purchase and construction of the Ashburn Property. The Receiver has already identified over $1 million of payments made directly by Compuquest and the investigation is far from complete.

22. The Receiver remains prepared to negotiate an interim distribution of funds to Aimee, conditional upon final disposition of the claims of Norris and Salem. However, such negotiations must be based on Aimee's realistic entitlements.

## PART II - SUMMARY OF FACTS

### CIBC Financing to Compuquest

23. 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.[6]

24. 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.[7]

25. 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 cheque transactions with Salem. On February 25, 2016, management of Compuquest's accounts was transferred to CIBC's Special Loans department.[8]

26. On March 24, 2016, CIBC, through counsel, issued formal demand letters to Compuquest and Gary.[9]

27. On April 12, 2016, Gary/Compuquest consented to the appointment of GTL as consultant. GTL visited Compuquest's premises and discovered inventory on hand had a value of less than $50,000.[10]

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[6] CIBC Application Record, including the Affidavit of Douglas MacLaine sworn April 28, 2016; Fifth Report, Appendix 13
[7] Receiver's Second Report dated November 24, 2016, Appendix 31
[8] CIBC Application Record; Fifth Report, Appendix 12
[9] CIBC Application Record

28. On April 28, 2016, CIBC issued an Application Record to appoint GTL as Interim Receiver. CIBC initially sought the appointment without notice. The motion 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").[11]

29. On May 3, 2016, CIBC issued bankruptcy applications against each of Compuquest and Gary.[12]

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

31. On May 25, 2016, bankruptcy orders were issued against Compuquest and Gary. On June 1, 2016, GTL as Trustee registered Gary's bankruptcy order against the Ashburn Property.[14]

32. The Receiver has been unable to collect any accounts receivable. The Receiver realized only $120,000.00 from an online auction that included all inventory, furniture and equipment of Compuquest.[15]

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[10] CIBC Application Record
[11] Second Report at paras. 62-63, Appendix 2
[12] Second Report, Appendix 4
[13] CIBC Application Record; Fifth Report, Appendix 12
[14] Second Report, Appendices 4 and 15
[15] Second Report at paras. 56-57.

**The Ashburn Property**

33. On September 28, 2007, the Ashburn Property was purchased in Aimee's name for $638,000.[16] Gary and Aimee financed the purchase using approximately $230,000 from sale proceeds of their former jointly-held home. In addition, they sought and received mortgage financing from BNS. Title to the Ashburn Property was registered in Aimee's name on September 28, 2007. Both Aimee and Gary were listed on the mortgage documentation with BNS.[17]

34. 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

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[16] Second Report at para. 20.
[17] Affidavit of Aimee Bodimeade sworn January 6, 2017, para. 3, Exhibits A, B and D; Exhibit 1 to Aimee's January 13, 2017 cross-examination; Cross-examination of Gary January 13, 2017 at Q. 18; Second Report at para. 14; Receiver's Third Report, Appendix 3

(f) an approximately 2,400 square foot insulated hay/equipment barn.[18]

**Gary's Criminal Past**

35. In 1993, Gary was convicted of fraud.[19]

36. 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.[20]

37. On September 12, 2006, Gary pleaded guilty to laundering proceeds of crime contrary to the *Criminal Code of Canada* and received two years' probation.[21] While he was on probation for the money-laundering charge, Gary applied for and obtained a pardon in respect of his 1993 fraud conviction.[22]

38. Gary was also sued by RBC. He borrowed money from Aimee's father to settle the lawsuit.[23] Aimee knew that Gary had been arrested for fraud and money-laundering.[24]

39. 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.[25]

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[18] Second Report at para 15.
[19] Affidavit of Gary Bodimeade sworn June 7, 2017; Fifth Report, paras. 21-23
[20] Second Report, Appendix 32
[21] Second Report, Appendix 32
[22] Receiver's Fourth Report dated June 9, 2107
[23] Examination of Gary Bodimeade February 22, 2017, Qs. 102-124
[24] Cross-examination of Aimee Bodimeade January 13, 2017, Qs. 421-429
[25] Affidavit of Aimee Bodimeade sworn June 20, 2017, para. 3

**The Receiver's Investigation**

40. 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. Gary's email to Aimee stated in part:

> Yes, as was the house build, the barn, Dons/Dennis cash payments from you and everything else that was removed from the company. Don't shoot blanks about stuff you know nothing about. Statements like that are not something you really want to shoot your mouth of about. That said as a director of the corporation WE jointly own, you are also responsible for all part of any funds removed from the company and taxed personally with interest and penalties. Ignorance is not a defence.
>
> Anything that was paid through the company (everything) are considered company assets (letter was provided 4 months ago by Alan Hogan) therefore, all assets once sold will be put back into the company to operate ...[26]

41. The Receiver also found an email in Compuquest's records where Gary estimated the cost of the improvements to the Ashburn Property as $3,065,000.00.[27] As a result of these improvements, the estimated value of the Ashburn Property as at April 11, 2016 was $3,700,000.[28]

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

[26] Second Report at para. 32, Appendix 19.
[27] Third Report at 24, Appendix 4.
[28] Second Report at para 16, Appendix 9; Aimee alleges that Gary's email regarding the construction costs should not be believed; however the figures are corroborated independently by the appraiser of the Ashburn Property – Exhibit ^ to Aimee's July 24, 2017 cross-examination

Receiver traced approximately $1 million of Compuquest's funds during this time period (i.e. after 2008) directly into the Ashburn Property.[29]

43. 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"), who held a mortgage over the Ashburn Property;[30]

(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;[31]

(c) $1,219,530.19 in payments to either Clausner, his wife Kara Clausner, 240, or Clausner's company Total Cart Solutions Inc.[32]

(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;[33]

(e) Down payments and lease payments for leased vehicles (including many luxury vehicles) from 2009 to 2015 totalling $1,759,994.53;[34]

[29] Second Report; Third Report, Appendix 5
[30] The mortgage was discharged prior to these events
[31] Second Report at paras. 42-43, Appendix 25
[32] Second Report at para. 65, Appendix 34
[33] Third Report at para. 61-63, Appendices 14,15
[34] Third Report at para. 47, Appendix 8

(f) Personal cheques to Aimee, Gary and "CASH" and 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.[35]

44. Aimee has been out of the workforce since 1999. She was not involved in the day to day business of Compuquest.[36] She never looked at or asked to see Compuquest's financial statements and she had no idea what kind of income Compuquest had.[37] 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.[38]

45. Aimee admitted that Gary had "BMWs, he had Lamborghinis, Porsche, Mercedes, Aston Martin, Audi."[39]

46. Aimee has now produced her tax assessments going back to 2006. In addition to the other funds identified by the Receiver, Aimee was on the Compuquest payroll up until 2013, even though she did not work at Compuquest.[40]

47. Aimee alleged in her July 20, 2017 affidavit that she has been advised by Hogan that all payments made by Compuquest for personal expenses were accounted

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[35] Third Report at paras. 45, 50-52, Appendices 7, 9-11
[36] Affidavit of Aimee Bodimeade sworn June 20, 2017, paras. 4 and 5
[37] Cross-examination of Aimee Bodimeade January 13, 2017, Qs. 541-432,
[38] Cross-examination of Aimee Bodimeade January 13, 2017, Q. 533
[39] Cross-examination of Aimee Bodimeade January 13, 2017, Q. 536
[40] Affidavit of Aimee Bodimeade sworn July 20, 2017, Cross-examination of Aimee Bodimeade Bodimeade July 24, 2017, Exhibit "3"

for as income, dividends and shareholder loans.[41] On cross-examination, Aimee admitted that Hogan had not made any such representations.[42] Indeed, the “dividends” declared by Compuquest represent only a fraction of the vehicle leasing costs, let alone accounting for the construction of the Ashburn Property, purchase of horses and other personal expenses paid by Compuquest.

48. The Receiver’s investigation into the diversion of Compuquest’s assets, including the use of funds to construct the Ashburn Property, is ongoing. Among other things, the Receiver requires production of Aimee’s banking records[43] and production of third party records from Hogan, Pinfold, Clausner and construction trades in order to complete its investigation.[44]

**GTL’s Appointment as Receiver of the Ashburn Property**

49. 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 motion was adjourned pending delivery of responding material and cross-examinations. On January 25, 2017, Conway J. appointed GTL as Receiver of the Ashburn Property.

**Issues with Salem and Norris**

50. On December 31, 2015, Gary signed the RLOC Agreement.[45]

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[41] Affidavit of Aimee Bodimeade sworn July 20, 2017, paras. 21, 26 and 42
[42] Cross-examination of Aimee Bodimeade July 24, 2017
[43] Which she has refused to produce
[44] Per the Order of Mr. Justice Hainey dated February 21, 2017
[45] Second Report at Appendix 27.

51. On February 4, 2016, Gary registered notice of his spousal interest on title to the Ashburn Property.[46] Gary's interest in the Ashburn Property has vested in the Trustee.[47]

52. In February 2016, Salem was coaching Gary on points he should make at an upcoming mediation with Aimee, to pressure her into signing the RLOC Agreement.[48] Salem now takes the position that he knew nothing about Compuquest's assets and liabilities at the time.[49]

53. On March 3, 2016, Aimee signed a modified form of RLOC Agreement with Salem/Norris, which was limited by a side letter to "*Gary's share*" of the Ashburn Property (the "Side Letter").[50] Aimee later refused to execute a mortgage as she did not agree to mortgage her interest in the Ashburn Property.[51]

54. On March 3, 2016, simultaneously with Aimee's execution of the modified RLOC Agreement, Salem drafted an email for Gary to send to CIBC, falsely representing that Compuquest's business was "100% legitimate" and accusing CIBC of damaging Compuquest's business relationships by bouncing cheques.[52]

55. The March 3, 2016 Side Letter stipulated that the proceeds of a 2014 King Aire motorhome (the "King Aire") would be divided between Gary and Aimee. Unbeknownst to Aimee (and CIBC), Gary had already made arrangements as of March

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[46] Second Report at para. 13.
[47] Third Report at paras 15-16.
[48] Exhibit "2" to Salem's cross-examination
[49] Cross-examination of Dean Salem; Salem's answers to undertakings
[50] Second Report, Appendix 28.
[51] Cross-examination of Aimee Bodimeade January 13, 2017 at Qs. 253, 263-265
[52] Fifth Report, Appendix 15

3, 2016 to sell the King Aire and give all the proceeds to Norris. On April 6, 2016, USD$255,881.77 from the sale of the King Aire was deposited into a newly opened account in Compuquest's name at TD Bank and wired to Norris.[53]

56. During April 2016, Salem was involved in strategy sessions with Gary's and Compuquest's legal counsel at Fogler Rubinoff LLP. Salem was also coaching Gary on information he should provide to GTL. Among other things, Salem instructed Gary not to tell GTL anything about Norris.[54]

57. On May 5, 2016, two days after issuance of the bankruptcy applications, CQ2K was incorporated. On the same day, Norris issued a Sales Order to CQ2K, addressed to Gary's girlfriend's house.[55]

58. On May 18, 2016, Aird & Berlis LLP, counsel for CIBC, wrote to Salem's real estate lawyer advising that CIBC had brought a bankruptcy application against Gary returnable on May 24, 2016 and that any attempt to encumber the Ashburn Property would be improper.[56]

59. In June 2016, Salem and Norris issued the Norris Application and obtained and registered the *ex parte* CPL on title to the Ashburn Property.[57]

60. 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.[58]

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[53] Second Report, para. 52; Appendix 29
[54] Exhibits "3" - "5" to Salem's cross-examination
[55] Seventh Report
[56] Affidavit of Dean Salem sworn July 20, 2017, Exhibit "F"
[57] Second Report at paras. 27-28, Appendices 16-17

61. On August 12, 2016, Salem and Norris obtained and registered the Glustein Order on title to the Ashburn Property, without notice to CIBC, the Receiver or the Trustee.[59]

62. 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**

63. 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.[60] Gary testified, among other things, that:

(a) Over the years, Clausner and Pinfold were loaning money to Compuquest because of Compuquest's "cash flow constraints". Gary alleged that he had no records of these transactions;

(b) Compuquest purportedly lost all its records in a 2013 server crash;

(c) Compuquest's main supplier (95%) was HP. Compuquest was getting virtually all of HP's off-lease desktop computers. In September 2013,

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[58] Second Report at para. 46, Appendix 26
[59] Second Report at paras. 29-30, Appendix 18
[60] Order of Mr. Justice Hainey dated February 21, 2017

Gary's contact at HP was fired. In 2014, HP cut off Compuquest.[61] Gary introduced HP to Salem/Norris, who began purchasing the product from HP and supplying it to Compuquest for a share of the profits;

(d) 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";

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

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

(g) Since his bankruptcy, Gary has worked for Phase5, which was purportedly started by his public school friend, Brad Fisher. Gary admitted that all of Phase5's employees (other than Brad Fisher) are former Compuquest employees and that Phase5 purchases product from Norris.[62]

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[61] Gary testified that his HP contact was fired for "being paid off to do certain business". Aimee testified that Gary was shipping drugs to his HP contact. Salem testified that the HP contact was fired because he was a drug addict.

[62] Examination of Gary Bodimeade February 22, 2017 examination and exhibits thereto.

**Scheduling of the July 17, 2017 Motion**

64. 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.[63]

65. On April 17, 2017, the Receiver followed up to schedule the motion and provided Gary's transcript and the exhibits to his examination.[64] The Receiver advised of urgency in having these matters determined and stated:

> 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.[65]

66. 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).[66]

67. 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.[67]

68. 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

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[63] Fifth Report, Appendix 25
[64] Fifth Report, Appendix 25
[65] Fifth Report, Appendix 25
[66] Fifth Report, Appendix 25
[67] Fifth Report, paras 88-94. Appendices 25 and 26

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.[68]

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

70. On June 23, 2017, 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.[69]

71. On June 27, 2017, Salem and Norris provided additional documents to the Receiver's counsel in support of their proofs of claim. The Receiver and Salem/Norris agreed that the validity of the purported security would be determined on July 17, 2017 and that the issue of quantification would be deferred.[70]

72. On July 14, 2017, after an unsuccessful attempt to adjourn the motion, Salem/Norris delivered a 1,900 page responding motion record, the vast majority of which is verbose, repetitive and/or irrelevant to the issues for determination.[71]

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[68] Fifth Report, paras. 21-23
[69] Receiver's Sixth Report dated July 6, 2017, para. 20, Appendix 5
[70] Sixth Report, paras. 22-24
[71] Salem/Norris Responding Motion Record

## PART III - STATEMENT OF ISSUES, LAW & ARGUMENT

### Discharge of the CPL and Glustein Order and Dismissal of the Norris Application

73. Salem and Norris consented to the discharge of the CPL and Glustein Order to facilitate the sale of the Ashburn Property. The substantive issue of their claim to an interest in the Ashburn Property was deferred to August 10, 2017.

### Fraudulent Conveyances and Preferences

74. Every conveyance of real or personal property with the intent to defeat, hinder, delay or defraud creditors or others is void against such persons or their assigns.[72]

75. Every conveyance or transfer made by an insolvent person to a creditor with the intent to give such creditor an unjust preference over other creditors is void as against the other creditors.[73]

76. These provisions are remedial in nature and are to be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects.[74]

77. On bankruptcy, the Trustee is entitled to make use of the rights and remedies provided under provincial legislation, as well as the BIA provisions.[75]

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[72] Section 2 of the *Fraudulent Conveyances Act,* R.S.O. 1990, CHAPTER F.29; Section 4(1) of the *Assignments and Preferences Act* RSO 1990, c A.33 (“APA”)
[73] Section 4(2) of the APA
[74] *Royal Bank of Canada v. North American Assurance Co.*, 1996 CanLII 219 (SCC), [1996] S.C.J. No. 17, at para. 59; *Cambone v Okoakih*, 2016 ONSC 792 (CanLII)
[75] *Optical Recording Laboratories Inc. v. Digital Recording Corp*. (C.A.), 1990 CanLII 6672 (ON CA)

78. Pursuant to the BIA, any transfer or payment made by an insolvent person to a creditor within three months before the date of the initial bankruptcy event is void against the trustee. This period is extended to one year if the debtor and creditor are not dealing at arm's length.[76]

79. If the transfer or payment has the effect of giving a creditor a preference it is presumed to have been made with a view to giving a preference absent evidence to the contrary, and evidence of pressure is not admissible to support the transaction.[77]

80. Every transfer at undervalue is void against the trustee if made within one year before the date of the initial bankruptcy event, if the parties were not dealing at arm's length or if the debtor was insolvent at the time and the debtor intended to defraud, defeat or delay a creditor.[78]

81. The date of the initial bankruptcy event with respect to Gary and Compuquest is May 3, 2016, the date CIBC filed the bankruptcy applications.[79]

82. A finding of concurrent intent is not necessary in order to set aside a payment as a fraudulent preference under the BIA.[80]

83. Preference claims must be brought by the trustee, but the distribution of funds is subject to the rights of secured creditors.[81]

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[76] BIA, section 95(1)
[77] BIA, section 95(2)
[78] BIA, section 96
[79] "*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 …"
[80] *Hudson v. Benallack*, [1976] 2 SCR 168, 1975 CanLII 158 (SCC)
[81] *Tucker v. Aero Inventory (UK) Limited*, 2011 ONSC 4223 (CanLII)

**The Stay of Proceedings**

84. On bankruptcy, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.[82]

**Resulting Trust and Constructive Trust**

85. Where the money to purchase an asset is furnished by one person, but the asset is placed in the name of another, the doctrines of resulting trust and constructive trust come into play.[83]

86. In questions of the ownership of property between spouses, the presumption of resulting trust applies.[84]

87. A constructive trust can arise in a number of ways, but fundamentally it has been applied to prevent unjust enrichment, which arises where there has been enrichment of one party; corresponding deprivation to another; and no juristic reason for the enrichment and corresponding deprivation.[85]

88. In this case, there is strong evidence that, apart from the original down-payment and funds covered by the CIBC first mortgage, virtually all of the funds to construct the Ashburn Property came from Compuquest.

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[82] BIA, section 69.3(1)
[83] *Cambone v Okoakih*, 2016 ONSC 792 (CanLII), para. 172
[84] *Family Law Act*, RSO 1990, c F.3, section 14
[85] *Cambone v Okoakih*, para. 174

**Equitable Mortgage**

89. An equitable mortgage is based on the maxim that "equity looks on that as done which ought to be done". 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.[86]

**The Claim Against Aimee**

90. Aimee is the sole named respondent to the Norris Application. There was no common intention by Aimee and Salem/Norris to mortgage Aimee's interest in the Ashburn Property. Aimee's intention was expressed in the Side Letter, which Gary emailed to Salem on March 3, 2016 and discussed with Salem before agreeing to Aimee's conditions.[87]

91. Salem now claims that he did not read the Side Letter.[88] Apart from whether this assertion is credible and the conflict with Gary's evidence, this is irrelevant. In the absence of a common intention to mortgage Aimee's interest in the Ashburn Property, Salem/Norris cannot claim an equitable mortgage under the March 3, 2016 RLOC Agreement. In any event, Salem/Norris cannot show good consideration. They did not advance further credit to Compuquest – to the contrary, all of their activity after December 31, 2015 was geared to obtaining repayment of their debt.

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[86] *Elias Markets Ltd*., Re, 2006 CanLII 31904 (ON CA), [2006] O.J. No. 3689 at paras. 63-65; *Ontario Securities Commission v Kotton*, 2017 ONSC 1379 (CanLII)
[87] Fifth Report, paras. 98-105
[88] See Answers to Undertakings of Dean Salem

**Material Non-Disclosure**

92. An *ex parte* order including a CPL obtained without making full and fair disclosure of all material facts should be set aside.[89]

93. Salem and Norris failed to disclose very material facts in obtaining the *ex parte* Order for leave to register the CPL. Among other things, Salem failed to disclose the Side Letter, his involvement in Gary's negotiations with Aimee and CIBC, the secret sale of the King Aire and diversion of the proceeds to Norris or the May 18, 2016 letter from CIBC's counsel advising that it would be improper to encumber the Ashburn Property in the face of the bankruptcy applications. He did not disclose his intention to claim a security interest in priority to the rights of the Receiver and the Trustee.

94. In obtaining the Glustein Order, neither Salem/Norris nor Aimee disclosed the Side Letter. It appears that Aimee and Salem may have been acting in concert at the time to defeat the interests of the Trustee in the Ashburn Property. 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.[90]

[89] Rule 39.01(6) of the Rules of Civil Procedure; *Ranger House Inc. et al v. Dash Domi et al,* 2013 ONSC 1154; *Levy v. Fitzgerald*, 2012 ONSC 2105 (CanLII)
[90] Affidavit of Aimee Bodimeade sworn June 20, 2017; Exhibit "H"

95. The Receiver discovered the Side Letter through Gary's email records. It was only after this discovery that Salem reversed course and filed purported "secured" claims in the estates of Gary and Compuquest.

**Clean Hands**

96. As with any equitable relief, the party seeking such relief must come to court with "clean hands".[91]

97. Salem and Norris are not coming to court with clean hands. To the contrary, their conduct throughout has been shocking. They have gone to extreme lengths to obtain preferential payment of their claims, completely disregarding the legitimate rights of Gary's and Compuquest's other creditors.

98. Further, Salem's evidence is not credible. For example, even though Norris was allegedly Compuquest's principal supplier, Salem claims not to have known anything about Gary's or Compuquest's assets, liabilities or operations. If so, then it is even more astonishing that Salem was counselling Gary on his communications and negotiations with Aimee and CIBC. Unless Salem had good reason to believe that Gary and Compuquest were able to satisfy their debts, he should not have been helping Gary to obtain overdrafts in the CIBC account, run up his Amex card, stall CIBC and set up a new business operation through CQ2K.

99. It is submitted that, having coerced Aimee into signing the RLOC Agreement, obtained *ex parte* orders encumbering the Ashburn Property without

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[91] *Taylor v. Guindon*, 2005 CanLII 25894 (ON SC), para. 48, Craiggs v. Owens, 2012 BCSC 29 (CanLII)

making full and fair disclosure of material facts and engaged in the other activities detailed in the Receiver's reports, Salem and Norris cannot now rely on equitable principles to obtain priority over the interests of the Receiver and the Trustee in the Ashburn Property.

**The RLOC Agreements are Void and Unenforceable Against the Trustee**

100. The RLOC Agreements are in any event unenforceable.

101. Despite Salem's and Norris's voluminous responding motion records, there is not a shred of evidence that Gary guaranteed Compuquest's debts to Salem and Norris prior to executing the December 31, 2015 RLOC Agreement.[92] Nor is there a shred of evidence that Compuquest ever provided security to Salem or Norris.

102. The evidence is overwhelming that Compuquest and Gary were insolvent as of December 31, 2015. Gary's personal statement of affairs, which did not include either the BDC debt ($469,448.10) or the alleged indebtedness to Salem and Norris, reflected liabilities of $2,350,963.64.[93]

103. To the extent that the December 31, 2015 RLOC Agreement purported to encumber Gary's assets or transfer his interest in the Ashburn Property and other assets to Salem and Norris, it is void and unenforceable as a fraudulent conveyance, fraudulent preference and/or transfer at undervalue. In any event, the RLOC Agreement could not and did not provide Salem or Norris with a security interest in the

[92] Under section 4 of the *Statute of Frauds*, R.S.O. 1990, CHAPTER S.19, a guarantee must be in writing and signed by the guarantor

[93] Fifth Report, Appendix 20; Exhibit "5" to Aimee's July 24, 2017 cross-examination

assets of Compuquest, which were subject to prior registered security interests held by CIBC and BDC.

104. There is overwhelming evidence that Gary and Salem were not dealing with each other at arm's length. The circular cheque transactions, Salem's role as advisor to Gary and their apparent joint retainer of Fogler Rubinoff LLP are just some examples of non-arm's length dealings. In any event, whether or not Gary and Salem were dealing at arm's length, the RLOC Agreement is unenforceable under both the BIA and provincial legislation, given Gary's insolvency and Gary's intention to defraud or delay his other creditors, including CIBC, BDC and Amex.

105. Gary's intention is the only governing intention. His intention to pay Salem and Norris in priority to CIBC, BDC, Amex and other creditors is patent. His motivation for doing so is clear. Not only did Gary and Salem have a close personal relationship but Norris is now supplying product to Gary's new business venture.

106. There was no consideration for the RLOC Agreement. Salem's and Norris's exposure did not increase after Gary executed the RLOC Agreement. To the contrary, the indebtedness declined by at least USD $480,000 – without considering the Receiver's inability to determine what happened to the product allegedly delivered by Norris after December 31, 2015.[94]

107. It is highly suspicious that all of Compuquest's inventory and accounts receivable vanished prior to GTL's appointment as Interim Receiver of Compuquest on

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[94] USD $1,283,797.35 was owed as of December 31, 2015 as compared to USD $803,585.49 claimed in the proofs of claim

April 29, 2016, while just a few days later CQ2K was able to pay for product shipped by Norris on a COD basis.[95]

108. The RLOC Agreement executed by Aimee on March 3, 2016 cannot form the basis for an equitable mortgage over Gary's interest in the Ashburn Property. Even if Aimee had the legal capacity to encumber Gary's interests, Aimee executed the RLOC Agreement just two months before the date of the initial bankruptcy event. The RLOC Agreement is void against the Trustee under section 95 of the BIA.

109. An equitable mortgage cannot be granted where to do so would contravene a statute.[96] There is no authority for the Court to grant an "equitable mortgage" based on alleged agreements or promises that constitute fraudulent conveyances and/or preferences under both the BIA and provincial legislation. This flies in the face of the concept of an "equitable" mortgage.

**Aimee's Request for Distribution of Funds**

110. It is respectfully submitted that Aimee's request for distribution of funds from the sale of the Ashburn Property is premature. The Receiver cannot consider any distribution of funds until the claims of Salem and Norris are fully disposed of. Aimee herself took no steps to address these claims on a timely basis.

111. Aimee's request for an "interim distribution" of $1 million is in any event completely out of line. Aimee cooperated in the sale of the Ashburn Property after the Receiver's appointment, but she has not been forthcoming with information required for

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[95] Affidavit of Dean Salem sworn July 20, 2017, Exhibit "F"
[96] *Elias Markets Ltd., Re*, 2006 CanLII 31904 (ON CA)

the Receiver's investigation. She has refused to produce her bank records. Her affidavits have not been forthright. Aimee claims that she should be entitled to the appreciation in the value of the Ashburn Property; however, the evidence suggests that funds appropriated from Compuquest exceed the equity in the Ashburn Property.

112. Aimee is in a difficult situation but she brought these problems on herself. She was willfully blind to the source of funding for her extravagant lifestyle, knowing that Gary had a criminal past. By at least April 2016, Aimee knew that everything – the house, the horses, the luxury vehicles – had been funded by Compuquest. There were many red flags. Aimee knew about Compuquest's "cash flow" problems over the years and Gary's unusual transactions with Pinfold and Clausner. Aimee knew that BNS "demarketed" her and Gary in 2014 for irregular banking activity, after which they moved their accounts to CIBC. If Aimee did not know or suspect all along that Compuquest was funding her lifestyle, she should have known.

113. As a condition of the receivership, Aimee and her family were permitted to remain in the Ashburn Property during the marketing process. Aimee has not been paying the CIBC first mortgage or the property taxes. She cannot afford the luxury lifestyle to which she had become accustomed and she cannot afford to feed and house a stable of horses. She has had well over a year to deal with the horses but has failed to do so. Aimee's "needs" and desires cannot trump the rights of Compuquest's and Gary's creditors.

**PART IV - ORDER REQUESTED**

114. 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 4th day of August, 2017.

Catherine Francis

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## SCHEDULE "A"

## LIST OF AUTHORITIES


1 *Royal Bank of Canada v. North American Assurance Co.*, 1996 CanLII 219 (SCC), [1996] S.C.J. No. 17

2 *Cambone v Okoakih*, 2016 ONSC 792 (CanLII),

3 *Optical Recording Laboratories Inc. v. Digital Recording Corp*. (C.A.), 1990 CanLII 6672 (ON CA)

4 *Hudson v. Benallack*, [1976] 2 SCR 168, 1975 CanLII 158 (SCC)

5 *Tucker v. Aero Inventory (UK) Limited*, 2011 ONSC 4223 (CanLII)

6 *Elias Markets Ltd., Re,* 2006 CanLII 31904 (ON CA), [2006] O.J. No. 3689

7 *Ontario Securities Commission v Kotton,* 2017 ONSC 1379 (CanLII)

8 *Ranger House Inc. et al v. Dash Domi et al,* 2013 ONSC 1154

9 *Levy v. Fitzgerald*, 2012 ONSC 2105 (CanLII)

10 *Taylor v. Guindon,* 2005 CanLII 25894 (ON SC),

11 *Craiggs v. Owens*, 2012 BCSC 29 (CanLII)

## SCHEDULE “B”

## TEXT OF STATUTES, REGULATIONS & BY-LAWS

1 *Fraudulent Conveyances Act,* R.S.O. 1990, CHAPTER F.29, Section 2

2 *Assignments and Preferences Act* RSO 1990, c A.33, Sections 4(1) and (2)

3 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 sections 69.3(1), 95(1) and (2) and 96

4 *Family Law Act*, RSO 1990, c F.3, section 14

5 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 39.01(6)

## *Fraudulent Conveyances Act,* R.S.O. 1990, CHAPTER F.29, Section 2

### Section 2

Where conveyances void as against creditors

**2.** Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

## *Assignments and Preferences Act* RSO 1990, c A.33, Sections 4(1) and (2)

### Sections 4(1) and (2)

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

**4.** (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

## ***Bankruptcy and Insolvency Act*, RSC 1985, c B-3 sections 69.3(1), 95(1) and (2) and 96**

### Section 69.3(1)

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

### Section 95(1) and (2)

**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.

**Section 96**

**96 (1)** On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

**(a)** the party was dealing at arm's length with the debtor and

**(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

**(ii)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

**(iii)** the debtor intended to defraud, defeat or delay a creditor; or

**(b)** the party was not dealing at arm's length with the debtor and

**(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

**(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

**(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

**(B)** the debtor intended to defraud, defeat or delay a creditor.

***Family Law Act*, RSO 1990, c F.3, section 14**

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**Section 14**

Presumptions

14 The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

## ***Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 39.01(6)**

### **Rule 39.01(6)**

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

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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