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

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

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

FACTUM OF THE TRUSTEE IN BANKRUPTCY GRANT THORNTON LIMITED

February 9, 2023

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AND TO: **THIS HONOURABLE COURT**

Table of Contents

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FACTUM OF THE TRUSTEE IN BANKRUPTCY, GRANT THRONTON LIMITED

PART I - NATURE OF THE MOTION

1. Grant Thornton Limited brings this motion in its capacity as the trustee in bankruptcy ("**Trustee**") of the estates of Aiden Pleterski ("**Pleterski**") and AP Private Equity Limited ("**AP**" and together with Pleterski, the "**Bankrupts**") for an order compelling Mitchell Learning to answer his undertaking given at a section 163 examination under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and produce the documents required pursuant to a Notice for Production under section 164 of the BIA.

2. The answer and documents sought by the Trustee concern Mr. Learning's banking records and accounting information relating to the Bankrupts, the Bankrupts' dealings and property, and are necessary for the Trustee's investigation and administration of the Bankrupts' estates.

PART II - THE FACTS

3. The Bankrupts operated an investment scheme on behalf of a pool of investors that centered on cryptocurrency and foreign exchange positions. Pleterski is the sole director and officer of AP.[1]

4. On July 7, 2022, certain investors in the investment scheme successfully obtained an *ex parte* worldwide *Mareva* injunction against the Bankrupts, after demonstrating *prima facie* fraudulent misrepresentation, civil fraud, misappropriation of funds, conversion, and unjust enrichment (the "**Mareva Order**").[2]

5. On August 9, 2022, on application by certain other creditors of the Bankrupts, the Ontario Superior Court of Justice ordered that Pleterski and AP be adjudged bankrupt (the "**Bankruptcy Orders**"). Grant Thornton Limited was appointed Trustee of the Bankrupts.[3]

6. During the course of its investigation, the Trustee has been advised that much of the funding raised by the Bankrupts was raised through "originators" who introduced potential investors to Pleterski. The Trustee has been advised that Mr. Mitchell Learning was one of those Originators.[4]

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[1] Second Report of the Trustee dated October 21, 2022 (the "**Second Report**"), para. 2, Trustee's Motion Record ("**Trustee's MR**"), Tab 6, pp. 148-149.

[2] *Ibid* at para. 5, p. 150; Mareva Order dated July 7, 2022, attached as Appendix "B" to the Second Report, Trustee's MR, Tab 6, p. 172**.**

[3] Second Report, *supra* note 1 at para. 1, p. 148; Bankruptcy Orders dated August 9, 2022, attached as Appendix "A" to the Second Report, Trustee's MR, Tab 6, p. 165.

[4] Preliminary Report of the Trustee dated August 29, 2022 (the "**Preliminary Report**"), para. 3, Trustee's MR, Tab 3, pp. 122-123.

Numerous Requests for the Accounting

7. On October 11, 2022, Mr. Learning was formally examined pursuant to section 163 of the BIA as amended (the "**BIA**"), wherein he gave the following undertaking:

> To provide all of Mr. Learning's bank statements for all of his bank accounts from June 2020 to present. Also, to identify which transactions represent money going to Aiden Pleterski or AP Private Equity, or any transaction where he received money from AP Private Equity or Aiden Pleterski[5] (the "**Undertaking**").

8. Mr. Learning further undertook to answer the Undertaking within two weeks, being by October 25, 2022.[6]

9. Mr. Learning failed to answer the Undertaking by October 25, 2022. Mr. Learning, through his counsel, advised on separate consecutive occasions that Mr. Learning would answer the Undertaking by October 31, 2022, November 1, 2022, November 15, 2022, November 18, 2022, November 25, 2022. Counsel for the Trustee offered a further extension to December 5, 2023 through correspondence dated November 29, 2022.[7]

10. On December 13, 2022, counsel for the Trustee served Mr. Learning with a Notice for Production under section 164 of the BIA requiring that Mr. Learning deliver "any and all banking records, receipts, and proof of any transactions and/or investments between yourself and Aiden Pleterski and/or AP Private Equity Limited in your possession and/or

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[5] Affidavit of Alexander Overton sworn February 9, 2023 (the "**Overton Affidavit**") at paras. 4 & 5, Trustee's MR, Tab 2, p. 13; Exhibits D and E - Overton Affidavit, Trustee's MR, Tabs D and E, pp. 34 and 37**.**

[6] *Ibid* at para. 5, p. 13; Exhibit E – Overton Affidavit, Trustee's MR, Tab E, p. 37.

[7] *Ibid* at paras. 6 - 9, pp. 14-15; Exhibits F, G and I – Overton Affidavit, Trustee's MR, Tabs F, G and I, pp. 40, 58 and 67.

control, by no later than December 20, 2022" (the "**Production Notice**", and together with the Undertaking, collectively referred to as the "**Accounting**").[8]

11. Counsel to Mr. Learning verbally advised counsel for the Trustee on December 23, 2022, that Mr. Learning would provide the Accounting later that evening, but nothing was delivered.[9]

12. By email on January 3, 2023, counsel for Mr. Learning again advised counsel for the Trustee that Mr. Learning would provide the Accounting that evening.[10]

13. On January 5, 2023, counsel for the Trustee received a document from counsel for Mr. Learning, which purported to satisfy Mr. Learning's obligations under the Accounting. That document consisted of a redacted excel spreadsheet listing excerpts from banking records without any explanation or other supporting documentation.[11]

14. Counsel for the Trustee advised counsel to Mr. Learning that this document did not satisfy Mr. Learning's obligations under the Accounting. Counsel to the Trustee also stated that the Trustee would be seeking an order to compel the production of documents from Mr. Learning.[12]

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[8] *Ibid* at para. 10, p. 15; Exhibit J – Overton Affidavit, Trustee's MR, Tab J, p. 72.

[9] *Ibid* at para. 11, p. 15; Exhibit K – Overton Affidavit, Trustee's MR, Tab K, p. 78.

[10] *Ibid* at para. 12, p. 15; Exhibit L – Overton Affidavit, Trustee's MR, Tab L, p. 81.

[11] *Ibid* at para. 14, p. 16; Exhibit N - Overton Affidavit, Trustee's MR, Tab N, p. 106.

[12] *Ibid*; Exhibit N - Overton Affidavit, *supra* note 11, p. 96.

The Trustee Receives Bank Statements

15. On February 5, 2023, counsel to Mr. Learning provided copies of Mr. Learning's bank statements to the Trustee (the "**Bank Statements**"). The Bank Statements were for two BMO bank accounts from the period of July 2020 until the end of August 2022. The Bank Statements did not include the statement for February 2022 for the BMO Account ending in 543.[13]

16. The Bank Statements contained no notes identifying payments to Mr. Learning from either of the Bankrupts and no notes identifying transactions reflecting Mr. Learning's investment with either of the Bankrupts.[14]

17. Other than the redacted spreadsheet received on January 5, 2023, and the Bank Statements received on February 5, 2023, no other banking records, receipts, or proof of transactions between Mr. Learning and any of the Bankrupts were provided.[15]

PART III - LAW & ISSUES

18. The issues to be determined on this motion are a) whether Mr. Learning is required to comply with the Undertaking; and (b) whether Mr. Learning is required to comply with the Production Notice.

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[13] *Ibid* at paras. 18 - 20, p. 17; Exhibit P – Overton Affidavit, Trustee's MR, Tab P, p. 114.

[14] *Ibid* at para. 21, p.17.

[15] *Ibid*.

A. Mr. Learning is Obligated to Produce the Accounting

(i) Undertaking Obligation

19. Under section 163 of the BIA, the Trustee has a *prima facie* right to examine a person described in that section and to require such person to produce any "books, documents, correspondence or papers" in their possession or power relating to the bankrupt's dealings or property.[16]

20. While section 163 of the BIA does not contain an internal timeline for answers to undertakings given on examination, the Court can draw guidance from the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules").[17]

21. Mr. Learning has an obligation to answer his Undertaking. "An undertaking is a promise to provide an answer."[18] For greater clarity, Rule 31.07(4) states that "nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking."[19]

22. Rule 31.07(1)(c) requires a person who undertakes to answer a question on examination for discovery to provide an answer within sixty days.[20] However, the examination of Mr. Learning was not an examination for discovery and nothing in the Rules precludes parties

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[16] *Trend International Tool Ltd. (Trustee of) v Wayne Forge Ltd.*, [1986] O.J. No. 2156 (Ont. Sup. Ct. [HCJ]) at para. 9.

[17] *Speedy Roofing Ltd., Re*, 1992 CarswellOnt 172 (Ont. Ct.J.[Gen. Div.], In Bankr.; Section 3, "Bankruptcy and Insolvency General Rules" C.R.C., c. 368.

[18] *Buttar v. Cheema*, 2021 ONSC 5504 (CanLII) ("***Cheema***") at para. 14.

[19] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*The Rules*] at R31.07(4).

[20] *Ibid* at R31.07(1)(c).

from agreeing to answer undertakings earlier than the sixty-day deadline, as Mr. Learning did when he agreed to answer the Undertaking within two weeks from the date of the examination.[21]

23. Mr. Learning was examined on October 11, 2022. As of the date of this Factum, Mr. Learning's Undertaking has remained unanswered for almost four months, well outside the two-week timeline he committed to at his examination and the sixty-day timeline stipulated under the Rules.

(ii) Production Notice Obligation

24. Pursuant to section 164 of the BIA, a trustee in bankruptcy may compel any person who it believes, or suspects, has records in their possession relating to a bankrupt, the bankrupt's dealings or property, to produce such records to the trustee within five days of receiving notice.[22] Section 164 applies even where the documents are the property of a person other than the bankrupt.[23]

25. Once the request under section 164 is made by a trustee in bankruptcy, there is an obligation to produce.[24]

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[21] Exhibit E – Overton Affidavit, *supra* note 6, p. 37.

[22] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 at s. 164; Overton Affidavit, *supra* note 5 at para. 10, p. 15.

[23] *Sun Squeeze Juices Inc., Re*, 1994 CanLII 7467 (ON SC) at para. 1.

[24] *Yellowstone Property Consultants Corp. v Abusalim*, 2013 ABQB 556 (CanLII) at para. 20.

26. The Trustee delivered the Production Notice to Mr. Learning on December 13, 2022.[25] Mr. Learning failed to produce all of the documents required under the Production Notice by December 20, 2022 or at all.

(iii) The Redacted Document does not Satisfy Mr. Learning's Obligations

27. Mr. Learning has failed to answer the Undertaking or comply with the Production Notice. The "Financial Analysis_Redacted" document delivered to the Trustee in no way satisfies Mr. Learning's obligations under the Accounting. Mr. Learning's obligations require him to produce actual copies of bank records, along with corresponding notes indicating the relevant transactions, not a brief excel spreadsheet containing specifically selected entries.

28. The Bank Statements provided to the Trustee on February 5, 2023, also do not fulfill Mr. Learning's obligation to deliver the Accounting. While part of the Accounting obligation included providing the Bank Statements, Mr. Learning has failed to:

(a) provide his bank statements from May 2020 to June 2020, and then again from September 2022 to October 11, 2022;

(b) provide his bank statements for February 2022 for the BMO account ending in 543;

(c) identify the transactions in his bank statements which purport to be payments to Mr. Learning from either of the Bankrupts;

(d) identify the transactions in those bank statements which purport to represent Mr. Learning's investment with either of the Bankrupts;

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[25] Overton Affidavit, *supra* note 5 at para. 10, p. 15; Exhibit J – Overton Affidavit, *supra* note 8, p. 72.

(e) provide an unredacted spreadsheet indicating all payee and payors along with the listing of all payments referred to in (c) and (d) above; and

(f) provide any other banking records, receipts, or proof of transaction (such as copies of wires, drafts, cheques etc.) between Mr. Learning and any of the Bankrupts.[26]

29. The Trustee has not relieved Mr. Learning of his obligations. Only the recipient of an undertaking can relieve the undertaking party from compliance.[27] Not only has the Trustee granted significant extensions and accommodations to Mr. Learning to facilitate production of the Accounting, but counsel to the Trustee also promptly advised counsel to Mr. Learning that the "Financial Analysis_Redacted" document and the Bank Statements were not acceptable and did not satisfy Mr. Learning's obligation to produce the Accounting.[28]

30. An undertaking is a promise that the Court enforces – the fact that an undertaking may be difficult to fulfill after the fact does not change the obligation it imposes.[29]

31. To date, Mr. Learning has not provided any reason that would absolve him of his obligations.

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[26] *Ibid* at para. 24, pp. 17 and 18; Exhibit R – Overton Affidavit, Trustee's MR, Tab R, p. 118.

[27] *Abbott-Fleming v Levesque*, 2022 ONSC 1568 (CanLII) at para. 9.

[28] Overton Affidavit, *supra* note 5 at paras. 14 and 24, pp. 16-18; Exhibits N and R – Overton Affidavit, *supra* notes 12 and 26, pp. 96 and 118.

[29] *Fyffe v Ontrac Equipment Services Inc.*, 2008 CanLII 48133 (Ont. S.C.) at para. 12.

32. Almost four months have passed since Mr. Learning provided the Undertaking, and almost two months have passed since the Production Notice was served. The Trustee has yet to receive documents adequately fulfilling all of Mr. Learning's obligations and an order for production is required.[30] If Mr. Learning had any intention of satisfying his obligations, he has had more than ample time to provide the required documentation to the Trustee.

B. The Trustee is Entitled to Investigate the Extent of Mr. Learning's Involvement with the Bankrupts

33. The Trustee requires the Accounting in order to fulfill its statutory duties, including gathering all funds and assets which belong to the Bankrupts' estates.

34. As part of the administration of the Bankrupts' estates, a Trustee has a duty and responsibility to pursue recovery of any property of the Bankrupts that has been misappropriated, misused or misapplied. If successful, the recovered property accrues to the benefit of the Bankrupts' creditors.[31]

35. The purpose of a section 163 examination is to provide the information a trustee needs to carry out its duty to administer a bankrupt's estate by collecting the property of the bankrupt and distributing proceeds to creditors.[32]

36. In order to properly investigate the transactions and facts relevant to the administration of the Bankrupts' estates, the Trustee must further investigate Mr. Learning's involvement

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[30] *Cheema*, *supra* note 20 at paras 8-10.

[31] *Principal Group Ltd. (Trustee of) v Principal Savings and Trust Co*., [1990] A.J. No. 907 (Ct. QB); Preliminary Report, *supra* note 4 at paras. 8 and 9, p. 124.

[32] *Rieger Printing Ink Co., Re*, 2009 CanLII 7766 (Ont. SCJ) at para.10.

with the Bankrupts' scheme and trace the flow of any funds or other property between Mr. Learning and the Bankrupts.

37. The Trustee requires unredacted copies of Mr. Learning's bank records, along with supporting information such as copies of wire transfers, cheques and bank drafts, to investigate the extent of Mr. Learning's potential profit from any transaction or investment with the Bankrupts and determine if there are any assets that rightfully belong to the Bankrupts' estates for the benefit of the various stakeholders.

PART IV - RELIEF REQUESTED

38. For the reasons set forth herein, the Trustee respectfully requests an Order:

(a) requiring Mr. Learning, within seven (7) days of the Order, to:

(i) deliver all of his bank statements from all of his bank accounts for the period June 2020 to October 31, 2022, to the Trustee to the extent not already delivered;

(ii) identify any and all transactions representing funds transferred to the Bankrupts or received from the Bankrupts in the statements referred to in (i) above;

(iii) deliver an unredacted copy of the document titled "Financial Analysis_Redacted", previously provided to the Trustee on January 5, 2023, which includes all payees and payors together with a listing of all payments to and/or from Mr. Learning relating to other parties' investments with the Bankrupts;

(iv) deliver all receipts and proof of transactions or investments between himself and the Bankrupts, including copies of wire transfers, bank drafts and cheques.

(b) directing the parties to reappear before this Court should Mr. Learning fail to provide the production described in (a)(i) to (iv) above for a contempt hearing pursuant to Rule 34.15(2) of the Rules, such hearing to be scheduled no later than fifteen (15) days after the deadline for such delivery;

(c) the costs of this motion on a full indemnity basis; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Trend International Tool Ltd. (Trustee of) v Wayne Forge Ltd.*, [1986] O.J. No. 2156 (Ont. Sup. Ct. [HCJ])
2. *Speedy Roofing Ltd., Re*, 1992 CarswellOnt 172 (Ont. Ct.J.[Gen. Div.]
3. *Buttar v Cheema*, 2021 ONSC 5504 (CanLII)
4. *Sun Squeeze Juices Inc., Re*, 1994 CanLII 7467 (ON SC)
5. *Yellowstone Property Consultants Corp. v Abusalim*, 2013 ABQB 556 (CanLII)
6. *Abbott-Fleming v Levesque*, 2022 ONSC 1568 (CanLII)
7. *Fyffe v Ontrac Equipment Services Inc.*, 2008 CanLII 48133 (Ont. S.C.)
8. *Principal Group Ltd. (Trustee of) v Principal Savings and Trust Co.*, [1990] A.J. No. 907 (Ct. QB)
9. *Rieger Printing Ink Co., Re*, 2009 CanLII 7766 (Ont. SCJ)

SCHEDULE "B"
RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Examination of bankrupt and others by trustee

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

Trustee may require books and property of bankrupt to be produced

164 (1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

Examination on failure to produce

(2) Where a person fails to produce a book, document or paper or to deliver property as required by this section within five days after being required to do so, the trustee may, without an order, examine the person before the registrar of the court or other authorized person concerning the property, book, document or paper that the person is supposed to possess.

Compelling attendance

(3) Any person referred to in subsection (1) may be compelled to attend and testify, and to produce on his examination any book, document or paper that under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as would apply to a bankrupt.

***Bankruptcy and Insolvency General Rules*, C.R.C., c. 368**

General

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Rules of Civil Procedure, R.R.O., Reg. 194

Failure to Answer Questions

31.07 (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,

(a) the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;

(b) the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or

(c) the party or other person undertakes to answer the question, but no answer is provided within 60 days after the response.

Effect of Failure to Answer

(2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may not introduce at the trial the information that was not provided, except with leave of the trial judge.

Additional Sanction

(3) The sanction provided by subrule (2) is in addition to the sanctions provided by rule 34.15 (sanctions for default in examination).

Obligatory Status of Undertakings

(4) For greater certainty, nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking.

Sanctions for Default or Misconduct by Person to be Examined

34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

(a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;

(b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;

(c) strike out all or part of the person's evidence, including any affidavit made by the person; and

(d) make such other order as is just. R.R.O. 1990, Reg. 194, r. 34.15 (1).

(2) Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person. R.R.O. 1990, Reg. 194, r. 34.15 (2).

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