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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

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

Respondents

FACTUM OF DEAN SALEM AND NORRIS TECHNOLOGIES LLC

July 14, 2017

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:
(Court Seal)

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

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

Respondents

FACTUM OF THE RESPONDENTS DEAN SALEM AND NORRIS TECHNOLOGIES LLC

I OVERVIEW

1. Receivers and trustees are not infallible. In this case they got it wrong.

2. Grant Thornton Limited (the "**Receiver**" or the "**Trustee**"), has made unfounded allegations against Norris Technologies LLC ("**Norris**") and its principal, Dean Salem, of suspicious circumstances, circular cheques, and preferential transactions. These unfounded allegations are based on a misunderstanding of (i) the off-lease computer business, (ii) the nature of transaction financing, (iii) the business relationship between Norris and 1299746 Ontario Inc. o/z Compuquest2000 ("**Compuquest**"), and the Receiver and Trustee's lack of thoroughness in conducting their review and investigation of the myriad documents evidencing the transactions between Norris and Compuquest.

3. Prior to the Compuquest's bankruptcy, Norris was a key supplier to Compuquest of off-lease computers and dealt with Compuquest in the ordinary course of business and in the same manner in which it dealt with others of its resellers. Contrary to allegations made by the Receiver and Trustee, Norris and Dean Salem were never involved in suspicious, questionable, or preferential transactions with Compuquest or Mr. Bodimeade.

4. Norris conducted its off-lease computer business with Compuquest, and other resellers, in the following manner. Norris purchased computers at the end of a lease from manufacturers like Hewlett Packard ("**HP**"). Norris sells these computers to resellers like Compuquest which takes delivery of the computers and makes all the shipping, delivery, and customs arrangements. Norris never actually sees or physically handles the computers and is not involved with or copied on the shipping or customs documents. These transactions may be financed through transaction financing which involves a loan by Norris to the reseller, Compuquest, and repayment of the loan once Compuquest resells the computers to an end user, generally within a few days or a few weeks. Norris' profit from these transactions through the margin on the resale and the interest charged on the transaction financing.

5. In January 2011 Compuquest and its principals Gary Bodimeade ("**Mr. Bodimeade**") and Aimee Bodimeade ("**Mrs. Bodimeade**") pledged their personal assets, including their matrimonial home at 7472 Ashburn Road, Whitby, Ontario registered in the name of Mrs. Bodimdeade (the "**Property**"), to Norris and Dean Salem as security for the revolving line of credit comprising the transaction financing. This agreement was later memorialized in writing by Mr. Bodimeade in December, 2015 and by Mrs. Bodimeade as of December, 2015

but executed in March, 2016, and provides the basis for Norris and Dean Salem's claim for a mortgage against the Property.

6. Extensive documents confirming the resale transactions between Norris and Compuquest, confirming delivery of the computers to Compuquest, and confirming the transaction financing have been provided to the Receiver either prior to or as part of this proceeding which the Receiver has dismissed out of hand and without examining Dean Salem although the Receiver had an order permitting it to do so.

7. The manner in which Norris conducted business with Compuquest, and the transaction financing arrangements between them, are no different from Norris' business relationships with other resellers in the off-lease computer industry. Affidavit evidence from another of Norris's customers has been filed by Norris on this application to underscore the ordinariness of the business relationship between Norris and Compuquest.

8. Pursuant to their mortgage against the Property, Norris and Dean Salem are secured creditors of Compuquest and Mr. and Mrs. Bodimeade.

9. Norris and Dean Salem are applicants in an application in the Superior Court of Ontario (the "**Application**") to enforce their entitlement to a mortgage against Mrs. Bodimeade's interest in the Property. In order to protect this secured interest in the Property, Norris and Salem have registered both a certificate of pending litigation (the "**CPL**") *and* an Order granted by the Honourable Justice Glustein requiring registration of a mortgage on title to the Property (the "**Glustein Order**").

10. As court appointed receiver of Compuquest and 2252709 Ontario Inc. ("**225**"), trustee in bankruptcy of Compuquest and Mr. Bodimeade, and receiver of the Property, the Receiver and Trustee has brought this motion for a series of relief including, an order discharging both the CPL and the Glustein Order, approval of an agreement of purchase and sale to sell the Property, possession of the Property and a vesting and sealing order pending closing, and dismissal of the Application and denial of Norris and Dean Salem's claim for an equitable mortgage.

11. Norris and Dean Salem will consent to an order discharging the CPL and the Glustein Order from title to the Property and permitting the sale, provided their claim to a mortgage against the Property for the full amount of the indebtedness owed by Compuquest to Norris and Dean Salem is recognized.

II THE FACTS

Dean Salem's Relationship with Gary Bodimeade

12. Dean Salem ("Salem") resides in Campbell, Tennessee and is the principal of Norris Technologies, LLC ("**Norris**"), a Tennessee corporation, an asset management company in the business of redeploying and remarketing personal computers, laptops and workstations once their lease has expired[1].

[1] Responding Motion Record of Dean Salem and Norris Technologies LLC ("**Salem Motion Record**"), Volume 1 of 5, Tab 1 Affidavit of Dean Salem Sworn July 14, 2017 ("**Salem Affidavit**"), paragraphs 1-2

13. 1299746 Ontario Inc. o/a Compuquest2000 ("**Compuquest**") was similarly in the business of off- lease computer equipment resale and refurbishment[2].

14. Gary Bodimeade ("**Gary**"), principal of Compuquest starting doing business with Norris in 2003 and met Dean Salem through his dealings with Norris. There are not a lot of large players in computer resale market and they mainly source their product from large computer manufacturers like Hewlett Packard ("**HP**") and Dell, which have leasing divisions[3].

Off-Lease Resale Business

15. When computer equipment comes off-lease from companies, such as accounting firms or design firms, the manufacturer of the equipment sells it to a resale and refurbishment business, such as Norris, who, in turn, resells the refurbished equipment to an end user. It is a high volume, low margin business[4].

16. The key to success in this industry is turning orders over quickly and minimizing overhead, particularly shipping and freight costs[5].

17. As a significant player in the industry, Norris, can secure a significant share of a manufacturers' off-lease equipment. Norris' sells this off-lease equipment both directly to end users and also to smaller resellers, such as Compuquest, who in turn sell to end users[6].

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[2] Salem Motion Record, Salem Affidavit, paragraph 3
[3] Salem Motion Record, Salem Affidavit, paragraph 5 and 7
[4] Salem Motion Record, Salem Affidavit, paragraph 7
[5] Salem Motion Record, Salem Affidavit, paragraph 7
[6] Salem Motion Record, Salem Affidavit, paragraph 8

18. While sales to smaller resellers like Compuquest is not as profitable for Norris as selling directly to end users (because the small resellers take part of the margin), Norris sells to a smaller reseller when Norris does not itself have a customer for the product[7].

19. As Computer equipment declines in value as the units become obsolete, moving product quickly is of paramount importance. Moving product quickly also keeps the manufacturers happy because they reduce their off-lease inventory which is becoming obsolete[8].

General Purchase Structure

20. The transactions completed by Norris with smaller sellers like Compuquest have a particular structure which has evolved to serve the specific needs of the computer resell business[9].

21. In most transactions, Norris would purchase product from HP or Dell and "drop ship" from the vendor directly to an end user or to a reseller like Compuquest. Drop shipping is where a party moves goods from a manufacturer directly to a retailer or end user without going through the usual distribution channels. Norris would never take delivery of the product. This was done to save money on freight since most transactions are done on very low profit margin[10].

22. Compuquest would arrange to transport the product through their own freight forwarding company usually in the Toronto area, as reginal freight companies offer the best terms to companies in their home region[11].

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[7] Salem Motion Record, Salem Affidavit, paragraph 8
[8] Salem Motion Record, Salem Affidavit, paragraph 8
[9] Salem Motion Record, Salem Affidavit, paragraphs 9-10
[10] Salem Motion Record, Salem Affidavit, paragraph 9
[11] Salem Motion Record, Salem Affidavit, paragraph 9

23. Compuquest would generate a Bill of Lading which is described as a "Blind Shipment" which describes a shipment where when one or more parties to the shipment does not know the identity of the shipper, receiver, or both. In other words, they are in "the Blind". Blind Shipments are used to protect confidential client information, ie – a wholesaler keeps their customer information confidential so that the vendor cannot sell directly to their customers and cut the wholesaler out of future transactions[12].

24. In order to ship blind, the shipment must be prepaid and Blind Shipment service requested prior to the freight pickup[13].

25. Information concerning the specific arrangements for each of Norris' vendors is set out in Dean Salem's affidavit at paragraphs 12 through 16[14].

26. Most purchases by Compuquest from Norris were completed in this manner. Occasionally Compuquest made purchases from Norris' inventory[15].

The Revolving Line of Credit Agreement and the Creation of the Equitable Mortgage

27. Compuquest started doing business with Norris in 2003[16].

28. In order to facilitate the business, Norris made transaction loans to Compuquest whereby Compuquest would borrow money from Norris in order to purchase of off-lease computers,

[12] Salem Motion Record, Salem Affidavit, paragraph 10
[13] Salem Motion Record, Salem Affidavit, paragraph 10
[14] Salem Motion Record, Salem Affidavit, paragraphs 12-16
[15] Salem Motion Record, Salem Affidavit, paragraph 11
[16] Salem Motion Record, Salem Affidavit, paragraph 17

then repay the loan when the computers from that transaction were sold. Compuquest generally repaid transaction loans within 2 weeks[17].

i. Revolving Line of Credit granted to Compuquest

29. In January 2011, Norris and Dean Salem agreed to provide a revolving line of credit to Compuquest in cash and equipment in an amount up to $1,500,000 (the "**RLOC**"). In return for providing the RLOC, Gary Bodimeade agreed that:

    a. Gary would be personally responsible for the debt;

    b. Gary would guarantee the debt; and

    c. personal assets owned by Gary and his wife Aimee Bodimeade, including the family home at 7472 Ashburn Rd. Whitby, Ontario, L1M 2E8 (the "**Property**"), would be pledged as security for the RLOC[18].

30. When the RLOC was granted in January 2011, Gary and Aimee Bodimeade were happily married, both principals of Compuquest and the business appeared to be doing very well. Having conducted business with Compuquest and Mr. Bodimeade for approximately ten years at this point, Dean Salem trusted Mr. Bodimeade and consequently was not concerned about formalizing the RLOC into a written agreement at that time[19].

ii. Written Memorialization of the RLOC

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[17] Salem Motion Record, Salem Affidavit, paragraph 17

[18] Salem Motion Record, Salem Affidavit, paragraph 18

[19] Salem Motion Record, Salem Affidavit, paragraph 19

31. In July, 2015, Gary Bodimeade advised Dean Salem that his marriage to Mrs. Bodimeade was failing as Mrs. Bodimeade was having an affair with her then 16-year-old horse stable employee. In September, 2015, Mrs. Bodimeade announced that she wanted a divorce[20].

32. In light of these marital difficulties, and after learning the fact that the Property was held solely in Mrs. Bodimeade's name, Dean Salem and Norris took steps to memorialize the RLOC in writing, and to register a mortgage on title to the Property[21].

33. In late December 2015, Mr. Bodimeade traveled to Tennessee to discuss the situation with Dean Salem and on December 31, 2015 Mr. Bodimeade and Dean Salem, on behalf of himself and Norris, executed an RLOC agreement before a notary public ("**Mr. Bodimeade's RLOC Agreement**")[22].

34. Mr. Bodimeade's RLOC Agreement memorialized in writing the terms of the 2011 Agreement including the collateral previously pledged as security, in consideration for the continued extension of credit under the RLOC[23].

35. The only way that Dean Salem and Norris could continue in business with Compuquest was to obtain a signed RLOC Agreement and to get the security registered. Once the Mr. Bodimeade's RLOC Agreement was executed Dean Salem felt comfortable enough to continue to supply product and carry on business in the ordinary course. In fact Norris

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[20] Salem Motion Record, Salem Affidavit, paragraph 20
[21] Salem Motion Record, Salem Affidavit, paragraph 20, Salem Affidavit, Exhibit A
[22] Salem Motion Record, Salem Affidavit, paragraph 21
[23] Salem Motion Record, Salem Affidavit, paragraphs 21-22, and Salem Affidavit, Exhibit B

continued to supply product and receive payment on account of product in the same manner it had up until March 2016[24].

36. The key provisions of Mr. Bodimeade's RLOC Agreement are:

a. Mr. Bodimeade and Compuquest agreed, as principal debtors, to pay Norris and Dean Salem, all outstanding balances on the revolving line of credit, payable on demand no later than December 31, 2016;
b. Mr. Bodimeade and Compuquest agreed to secure their obligation to pay the revolving line of credit with any and all equity available in certain personal property and real property as detailed in Mr. Bodimeade's RLOC Agreement, including the Property;
c. Mr. Bodimeade, Compuquest, Dean Salem, and Norris acknowledged that the RLOC was originally established in January 2011;
d. Mr. Bodimeade certified that all assets identified were part of his marital estate and that he was a 50% owner of all assets including the Property;
e. Mr. Bodimeade and Compuquest agreed to, at their expense, legally formalize, in Canada, that Dean Salem and Norris were in the 2nd secured position on all properties and assets including the Property; and
f. Mr. Bodimeade and Compuquest guaranteed the RLOC personally and with all business inventory and assets owned by Compuquest[25].

iii Mrs. Bodimeade's RLOC

37. On January 5, 2016, Dean Salem sent Mrs. Bodimeade the following email :

[24] Salem Motion Record, Salem Affidavit, paragraph 21
[25] Salem Motion Record, Salem Affidavit, paragraph 22

> Aimee,
>
> I apologize for having to introduce myself in this manner, however, I am forced due to circumstance. I am not sure what you know of my relationship with Gary and Compuquest 2000 (C2K), so, at the risk of redundancy, I will give you some background. I have worked with Gary and C2K for 15+ years. My company, Norris Technologies, LLC, has been a supplier for C2K for most of those years. In 2010, I also began personally financing transaction for C2K at Gary's request. As you may or may not be aware, in December 2013 and January 2014, C2K faced a major tax issue and expulsion from HP which, had I not stepped in, would have bankrupted the company- everything would have been lost. For the last 2 years, I have worked closely and diligently with Gary to rebuild C2K.
>
> Most of what Gary and I have accomplished has been on our relationship and our word. However, with the personal turmoil your family is experiencing, I can no longer rely on Gary's word, particularly in light of the fact that you are half owner in C2K and the marital assets Gary has always offered as security for our financial arrangements. With those personal assurances in jeopardy, it is necessary to formalize our line of credit to secure my investments in C2K. The purpose of Gary's visit to TN [Tennessee] was to execute a formal legal agreement to protect my position (see attached).
>
> **Due to your position with C2K and your ownership in the marital assets, I will need for you to also execute a formal legal agreement to protect my position and keep the line of credit and the HP product flow open. My goal is to keep C2K's business operating**, protect my investment and not become embroiled in any disagreement in your family. I have also attached a formal legal agreement in your name, identical to the agreement Gary executed. Please review the document and reply with any questions or concerns. We will need to execute the agreement before the end of the month. I am looking at visiting the week of the 18th, or you are certainly welcome to come to TN- please confirm this timeline works for you…[26]

38. Dean Salem received no response from Mrs. Bodimeade to the January 5th email and so followed up with similar emails on January 11 and 19, 2016. On February 3, 2016, having not heard back from Mrs. Bodimeade or her counsel, Dean Bodimeade emailed Mrs Bodimeade and her counsel as follows:

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[26] Salem Motion Record, Salem Affidavit, paragraph 23, Salem Affidavit, Exhibit C

> ...I require a very reasonable level of security to keep our line of credit and vendor relationship with Compuquest 2000 open...with a contested divorce in the process, I do not care to be caught in the middle with no security... I have already sold Compuquest's orders for Feb to date ($630,000 in revenue) to other customers. I will not do business with Compuquest until the line is paid off- currently $857,927.40...[27]

39. Mrs. Bodimeade swears in her affidavit that she entered into a mediation process with Mr. Bodimeade to resolve their matrimonial issues[28]. Neither Dean Salem nor Norris had notice of or were parties to these discussions, nor did they agree to their terms or to be bound by them.[29]

40. In her affidavit, Mrs. Bodimeade details discussions she had with Mr. Bodimeade whereby they negotiated the allocation of risk under the RLOC as between them[30]. Neither Dean Salem nor Norris had notice of or were parties to these negotiations. Any agreement struck between Mr. Bodimeade and Mrs. Bodimeade regarding their respective assets and liabilities is an issue between them, in the matrimonial proceeding.[31]

41. Dean Salem's concern during this time was to ensure that Mrs. Bodimeade executed the RLOC, as Mr. Bodimeade had, and that it was registered on title in accordance with its terms. Dean Salem and Norris required this security to continue doing business with Mr Bodimeade. Norris continued to sell off-lease computers to and do business with Compuquest up until Compuquest was petitioned into bankruptcy only because Dean Salem believed Norris had

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[27] Salem Motion Record, Salem Affidavit, paragraphs 24-25, Salem Affidavit, Exhibits C and D
[28] Aimee Bodimeade Affidavit, para 8
[29] Salem Motion Record, Salem Affidavit, paragraph 26
[30] Aimee Bodimeade Affidavit, paras 10-14
[31] Salem Motion Record, Salem Affidavit, paragraph 27

security over the Property and other assets referred to in the RLOC Agreement. Compuquest continued to pay Norris on the line of credit in the ordinary course of business[32].

42. On March 3, 2016, Dean Salem received two emails. The first email was from Mr. Bodimeade forwarding a letter from Mrs. Bodimeade's counsel addressed to Mr. Bodimeade's matrimonial counsel. The letter referred to a promissory note and an interim separation agreement and stated that Mrs. Bodimeade wished to make a number of changes to both documents. The "promissory note" referenced in the letter appears to refer to the RLOC agreement as follows:

> The Promissory Note states that the proceeds of sale of the assets will be paid to the line of credit. This is not the agreement between the parties. They have agreed that the proceeds of sale of the King Aire RV will be shared equally between the two of them. Aimee will not agree to the sale of the King Aire if the proceeds are not divided between them equally.
>
> The Promissory Note limited the collateral of the home to one million dollars but does not specify that this is from Gary's share of the home, and that Aimee's share of the home will not be used as collateral.
>
> Aimee's liability under the Promissory Note shall be limited to the assets specifically listed as collateral in the Promissory Note, and the inventory and assets of Compuquest 2000.[33]

43. Dean Salem had no notice of and was not a party to the discussions referenced in the March 3, 2016 email nor did he agree in writing or otherwise to be bound by the terms set out in this email[34].

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[32] Salem Motion Record, Salem Affidavit, paragraph 28
[33] Salem Motion Record, Salem Affidavit, paragraph 29, Salem Affidavit Exhibit F
[34] Salem Motion Record, Salem Affidavit, paragraph 30

44. While Mr. Bodimeade and Mrs. Bodimeade may have agreed between themselves that the mortgage against the Property be as against Gary's share of the Property alone, Dean Salem never agreed to those terms, and the RLOC agreement signed by Mrs. Bodimeade does not reflect those terms. Mrs. Bodimeade, together with her counsel, made four modifications to the RLOC agreement and returned a copy to Dean Salem. *None of these modifications* to the agreement limited the mortgage against the Property to Mr. Bodimeade's half interest[35].

45. On March 3, 2016 Dean Salem received a second email from Mr. Bodimeade forwarding a copy of the RLOC Agreement which was dated *December 31, 2015*, as amended and executed by Mrs. Bodimeade with the advice of her counsel. Mrs. Bodimeade's counsel, Andrea Robertson, acted as commissioner witnessing Mrs. Bodimeade's signature ("**Mrs. Bodimeade's RLOC Agreement**")[36].

46. Pursuant to Mrs. Bodimeade's RLOC Agreement, in consideration for the continued provision of the RLOC, she agreed to pledge collateral as security on the following key terms:

    a. Mrs. Bodimeade and Compuquest agreed, as principal debtors, to pay Norris and Dean Salem, all outstanding balances on the revolving line of credit, payable on demand no later than December 31, 2016;

    b. Mrs. Bodimeade and Compuquest agreed to secure their obligation to pay the revolving line of credit with any and all equity available in certain personal property

[35] Salem Motion Record, Salem Affidavit, paragraph 31
[36] Salem Motion Record, Salem Affidavit, paragraph 34, Salem Affidavit Exhibit G

and real property owned by Mrs. Bodimeade and Compuquest, including the Property;

c. Mrs. Bodimeade, Compuquest, Norris, and Dean Salem acknowledged that the RLOC was originally established in January 2011;

d. Mrs. Bodimeade certified that all assets identified, including the Property, were part of her marital estate and that she is a 50% owner of all said assets;

e. Mrs. Bodimeade and Compuquest agreed to, at their expense, legally formalize, in Canada, a mortgage in favour of Norris and Dean Salem in the 2nd secured position on all properties and assets including the Property; and

f. Mrs. Bodimeade and Compuquest guaranteed the revolving line of credit with all business inventory and assets owned by Compuquest[37].

47. Significantly, Mrs. Bodimeade's RLOC Agreement was amended by Mrs. Bodimeade and her counsel in four separate places, none of which had the effect of limiting the mortgage against the Property to Mr. Bodimeade's half interest. In fact, one amendment specifically changes the word "his" to "her" obligation to pay the RLOC with respect to any and all equity in a number of assets including the Property.[38]

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[37] Salem Motion Record, Salem Affidavit, paragraph 34, Salem Affidavit Exhibit G
[38] Salem Motion Record, Salem Affidavit, paragraph 36, Salem Affidavit Exhibit G

48. On April, 29, 2016, by Order of Madam Justice Mesbur, Grant Thornton was appointed as an interim receiver of Compuquest[39].

Attempts to Register the Mortgage against the Property

49. Pursuant to Mr. Bodimeade's and Mrs Bodimeade's RLOC Agreements, on May 9, 2016, Dean Salem emailed Mr. Bodimeade the necessary mortgage documents for Mrs. Bodimeade to execute in order to register a collateral mortgage against the Property.[40]

50. On May 16, 2016, Andrea Robertson, counsel for Ms. Bodimeade, requested documentation from Dean Salem showing the outstanding amounts owing to Norris and Dean Salem up to April 28, 2016, the date Compuquest ceased operations.[41]

51. On May 17, 2016, Dean Salem responded to Mrs. Robertson advising that Mr. Bodimeade had provided Mrs. Bodimeade with the mortgage documents, that the total amount owing on the RLOC was $803,585.49US, and that no additional advances had been made.[42] Dean Salem received no response to this email nor did Mrs. Bodimeade execute the mortgage documents.

52. If Mrs. Bodimeade believed her RLOC Agreement limited the mortgage security against the Property to Mr. Bodimeade's half interest alone, neither Mrs. Bodimeade nor her counsel would have inquired as to the outstanding balance on the revolving line of credit, (which was

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[39] Second report of the Receiver, Appendix 2
[40] Salem Motion Record, Salem Affidavit, paragraph 37, Salem Affidavit Exhibit H
[41] Salem Motion Record, Salem Affidavit, paragraph 38, Salem Affidavit Exhibit I
[42]. Salem Motion Record, Salem Affidavit, paragraphs 39-40 , Salem Affidavit Exhibit J

within the cap contemplated in the RLOC), nor refused to executed the documents permitting the registration of the mortgage against the Property[43].

53. On May 25, 2016 Compuquest and Mr. Bodimeade were both petitioned into bankruptcy. [44]

54. In light of the bankruptcy and in order to preclude Mrs. Bodimeade from conveying or refinancing the Property, Dean Salem commenced an application in the Superior Court for an order permitting Dean Salem and Norris to register a mortgage against Mrs. Bodimeade's interest in the Property. (the "**Application**")[45].

55. After the Application was commenced, on June 30, 2016, Dean Salem brought a motion to register a certificate of pending litigation against the Property (the "**CPL**"). The bankruptcy was fully disclosed in the materials filed on the motion for the CPL. The trustee was not given notice of the motion because it affected only Mrs. Bodimeade's interest in the Property and not the bankrupt or trustee's interest. The Master hearing the motion did not require service of the motion materials on the trustee. An Order was obtained and a CPL was registered on title.[46]

56. On the return date of the Application on August 9, 2016, Mrs. Bodimeade's counsel sought an adjournment. As Dean Salem was concerned that Mrs. Bodimeade would declare bankruptcy before the next return date of the Application, he sought an Order allowing him

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[43] Salem Motion Record, Salem Affidavit, paragraph 41
[44] Salem Motion Record, Salem Affidavit, paragraph 42, Salem Affidavit Exhibit K.
[45] Salem Motion Record, Salem Affidavit, paragraph 43, Salem Affidavit Exhibit L
[46] Salem Motion Record, Salem Affidavit, paragraphS 43-44, Salem Affidavit Exhibits L, M and N

to register a non-interest bearing mortgage against the Property until the Application could be decided and a determination made concerning the entitlement to and quantum of a mortgage to be registered against Mrs. Bodimeade's interest in the Property. Mr. Justice Glustein *granted* the Order (the "**Glustein Order**") with full disclosure of the bankruptcy proceedings, ordered that a copy of the Order be sent to the trustee and receiver, and that service of the Application materials be made on the trustee and receiver *going forward*.[47]

57. Dean Salem was unable to register a mortgage on title to the Property, as permitted by the Glustein Order, as Mr. Bodimeade was required to sign as a spouse but was unable to do so due to the bankruptcy. Instead, Dean Salem registered the Glustein Order on title to the Property.[48]

Receiver's Unfounded Allegations of non-disclosure by Dean Salem and Norris

58. The Receiver suggests in its factum that Dean Salem should have disclosed to Justice Glustein that Mrs. Bodimeade did *not* grant Norris or Dean Salem a mortgage over her interest. However that was neither Norris; nor Dean Salem's understanding. Neither Norris nor Dean Salem were parties to or agreed to any side agreements between the Bodimeades in their matrimonial proceedings. The Mrs. Bodimeade RLOC, which she signed with the benefit of legal advice, confirmed her agreement to pledge her half interest in the Property in consideration of the revolving line of credit granted to Compuquest since January, 2011. The Glustein Order was obtained on the basis of that agreement and there was no lack of

[47] Salem Motion Record, Salem Affidavit, paragraph 45, Salem Affidavit Exhibit O
[48] Salem Motion Record, Salem Affidavit, paragraph 46, Salem Affidavit Exhibit P

disclosure by Norris or Dean Salem in obtaining it.[49]

59. Further, the receiver asserted the same view of Norris and Dean Salem's interest over the Property when CIBC brought a motion to appoint Grant Thornton as equitable receiver of the Property. In its third report, which was successfully relied upon by CIBC in support of its motion, the receiver stated at paragraph 80(d):

> *Aimee* [Mrs Bodimeade] *appears to have mortgaged whatever equity she may have to Salem/Norris Technologies*[50].

60. This statement from the receiver's third report was made after the receiver had access to emails from Mrs. Bodimeade and Mr. Bodimeade regarding their side agreement to limit security over the Property to Mr. Bodimeade's interest,[51]

61. The receiver has failed to explain why it now takes a different position concerning Norris' and Dean Salem's security against the Property, than the position stated in its third report, and instead supports CIBC's motion. The receiver has chosen to prefer the version of events proffered by Mrs Bodimeade who benefitted handsomely from the success of Compuquest through the continued financial support of Norris and Dean Salem, without cross-examining her on her affidavit evidence, and even though her evidence is inconsistent with the written documents and is contrary to common sense. This unexplained change in the receiver's position casts doubt on the independence, impartiality and objectivity of the receiver[52].

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[49] Salem Motion Record, Salem Affidavit, paragraph 47
[50] Receiver's third report, paragraph 80(d)
[51] Receiver's second report, paragraphs 45-50
[52] Salem Motion Record, Salem Affidavit, paragraph 49

62. Mrs. Bodimeade was a principal and 50% shareholder of Compuquest. She is the only title holder to the Property, which consists of:

i. An approximately 5,680 square foot two storey detached residential dwelling, excluding the basement;

ii. An approximately 3,196, square foot finished basement with dance studio, family room, gym, bedroom and three piece bathroom;

iii. An outdoor pool with pool house;

iv. An approximately 800 square foot heated and insulated SUV garage;

v. An approximately 11,000 square foot equestrian barn complete with riding centre and stalls for 14 hours; and

vi. An approximately 2,400 square foot insulated hay/equipment barn.[53]

According to the receiver, the vast majority of the Property was paid for with Compuquest's money. I understand that Mrs. Bodimeade leased and/or drove luxury vehicles on Compuquest's dime, bought horses costing as much as $50,000 and directed Compuquest's employees to do personal work for her benefit. The court should remember that while Mrs. Bodimeade is accusing Norris and I of improper conduct, we are simply creditors owed money, and she is, at minimum, a beneficiary of significant improper conduct who has lived a life in incredible luxury for the past 8 years[54].

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[53] Salem Motion Record, Salem Affidavit, paragraph 110

[54] Salem Motion Record, Salem Affidavit, paragraph 111

63. In any event, Norris and Dean Salem do not oppose the receiver's motion to discharge the CPL and Glustein Order from title provided their position as a secured creditor of Compuquest, Mr. Bodimeade, and Mrs. Bodimeade is preserved.[55]

Proofs of Claim and Supporting Documentation and Receiver's lack of Diligence

64. Since the receiver was appointed on April 28, 2016, the receiver has failed to conduct a fair, balanced, and objective review of the evidence and investigation into Compuquest's affairs. The receivers reports use words like "suspects" and "suspicion" in respect of Dean Salem and Norris without any evidence to support these suspicions, suggesting that the receiver's position is based on speculation, and innuendo rather than evidence.[56]

65. On July 29, 2016, Dean Salem filed proofs of claim in the bankruptcy and an accounting of the debt owing. As fully detailed in Dean Salem's affidavit, Norris and Dean Salem made every effort, regardless of the unreasonableness of the request, to satisfy the receiver of the legitimacy of their claims. Notwithstanding these efforts, the trustee and receiver disregarded Norris and Dean Salem's efforts to explain their business relationship with Compuquest, disregarded evidence of the ongoing business relationship between Norris and Compuquest and the sale and delivery of off-lease computers, and unfairly prejudged the validity of Dean Salem's and Norris' claims. The receiver and trustee seem to have, despite evidence to the contrary, concluded that Dean Salem and Norris were in guilty of fraud

[55] Salem Motion Record, Salem Affidavit, paragraph 50
[56] Salem Motion Record, Salem Affidavit, paragraph 63, Receiver's second report, paragraph 55

merely by virtue of their association with Mr. Bodimeade[57].

66. In particular:

a. Dean Salem and Norris provided spread sheets showing funds that were advanced directly from Dean Salem's personal account and in respect of product shipped to Compuquest. Both could be accounted for in Compuquest's bank statements and accounting software which were in the receiver's possession. However, the receiver required Dean Salem to provide proofs of delivery for items shipped to Compuquest even though product was shipped in the blind and neither Norris nor Dean Salem would have copies of or access to these documents in the normal course of business[58];

b. in August, 2016, the trustee required Norris and Dean Salem to undergo extensive document review and organization to support its claim. In the course of the review Dean Salem discovered that one of the documents provided by the receiver for review contained a notation by the receiver "claim disallowed" even before the review was completed[59];

c. In its second report, at paragraph 55, the receiver states "the receiver strongly **suspects** that the debts allegedly owing by Compuquest, Bodimeade and Aimee to Norris and Salem are unfounded.." despite the fact that Dean Salem and Norris had submitted significant supporting documentation to the trustee and the receiver

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[57] Salem Motion Record, Salem Affidavit, paragraph 51, Salem Affidavit Exhibit Q
[58] Salem Motion Record, Salem Affidavit, paragraphs 51-61, Salem Affidavit Exhibits Q-Z
[59] Salem Motion Record, Salem Affidavit, paragraphs 58-59, Salem Affidavit Exhibit V

establishing the debts[60];

d. In order to establish delivery of off-lease computers to Compuquest and in response to the receiver's inquires, Dean Salem requested that the receiver provide freight documentation in Compuquest's possession (and therefore the receiver's possession). Although the receiver told Dean Salem that it spent time reviewing the records and was unable to find these documents, in fact the documents, which the trustee was demanding before it would accept Norris's proofs of claim, were at all times in the receiver's possession. The receiver would not even look for the freight documents despite very clear requests from Dean Salem and precise directions (a diagram of the office) as to where to find them. The documents for all shipments to Compuquest, except 2016 shipments, were later discovered by Dean Salem at Compuquest's premises, in the receiver's possession, and were provided by Dean Salem to the receiver. **On July 13, 2017, in order to fill in the missing shipping documents for 2016, counsel for Norris and Dean Salem obtained directly from Compuquest's shipping company, QuickEx Transportation, signed shipping documents which establish that off-lease computers purchased by Compuquest from Norris were in fact shipped to Compuquest in 2016.** These documents, filed as exhibits in this application, directly correspond to Norris' purchase orders for the same off-lease computers and conclusively show that there was no fraudulent activity between

[60] Salem Motion Record, Salem Affidavit, paragraph 63, Receiver's second report paragraph 55

Norris and Compuquest[61];

e. The receiver's conclusions concerning Dean Salem and Norris' relationship with Gary Bodimeade, as expressed in the 6 receiver reports, failed to take into account the fact that Norris was Compuquest's key supplier and therefore critical to its survival. If Norris stopped providing product to Compuquest, it would be game over. Mr. Bodimeade's assurances in email correspondence that he would pay Norris "every penny" were consistent with the fact that Norris was Compuquest's key supplier who had to be kept happy to keep the business operating and should have been interpreted by the receiver as confirming their ongoing business relationship[62];

f. In its second report the receiver ignores correspondence from Mr. Bodimeade indicating that he sold personal assets to pay outstanding amounts owing to Norris in order to continue receiving product from Norris and remain in business. The receiver instead concludes that all payments made by Bonimeade to Dean Salem or Norris were made from Compuquest's funds[63];

g. As of July 6, 2017, the receiver's counsel did not share documents provided by Dean Salem or Norris with the receiver[64];

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[61] Salem Motion Record, Salem Affidavit, paragraphs 62 73-75, 81, 112(h) Salem Affidavit Exhibit AA, BB, CC. DD, EE, HH, NNN

[62] Salem Motion Record, Salem Affidavit, paragraphs 66-67,

[63] Receiver's second report

[64] Salem Motion Record, Salem Affidavit, paragraph 112(d)(1)

h. On February 15, 2017, the receiver brought a motion, returnable February 21, 2017, for, among other things, an Order authorizing Grant Thornton as receiver and trustee to conduct an examination of a number of parties including myself and Norris. The receiver obtained the order it was seeking, however, it has never sought to examine me or Norris and yet had concluded, despite all the evidence to the contrary, that the claim should be disallowed[65].

i. In June, 2016, counsel for the receiver advised Dean Salem for the first time that the receiver had entered into an agreement of purchase and sale to sell the Property, with a closing date in September 2017[66].

Receiver and Mrs. Bodimeade's Allegations of Misconduct against Norris and Dean Salem

67. The receiver and Mrs. Bodimeade have made unfounded allegations of misconduct against Norris and Dean Salem despite evidence to the contrary as follows:

a. the receiver alleges that Norris' willingness to supply Phase5 with product is evidence that Norris is involved in improper dealings with Mr. Bodimeade however the receiver has not considered or included the following in the reports:

    i. Mr. Bodimeade confirmed on his examination that he is only an employee or Phase5, not an officer, director or shareholder;[67]

    ii. Norris does business with Phase5 on a cash on delivery basis, so as to avoid another situation like the one with Compuquest.

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[65] Salem Motion Record, Salem Affidavit, paragraph 85, Salem Affidavit Exhibit JJ
[66] Salem Motion Record, Salem Affidavit, paragraph 95, Salem Affidavit Exhibit OO
[67] Examination of Gary Bodimeade, p. 75, question458

iii. No credit has been extended to Phase5;

iv. since Compuquest's insolvency, Norris has to make up for the lost orders.[68]

b. the receiver alleges that because Norris received the proceeds of the King Aire RV, Norris received a preference and has engaged in improper conduct however the receiver has not considered or included in the reports the following:

i. Norris was Compuquest's key supplier. 95% of Compuquest's business was done through HP and Norris subsequently took over as the supplier of that business. Consequently Paying the proceeds of the King Aire to Norris, its key supplier, was not done with the intention of preferring one creditor over another but rather to ensure that Compuquest was able to continue to order product from its key supplier and continue to operate;

ii. Neither Norris or Dean Salem knew that Compuquest would petitioned into bankruptcy at the time of the payment. It was usual in their business relationship for Norris to receive large payments from Compuquest on account of its debts (as is evident from the spreadsheets setting out the balance owing).

iii. Norris and Dean Salem understood that the King Aire was a personal asset, not a corporate asset of Compuquest, that was sold by Mr. Bodimeade to ensure Norris would continue to supply product.[69]

[68] Salem Motion Record, Salem Affidavit, paragraph 112(a), Salem Affidavit Exhibit YY
[69] Salem Motion Record, Salem Affidavit, paragraph 112(b), Salem Affidavit Exhibit ZZ

c. The receiver alleges that because Dean Salem assisted Mr. Bodimeade in preparing an email response to CIBC's concerns about Compuquest that Dean Salem was engaged in improper conduct or that Dean Salem was non-arm's length to Mr. Bodimeade. However the receiver failed to consider or include in the reports the following:

   i. Norris was Compuquest's key supplier and was owed a lot of money. When Mr. Bodimeade advised Dean Salem that Compuquest was having trouble with CIBC, Dean Salem provided advice as someone who had been in the industry for decades in order to assist Compuquest and protect my investment and relationship. There was nothing nefarious about Dean Salem advising Mr. Bodimeade in how to respond to CIBC.[70]

d. The receiver alleges that the fact that there was very little inventory at Compuquest's facility proves that Norris and Compuquest were involved in fraudulent activity. However the receiver failed to consider or include it the reports the following:

   i. Norris and Dean Salem provided the receiver with a spreadsheet documenting the transactions between Norris and Compuquest from 2015 through to Compuquest's bankruptcy as well as supporting documentation for each transaction where available;

   ii. Norris and Dean Salem provided the receiver with hundreds of pages of related emails between the vendor of the off-lease computers, Norris, Compuquest and the freight companies who delivered the computers;

   iii. as of July 6, 2017, counsel for the receiver indicated that these hundreds of pages of evidence where not even provided to the receiver to consider;

[70] Salem Motion Record, Salem Affidavit, paragraph 112(c), Salem Affidavit Exhibit AAA

iv. these documents together with the shipping documents provided by QuickX Transportation on July 13, 2017 respecting the 2016 shipments and included in these motion materials, conclusively prove that there was no fraudulent activity between Norris and Compuquest respecting inventory. As the documents show, in 2016, as in all the prior years, Norris purchased off-lease computers from vendors, Norris then sold the computers to Compuquest, and Compuquest arranged for the computers to be shipped by the vendors directly to Compuquest for refurbishment and resale. Norris and Dean Salem had no involvement with the computers after shipment and therefore no involvement with or knowledge of Compuquest's inventory[71].

e. The receiver alleges in its fifth report that Norris and Dean Salem were involved in improper conduct because the timing of Norris' relationship with Compuquest coincides with the termination of Mr. Bodimeade's contact at HP for taking kickbacks. However the receiver fails to take into account or mention in the reports the following:

   i. Compuquest's HP contact was terminated in September 2013[72].

   ii. Mr. Bodimeade's relationship with Norris and Dean Salem had a business relationship since 2003.[73] Purchase and sales orders between Norris and Compuquest produced by Dean Salem date as far back as 2008, years before Compuquest's HP contact was terminated.[74]

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[71] Salem Motion Record, Salem Affidavit, paragraph 112(D), Salem Affidavit Exhibit BBB
[72] Receiver's 5th Report para 51c.
[73] Examination of Gary Bodimeade, pp. 59-60, questions 349-355.
[74] Salem Motion Record, Salem Affidavit, paragraph 112(E), Salem Affidavit Exhibit CCC

f. The receiver alleges that Norris and Dean Salem engaged in circular cheque writing with Compuquest. However the receiver failed to consider or mention in the reports the following:

   i. the spreadsheet provided by Norris and Dean Salem to the trustee shows that Norris provided Compuquest with transaction funding which involves a short term loan to facilitate the purchase of product. The term of the loan is the time it takes for the product to be received and sold, usually within two weeks. Interest on the loan is commonly 3% and repayment is sent by cheque at the inception of the loan drawn on a line of credit provided by Norris to Compuquest. The cheque is held by Norris until the Compuquest confirms the cheque may be deposited.

   ii. to facilitate the transaction funding Norris provided Mr. Bodimeade with some cheques drawn on Norris' account made out to Compuquest signed by Dean Salem, with the amount left blank. Mr. Bodimeade would call Dean Salem to confirm the amount of the funds required (and that the cheque would clear) before writing in the amounts he was borrowing.

   iii. Norris has provided transaction funding to its customers since 2007 and to Compuquest on a monthly and sometimes weekly basis, since 2011. Email correspondence between Dean Salem and Mr. Bodimeade provides an example of the transaction funding provided by Norris to Compuquest in 2011 as set out more particularly in Dean Salem's affidavit.

iv. Norris has provided transaction funding to other of its customers, including CDM Technologies and Memory Dogg Inc., whose affidavit is filed in this proceeding.

v. There is lengthy historical evidence of transaction financing between Norris and Compuquest in Compuquest's CIBC account history dating back to 2010 however the trustee and receiver refused to provide Compuquest's CIBIC account statements to Dean Salem despite his requests for them;

vi. in February 16, 2016 CIBC began refusing all cheques presented against the Compuquest account even when Dean Salem confirmed with Mr. Bodimead that cleared funds were available. Once the refusals began Norris insisted on payments in order to continue business with Compuquest;

vii. once cheques were refused Compuquest could not acquire inventory or sell product which would result in accounts receivable. This explains why there was diminished inventory and accounts receivable in Compuquest when the receiver took over.[75]

g. The receiver alleges that the transactions and supporting documentation outlined in the spreadsheets provided in support of the proofs of claim do not all reconcile which implies that Norris was engaged in improper conduct with Compuquest. However the receiver in drawing this conclusion the receiver did not consider or take into account the ordering and shipping process in this industry. For example at paragraph 95 of the receiver's fifth report, the receiver indicates that the documents concerning a shipment of $228,000 worth of off-lease computers on March 11, 2016 do not

[75] Salem Motion Record, Salem Affidavit, paragraph 112(f), Salem Affidavit Exhibit DDD, EEE, FFF, GGG

reconcile. The following is an outline of the March 11, 2016 transaction step by step as an example of how Compuquest and Norris transacted business:

i. On March 11, 2016, Norris issued a purchaser order to HP Financial services in the amount of $220,210USD for 1816 off-lease desktop computers. The same day, Norris wired payment in full to HP Financial Services for the 1816 off-lease desktop computers;

ii. the same day, Norris issued a sales order to Compuquest in the amount of $228,000USD for the 1816 off-lease desktop computers purchased from HP Financial Services. The difference between the purchase order amount ($220,210USD) and the sales order amount ($228,000USD), $7,790USD, is Norris' margin on the sale to Compuquest.

iii. the same day, Mr. Bodimeade, on behalf of Compuquest, contacted QuikX Transportation, a freight company, to arrange to ship the 1816 off-lease desktop computers directly from HP Financial Service to Compuquest. QuikX emailed Mr. Bodimeade indicating that Boston Creek Transportation would pick up the product and requests that Mr. Bodimeade send the Bill of Lading and Custom Documents as soon as possible.

iv. the same day, Norris prepares the Bill of Lading and provides it to HP Financial Services, and Mr. Bodimeade, who in turn provides it to QuikX Transportation, who in turn provides it to Boston Creek Transportation. Once Boston Creek Transportation has the Bill of Lading, they are able to complete the blind shipment. The Bill of Lading identifies the shipper (HP Financial Services), the consignee (Norris), describes the product being picked up and provides directions to the freight company on how to access the shipper's premises. Because the shipment is being done "in the blind", it does not indicate that the purchaser of the product is Compuquest. Once Boston Creek Transportation picks up the product, they deliver it directly to Compuquest.

v. Because this shipment originated in the United States, Compuquest was required to complete customs documents consisting of a Bill of Lading from the freight company (which is also for freight insurance purposes) and a commercial invoice describing the product and value. Norris and Dean Salem have no role in preparing the customs documents and do not receive copies of them.

vi. While the receiver correctly notes that the number of computers described on the customs documents is incorrect (1450 vs 1816), and the price is reflected as $42,500, the receiver incorrectly describes the custom documents as an invoice from Norris. Norris never prepared, or received these documents (until these proceedings) nor did Norris have anything more to do with the computers once they were shipped to Compuquest;

vii. While Compuquest may have misstated the value of the computers to reduce the duty owing, this would not benefit Norris or Dean Salem as Norris' margin is fixed as the difference between the Purchase Order price and the Sale Order price $7,790 USD;

viii. Norris and Dean Salem are not involved with product after it is shipped to Compuquest and therefore cannot account for its whereabouts.[76]

[76] Salem Motion Record, Salem Affidavit, paragraph 112(g), Salem Affidavit Exhibit HHH, III, JJJ, KKK, LLL, MMM, NNN

h. The receiver has alleged that because Mr. Bodimeade and Dean Salem, and Norris retained Foglers, although separately, they were all colluding. However the receiver did not take into account the following information in drawing this conclusion or in the reports:

   i. Dean Salem lives and works in the US and did not have any legal contacts in Toronto;

   ii. Mr. Bodimeade and Dean Salem were represented by different counsel at Foglers;

   iii. since Mr. Bodimeade had no prospect of recovering any money or assets in the bankruptcy, his interests did not conflict with Dean Salem's interests;

   iv. Mr. Bodimeade's counsel left Foglers for Miller Thomson several months ago and continues to act for Mr. Bodimeade.[77]

i. Mrs. Bodimeade has alleged that Mr. Bodimeade and Dean Salem did not have a "normal creditor relationship" and therefore are not arm's length however her allegations are bald, self-serving, not supported by documentary evidence and are contradicted by Dean Salem's evidence and the supporting documentation[78].

III- STATEMENT OF ISSUES, LAW& ARGUMENT

68. The issues to be decided on this motion are as follows:

a. Do Norris and Dean Salem hold an Equitable Mortgage over the Property;

b. Are Equitable Mortgages Secured Debts which take Priority over the Trustee in Bankruptcy;

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[77] Salem Motion Record, Salem Affidavit, paragraph 112(h),

[78] Salem Motion Record, Salem Affidavit, paragraph 112(j), Salem Affidavit Exhibit ZZ

c. Does the Equitable Mortgage Does Constitute a Preference to Norris or Dean Salem;

d. If there is a Presumption of Preference, is it Rebutted by the Prior Agreement; and

e. If there is a Presumption of Preference is it rebutted by payments made to keep Compuquest in Business.

i. Norris and Dean Salem hold an Equitable Mortgage over the Property

69. The Mrs. Bodimeade RLOC and the Mr. Bodimeade RLOC evidenced a common intention among the Bodimeades, Norris, and Dean Salem to create a mortgage over both the Bodimeades' interests in the Property. It describes Mrs and Mrs. Bodimeade as parties giving security, describes the Property, describes the RLOC as the debt secured, and creates an obligation to execute and register a legal mortgage on the Property.

70. Neither Dean Salem nor Norris had notice of, were parties to, or consented to matrimonial agreements between the Bodimeades in which they may have varied these arrangements amongst themselves.

71. The objective of equitable mortgages is to enforce a common intention of the mortgagor and mortgagee to secure property for either past debt or future advances, where the common intention is unenforceable under the strict demands of the common law.[79]

72. An equitable mortgage is created where parties, by written agreement, show an intention to make property security for a debt due or a present advance.[80] A written agreement to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands

[79] Berdeklis v David Terry Associates Inc., 2017 ONSC 3209 (CanLII), paras. 17- 18.
[80] R. v. Elias 2006 CanLII 31904 (ONCA), paras 63-65.

described in the agreement.[81]

73. The requirements for an equitable mortgage are that the document include a description of:

    a. the parties;

    b. the property; and

    c. principal amount secured.[82]

74. The document creating an equitable mortgage "need not use the formal wording of "transfer" or "mortgage" or " assign" but must in some manner show an intention to create a charge on property in equity or to grant a property interest to the mortgagee as security for a debt."[83]

ii Equitable Mortgages are Secured Debts which take Priority over the Trustee in Bankruptcy

75. The RLOC created an equitable mortgage over both Mr. Bodimeade and Mrs Bodimeade's interests in the Property. The Trustee takes no better title to the Property than the title held by the bankrupt, and is therefore subject to the mortgage held by Norris and Dean Salem.

76. "Secured creditor" is broadly defined under the *Bankruptcy and Insolvency Act*[84] :

> means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable[85]

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[81] Traub, *Falconbridge on Mortgages* 5th ed.looseleaf, (Toronto: Canada Law Book, 2014), para 5:40.20.
[82] *CIBC v. Saskatchewan Lawyers' Insurance Association Inc.* [1996] S.J. No. 32, (SKQB), para 16.
[83] *R. v. Elias* 2005 CanLII 30311 (ON SC), (2005) 77 OR (3rd) 461, paras 31-32, appeal dismissed 2006 CanLII 31904 (ONCA
[84] R.S.C. 1985, c. B-3 ["**BIA**"]
[85] *Ibid*, s.2(1)

77. For the purpose of determining what constitutes a secured claim the BIA defers to provincial law. A secured interest which was valid under provincial law remains valid after bankruptcy as if no bankruptcy had occurred. [86]

78. The trustee has no greater interest in the property under his or her responsibility than the bankrupt.[87] The trustee acquires the real property subject to any unregistered estates, rights or equities to which the property was subject at the date of bankruptcy.[88] Consequently, an unregistered mortgage given by the bankrupt prior to the bankruptcy is effective as against the trustee. [89]

79. The holder of an equitable mortgage is a secured creditor in the bankruptcy of the mortgagor and therefore the equitable mortgage granted by the Bodimeades to Norris and Dean Salem has priority over the trustee in bankruptcy.

iii the Equitable Mortgage Does not Constitute a Preference to Norris or Dean Salem

80. The Mr. Bodimeade RLOC was executed by Mr. Bodimeade in December 31, 2015, more than three months prior to the bankruptcy. The Mrs. Bodimeade RLOC was executed by Mrs. Bodimeade on March 3, 2016 but was dated as of December 31, 2015. These documents were intended to memorialize the security granted to Compuquest as of January 2011 by Norris and Dean Salem in order to facilitate the continued operation of the RLOC

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[86] *Falconbridge on Mortgages*, *supra*, p. 28-1, BIA, ss.72(1), 75.
[87] *Re Lefebre* (2004), 244 D.L.R. (4th) 513 (SCC), para 37
[88] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. looseleaf (Toronto: Thomson Reuters, 2013) p. 3-266; *Re Engineering & Contracting Co.* 1994 CarswellOnt 365, para 16.
[89] *Falconbridge on Mortgages*, *supra*, p. 28-2; *Re Engineering & Contracting Co.*, *supra*, para 15.

and to keep Compuquest operational.

81. Based on an objective assessment of the circumstances, the dominant intention of the mortgage was not to give Norris or Dean Salem a preference but rather to ensure that Compuquest was able to satisfy its major supplier and continue in business. In fact Compuquest continued to operate, take delivery of computers and use the RLOC well into 2016.

82. Three conditions precedent must be met for a payment to qualify as a fraudulent preference under s. 95of the BIA[90]:

  a. the payment must have been made within three months of bankruptcy;
  b. the debtor must have been insolvent at the time of the payment; and
  c. as a result of the payment, the creditor must have in fact received a preference over other creditors.[91]

83. Section 95(2) of the BIA provides that if a transfer, charge, payment, obligation or judicial proceeding has the effect of giving the creditor a preference, it is, **in the absence of evidence to the contrary**, presumed to have been made with a view to giving the creditor a preference.

84. When determining whether a payment constitutes a preference under s. 95, the court must consider whether the impugned payment was made with the "dominant intent" of preferring one creditor over another. The dominant intention test is based on an objective assessment of

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[90] BIA, s. 95
[91] BIA, s. 95(2)

the circumstances. In other words what the debtor's conduct objectively demonstrates when reasonably construed.[92]

85. If the trustee satisfies the conditions under s. 95 of the *BIA*, a rebuttable presumption arises and the onus shifts to the creditor to establish that debtor's dominant intent was not to prefer that creditor.[93]

86. Payments received by a secured creditor under a valid security document in the three months preceding bankruptcy cannot be attached as a fraudulent preference where the payment does not exceed the value of the security. [94] Where a secured creditor is paid first there can be no fraudulent preference.[95]

Presumption of Preference is Rebutted by Prior Agreement

87. Any presumption of preference created by the execution of the Mrs. Bodimeade RLOC within three months of the bankruptcy, is rebutted by the fact that the Bodimeades pledged the Property as security for the RLOC in January 2011.

88. An oral agreement to give a mortgage made when the debtor was solvent more than three months before bankruptcy rebuts the presumption of a preference.[96]

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[92] *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce,* 2011 MBCA 41, 268 Man.R. (2d) 30, at para 24.
[93] *Houlden & Morawetz, supra*, F201, p.4-73.
[94] *Houlden & Morawetz, supra,* F202, p. 4-79; *Tucker v. Aero Inventory (UK) Ltd.,* [2011] O.J. No. 3816 (S.C.), para 70.
[95] *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.* (2005), 2005 NBCA 55 (CanLII), 255 D.L.R. (4th) 137 (N.B.C.A.), para 18.
[96] *Re Rolphe*, 1984 CarswellMan 23. para 22, 23; *Re Blenkarn Planer Ltd.* 1958 CarswellBC 6, 14 D.L.R. (2d) 719, paras 16-17; *Salter & Arnold Ltd. v. Dominion Bank* 1926 CarswellMan 2 (SCC), paras 6-8.

89. A presumption of preference in respect of security or payment made within three months of bankruptcy is rebutted if there was an intention to fulfil a prior agreement.[97]

Presumption of Preference rebutted by payments made to keep Compuquest in Business

90. Any presumption of preference is rebutted by the fact that the mortgage was created and payments were made by Compuquest to Norris and Dean Salem in the ordinary course of business and in order to ensure that Compuquest could continue to operate. Norris was Compuquest's key supplier of off-lease computers. Without Norris and Dean Salem's continued supply of computers and the RLOC Compuquest could not continue to operate.

91. As Houlden and Morawetz explain, if a creditor, who received an alleged preference, can show that the payment was made by the debtor in the *bona fide* expectation that this payment would enable the debtor to continue in business and to extricate himself or herself from his or her financial difficulties, it is a powerful circumstance in rebutting the statutory presumption of a preference.[98]

92. Where the court finds that the debtor was genuinely anxious to stay in business, security was given to a creditor to obtain continued financial support, and the creditor continued to

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[97] *A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc.*, 1999 CarswellBC 335, 10 C.B.R. (4th) 49, paras 55-57; ***Boutique Euphoria Inc. (Arrangement relatif à)*** **[2008] Q.J. No. 14591, paras 48-51.**

[98] *Houlden & Morawetz, supra*, F211, p.4-112.1; *Grimsby Machine Manufacturing Co.*, Re, 1971 CarswellOnt 50 (ONCA), paras 4 -5; *Hodden Gray Graphics Ltd., Re* 1974 CarswellOnt 67, paras 15, 20;

provide financial support, the Court has held the security was given to enable to debtor to remain in business and consequently was not fraudulent preference.[99]

IV ORDER REQUESTED

Dean Salem and Norris Technologies request an Order:

(a) Dismissing the receiver's motion;

(b) Finding that Dean Salem have an equitable mortgage as against Mr. Bodimeade's interest in the Property and a legal and/or equitable mortgage as against Mrs. Bodimeade's equity in the Property;

(c) granting Dean Salem and Norris Technologies LLC costs of this motion on a full indemnity scale; and

(d) Such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ..14... day of July, 2017.

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David W. Levangie

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[99] *O & S Bronze & Metal Fabricators Ltd., Re*, 30 C.B.R. (3d) 255 (Que S.C.); paras 54-56;; ***St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc, supra*, paras 15-18; *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.* [2013] A.J. No. 1026 (Alta.C.A.), paras 16-17.**

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[99] *O & S Bronze & Metal Fabricators Ltd., Re*, 30 C.B.R. (3d) 255 (Que S.C.); paras 54-56;; ***St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc, supra*, paras 15-18; *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.* [2013] A.J. No. 1026 (Alta.C.A.), paras 16-17.**

tab A

SCHEDULE "A"

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A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc., 1999 CarswellBC 335, 10 C.B.R. (4th) 49, paras 55-57; ***Boutique Euphoria Inc. (Arrangement relatif à)*** **[2008] Q.J. No. 14591, paras 48-51.**

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O & S Bronze & Metal Fabricators Ltd., Re, 30 C.B.R. (3d) 255 (Que S.C.); paras 54-56; *Burns v. Royal Bank,* 1974 CarswellOnt 67 (Ont. S.C.), para 33-34; ***St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc, supra,*** **paras 15-18;** ***Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*** **[2013] A.J. No. 1026 (Alta.C.A.), paras 16-17.**

tab B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWSPreferences

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.

Marginal note: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.

Marginal note:Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

- **(a)** a margin deposit made by a clearing member with a clearing house; or
- **(b)** a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Marginal note:Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

CANADIAN IMPERIAL BANK OF COMMERCE	-and-	1299746 ONTARIO INC. o/a COMPUTQUEST2000 et al.
Applicants		Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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