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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

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

Respondent

FACTUM OF
GRANT THORNTON LIMITED,
(in its capacity as Receiver and Trustee)
(Hearing November 6, 2017)

October 19, 2017

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TO: **The Service List**

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PART I - OVERVIEW

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

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

3. The Ashburn Property is the former matrimonial home of Gary and his estranged wife, Aimee Bodimeade ("Aimee"). After purchasing the Ashburn Property in 2007, Gary and Aimee constructed a lavish new home, pool, RV garage, riding stable and barn at the Ashburn Property using Compuquest's funds. The Ashburn Property is the only meaningful asset available to satisfy the claims of Gary's and Compuquest's creditors.

4. The Receiver has sold the Ashburn Property for $3,470,000 and is holding the net proceeds of sale[1] pending determination of entitlement to the proceeds. The entitlement as between Aimee, the Trustee and the Receiver has been deferred pending completion of the Receiver's investigation. The sole issue for determination on November 6, 2016 is a claim by Dean Salem ("Salem") and Norris Technologies LLC ("Norris") to an "equitable mortgage" over the Ashburn Property.

5. Norris and Salem are unsecured creditors of Compuquest. As of December 31, 2015, Compuquest allegedly owed Norris and Salem USD $1,283,797.35.[2] These debts were not reflected in Compuquest's books.

6. Salem and Norris allege that they obtained an equitable mortgage over the Ashburn Property pursuant to a Revolving Line of Credit ("RLOC") Agreement signed by Gary on December 31, 2015 and by Aimee (modified version) on March 3, 2016.

[1] After discharge of a conventional first mortgage held by CIBC and the interim distribution of $500,000 to the Receiver of Compuquest and $250,000 to Aimee.
[2] Cross-examination of Dean Salem July 26, 2017.

7. The position of the Receiver and Trustee is that the purported secured claims of Salem and Norris have no merit. The RLOC Agreements do not meet the tests for an equitable mortgage, Salem and Norris do not have clean hands, and in any event the RLOC Agreements are void against the Trustee as fraudulent conveyances and/or preferences.

PART II - SUMMARY OF FACTS

CIBC Financing to Compuquest

8. Commencing in 2008, CIBC provided credit facilities to Compuquest and, later, 225. Gary on behalf of Compuquest executed a Security Agreement in favour of CIBC dated November 21, 2008.[3]

9. According to Compuquest's May 31, 2015 review engagement financial statements prepared by Alan Hogan ("Hogan") of Turner Moore LLP, Compuquest had $2,705,143 of accounts receivable and $2,397,177 of inventory as well as $432,618 of property, plant and equipment as of May 31, 2015.[4]

10. In February 2016, CIBC became concerned about the operation of Compuquest's account at CIBC. Among other things, CIBC's Fraud, Loss Prevention & Investigations department identified unusual activity in Compuquest's accounts, including circular cheque transactions with Salem. On February 25, 2016, management of Compuquest's accounts was transferred to CIBC's Special Loans department.[5]

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

11. On March 24, 2016, CIBC, through counsel, issued formal demand letters to Compuquest and Gary.[6]

12. On April 12, 2016, Gary/Compuquest consented to the appointment of GTL as consultant. GTL visited Compuquest's premises and discovered inventory on hand had a value of less than $50,000.[7]

13. On April 28, 2016, CIBC issued an Application Record to appoint GTL as Interim Receiver. GTL was appointed as Interim Receiver on April 29, 2016.[8]

14. On May 3, 2016, CIBC issued bankruptcy applications against each of Compuquest and Gary.[9]

15. On May 13, 2016, GTL issued its First Report as Interim Receiver. GTL reported that there had been limited business for several months, limited inventory and minimal accounts receivable. On May 17, 2016, by Order of Mr. Justice Newbould, GTL was appointed as Receiver of Compuquest and 225.[10]

16. On May 25, 2016, bankruptcy orders were issued against Compuquest and Gary. On June 1, 2016, GTL as Trustee registered Gary's bankruptcy order against the Ashburn Property.[11]

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[6] CIBC Application Record
[7] CIBC Application Record
[8] Second Report at paras. 62-63, Appendix 2
[9] Receiver's Second Report, Appendix 4
[10] CIBC Application Record; Receiver's Fifth Report, Appendix 12
[11] Receiver's Second Report, Appendices 4 and 15

17. The Receiver has been unable to collect any accounts receivable. The Receiver realized only $120,000.00 from an online auction that included all inventory, furniture and equipment of Compuquest.[12]

The Ashburn Property

18. On September 28, 2007, the Ashburn Property was purchased in Aimee's name for $638,000, using approximately $230,000 from sale proceeds of their former jointly-held home and mortgage financing from Bank of Nova Scotia ("BNS").[13]

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

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

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

(c) an outdoor pool with pool house;

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

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

(f) an approximately 2,400 square foot insulated hay/equipment barn.[14]

[12] Receiver's Second Report at paras. 56-57.
[13] Receiver's Second Report at paras. 14 and 20; Receiver's Third Report, Appendix 3; Affidavit of Aimee Bodimeade sworn January 6, 2017, para. 3, Exhibits A, B and D; Exhibit 1 to Aimee's January 13, 2017 cross-examination; Cross-examination of Gary January 13, 2017 at Q. 18

Gary's Criminal Past

20. In 1993, Gary was convicted of fraud.[15]

21. On or about September 12, 2005, Gary and his twin brother, Alan Bodimeade, were charged with defrauding Royal Bank of Canada ("RBC") between September 1, 2002 and April 30, 2004.[16]

22. On September 12, 2006, Gary pleaded guilty to laundering proceeds of crime contrary to the *Criminal Code of Canada* and received two years' probation.[17] While he was on probation for the money-laundering charge, Gary applied for and obtained a pardon in respect of his 1993 fraud conviction.[18]

23. Gary was also sued by RBC. He borrowed money from Aimee's father to settle the lawsuit.[19] Aimee knew that Gary had been arrested for fraud and money-laundering.[20]

The Receiver's Investigation

24. After its appointment, the Receiver identified a chain of emails dated April 6, 2016 between Gary, Aimee and Hogan (Compuquest's accountant), in which Gary admitted that "*everything*" was paid for with Compuquest funds.

25. The Receiver also found an email in Compuquest's records where Gary estimated the cost of the improvements to the Ashburn Property as $3,065,000.00.[21] As

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

a result of these improvements, the estimated value of the Ashburn Property as at April 11, 2016 was $3,700,000.[22]

26. The Receiver conducted an investigation into the use of Compuquest's funds during the period for which records were available from CIBC (after 2008). The Receiver traced approximately $1 million of Compuquest's funds during this time period (i.e. after 2008) directly into the Ashburn Property.[23]

27. The Receiver also identified many other suspicious payments and transactions.[24] The Receiver's investigation into the diversion of Compuquest's assets, including the use of funds to construct the Ashburn Property, is ongoing.[25]

GTL's Appointment as Receiver of the Ashburn Property

28. After learning of the diversion of Compuquest's funds into the Ashburn Property, CIBC brought a motion to appoint GTL as Receiver of the Ashburn Property. On January 25, 2017, Conway J. appointed GTL as Receiver of the Ashburn Property.[26]

29. Paragraph 11 of the Order provided that the Order was without prejudice to Aimee's or any other party's right to address distribution of funds on any motion to address approval of the sale of the Ashburn Property.

Issues with Salem and Norris

30. On December 31, 2015, Gary signed the RLOC Agreement.[27]

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[21] Receiver's Third Report at 24, Appendix 4.
[22] Receiver's Second Report at para 16, Appendix 9
[23] Receiver's Second Report; Receiver's Third Report, Appendix 5
[24] Receiver's Second Report at paras. 42-43, 65, Appendices 25, 34; Receiver's Third Report at paras. 8, 45, 47, 50-52, 61-63, Appendices 7, 9-11, 14 and 15
[25] Per the Order of Hainey J. dated February 21, 2017
[26] Order of Conway J. dated January 25, 2015

31. On February 4, 2016, Gary registered notice of his spousal interest on title to the Ashburn Property.[28] Gary's interest in the Ashburn Property has vested in the Trustee.[29]

32. In January and February 2016, Gary and Salem were involved in circular cheque transactions in Compuquest's USD CIBC accounts. CIBC became concerned and placed a hold on funds.[30]

33. In February 2016, Salem was coaching Gary on points he should make at an upcoming mediation with Aimee, to pressure her into signing the RLOC Agreement.[31]

34. On March 3, 2016, Aimee signed a modified form of RLOC Agreement, which was expressly limited by a side letter to "*Gary's share*" of the Ashburn Property (the "Side Letter"). Aimee refused to execute a mortgage as she did not agree to mortgage her interest in the Ashburn Property.[32]

35. The Side Letter stipulated that the proceeds of a 2014 King Aire motorhome (the "King Aire") would be divided between Gary and Aimee. Unbeknownst to Aimee (and CIBC), Gary had already made arrangements as of March 3, 2016 to sell the King Aire and give all the proceeds to Norris. On April 6, 2016, USD $255,881.77

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[27] Receiver's Second Report at Appendix 27.
[28] Receiver's Second Report at para. 13.
[29] Receiver's Third Report at paras 15-16.
[30] These activities are documented in the Receiver's Second, Third, Fifth, Sixth and Seventh Reports
[31] Exhibit "2" to Salem's cross-examination
[32] Receiver's Second Report, Appendix 28; Cross-examination of Aimee Bodimeade January 13, 2017 at Qs. 253, 263-265

from the sale of the King Aire was deposited into a newly opened account in Compuquest's name at TD Bank and wired to Norris.[33]

36. During April 2016, Salem was involved in strategy sessions with Gary's and Compuquest's lawyers at Fogler Rubinoff LLP. Salem was also coaching Gary on information he should provide to GTL. Among other things, Salem instructed Gary not to tell GTL anything about Norris.[34]

37. On May 5, 2016, a company called CQ2K Computer Sales Inc. ("CQ2K") was incorporated. Compuquest is carrying on the former business of Compuquest. Gary and the key employees of Compuquest are employed at CQ2K. Norris has been supplying product to CQ2K since its inception. The Receiver located a Sales Order issued by Norris to CQ2K on May 5, 2016, addressed to Gary's girlfriend's house.[35]

38. On May 18, 2016, Aird & Berlis LLP, lawyers for CIBC, wrote to Salem's real estate lawyer advising that CIBC had brought a bankruptcy application against Gary returnable on May 24, 2016 and that any attempt to encumber the Ashburn Property would be improper.[36]

39. In June 2016, Salem and Norris issued an Application against Aimee (the "Norris Application") and obtained an *ex parte* Certificate of Pending Litigation ("CPL") against the Ashburn Property.[37]

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[33] Receiver's Second Report, para. 52; Appendix 29
[34] Exhibits "3" - "5" to Salem's cross-examination
[35] Receiver's Fifth Report, paras. 66-69, Appendix 18; Receiver's Seventh Report, paras. 59-63, Appendix 3
[36] Affidavit of Dean Salem sworn July 20, 2017, Exhibit "F"
[37] Receiver's Second Report at paras. 27-28, Appendices 16-17

40. On July 29, 2016, Salem and Norris filed unsecured proofs of claim in each of Gary's and Compuquest's bankruptcies. Salem claimed USD$106,200.00 and Norris claimed USD $697,385.49.[38]

41. On August 12, 2016, Salem and Norris obtained an Order of Mr. Justice Glustein in the Norris Application, without notice to the Trustee or Receiver, authorizing them to register a mortgage against the Ashburn Property (the "Glustein Order"). They were unable to register the mortgage because Gary was required to sign as spouse but was unable to do so due to his bankruptcy.[39]

42. By Order of Hainey J. dated November 30, 2016, the Norris Application was transferred to the Commercial List, to be dealt with in conjunction with the receivership proceeding.[40]

The Receiver's Examination of Gary

43. On February 22, 2017, pursuant to an Order of Hainey J. dated February 21, 2017, the Receiver examined Gary in respect of the assets, operations and receivership of Compuquest and 225, the bankruptcies of Compuquest and Gary personally, the Ashburn Property and the Norris Application.[41]

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[38] Receiver's Second Report at para. 46, Appendix 26
[39] Receiver's Second Report at paras. 29-30, Appendix 18; Affidavit of Dean Salem sworn July 14, 2017, para. 46
[40] Now bearing Commercial List Court File No. CV-17-11698-00CL
[41] Order of Mr. Justice Hainey dated February 21, 2017

44. Gary admitted, among other things, that CIBC told him in February 2016 that they did not want his business and that Salem was aware of the conditions under which Aimee signed March 3, 2016 RLOC Agreement.[42]

Motion to Discharge the CPL and Glustein Order

45. On February 24, 2017, immediately following Gary's examination, the Receiver advised that it would be scheduling a motion to discharge the CPL and Glustein Order. The motion was scheduled for July 17, 2017.[43]

46. In the meantime, the Receiver entered into an agreement to sell the Ashburn Property. The Receiver served its Fifth Report dated June 19, 2017, seeking approval of the sale of the Ashburn Property, an Order discharging the CPL and Glustein Order and an Order dismissing the Norris Application.

47. On June 23, 2017, Salem and Norris resubmitted their claims as secured proofs of claim, claiming a mortgage over the Ashburn Property in priority to the interests of the Receiver and the Trustee.[44]

48. On June 27, 2017, Salem and Norris provided additional documents to the Receiver's counsel in support of their proofs of claim. The parties agreed that the validity of the secured proofs of claim would be determined on July 17, 2017 and that the validity and quantification of the unsecured claims would be deferred.[45]

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[42] Examination of Gary Bodimeade February 22, 2017, Qs. 981-1014
[43] Receiver's Fifth Report, Appendix 25
[44] Receiver's Sixth Report dated July 6, 2017, para. 20, Appendix 5
[45] Receiver's Sixth Report, paras. 22-24

49. On July 14, 2017, after an unsuccessful attempt to adjourn the Receiver's motion, Salem/Norris delivered a voluminous responding motion record.[46]

50. On July 17, 2017, Conway J. approved the sale of the Ashburn Property, discharged the CPL and Glustein Order on a without prejudice basis and adjourned the Receiver's motion to dismiss the Norris Application to August 10, 2017. On August 10, 2017, the motion was adjourned again by Lederman J. to a full-day hearing on November 6, 2017 due to the volume of material filed.[47]

PART III - STATEMENT OF ISSUES, LAW & ARGUMENT

The Receiver's Interest in the Norris Application

51. The Receiver sought to discharge the CPL and Glustein Order and dismiss the Norris Application so that it could negotiate a resolution of the respective interests of Aimee, the Trustee and the Receiver in the Ashburn Property prior to the sale of Ashburn Property.

52. Given that Salem and Norris were at best unsecured creditors in the estates of Gary and Compuquest, that Aimee's intentions were clearly expressed in the Side Letter and that Gary admitted on his examination that Salem knew of Aimee's conditions, the Receiver's motion should have been very straightforward.[48]

53. Instead, Salem and Norris delayed providing information requested by the Receiver/Trustee, reissued their claims as secured claims after being served with the

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[46] Salem/Norris Responding Motion Record
[47] Order and Endorsement of Conway J. dated July 17, 2017
[48] Receiver's Fifth Report, paras. 47-48, 98-105, 115, Appendices 25 (including February 24, 2017 email) and 27

Receiver's motion, delayed filing responding material, delivered a last-minute 1,900 page responding record on the day before the July 17, 2017 hearing, and then delivered a 55-page factum for the August 10, 2017 hearing. This resulted in the Receiver's motion being adjourned to a November 6, 2017.[49]

54. The sale of the Ashburn Property was scheduled to close on September 12, 2017. In light of the adjournment, the Receiver was required to negotiate an interim distribution of funds to Aimee in the amount of $250,000.00, without a prior determination of the claims of Salem and Norris. As such, the Receiver assumed the risk that Salem and Norris might be successful in the Norris Application and that the Receiver might be required to double-pay the distribution of funds to Aimee.[50]

Onus/Burden of Proof

55. As the applicants in the Norris Application, Salem and Norris bear the onus of establishing that they are entitled to an equitable mortgage over Aimee's interest (if any) in the Ashburn Property.[51]

56. The Receiver and Trustee are not parties to the Norris Application. Due to the last-minute filing by Salem and Norris of secured claims in the estates of Gary and Compuquest, it was agreed that the Receiver's motion would also be treated as an appeal from disallowance of the secured claims.

57. Contrary to this understanding, Salem/Norris then took the position in their factum for the August 10, 2017 hearing that the Trustee had elected not to disallow their

[49] Receiver's Eighth Report, paras. 25-32
[50] Receiver's Eighth Report, Order of Hainey J. dated August 23, 2017
[51] See *Honda of Canada Mfg. v Micro Focus (Canada),* 2015 ONSC 6264 (CanLII), Norris's Brief of Authorities, Tab 3, paras 16-17

secured claims and therefore that the onus was on the Trustee to establish that Salem and Norris are not secured creditors of Gary and Compuquest.

58. In light of this position, the Trustee has now delivered formal Notices of Disallowance dated September 13, 2017 and Salem/Norris have delivered appeals from disallowance. The parties have agreed that the appeals will be heard on November 6, 2017, together with the Receiver's motion. Salem/Norris bear the onus of proving that the Trustee erred in disallowing their secured claims.[52]

The Merits of the Norris Application

59. Salem and Norris did not obtain a registered mortgage over the Ashburn Property. Rather, they claim to be entitled to an "equitable mortgage" pursuant to the RLOC Agreements.

60. An equitable mortgage is based on the maxim that "equity looks on that as done which ought to be done". An equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.[53]

61. An equitable mortgage cannot be granted where to do so would contravene a statute.[54]

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[52] *DBCD Spadina Ltd et al v Norma Walton et al*, 2015 ONSC 5608 (CanLII), para. 2
[53] *Elias Markets Ltd*., Re, 2006 CanLII 31904 (ON CA), [2006] O.J. No. 3689 at paras. 63-65; *Ontario Securities Commission v Kotton*, 2017 ONSC 1379 (CanLII)
[54] *Elias Markets Ltd., Re*, 2006 CanLII 31904 (ON CA)

62. Pursuant to section 21 of the *Family Law Act*, no spouse shall dispose of or encumber an interest in a matrimonial home unless the other spouse joins in the instrument or consents.[55]

63. Aimee was the registered owner of the Ashburn Property. Gary could not mortgage the Ashburn Property by executing the RLOC Agreement. There is no evidence that Aimee consented to Gary mortgaging the Ashburn Property at the time.

64. There was no common intention by Aimee and Salem/Norris that Aimee would guarantee advances by Salem/Norris to Compuquest or that Aimee would mortgage her interest in the Ashburn Property to secure such advances.

65. The RLOC Agreement presented to Aimee contained the following language: "BORROWER guarantees this RLOC both personally and with all business inventory and assets owned by Compuquest 2000". The words "both personally and" were stroked out and initialled by Aimee. Aimee's understanding of the RLOC Agreement was set out in the Side Letter, which as indicated Gary emailed to Salem on March 3, 2016 before agreeing in writing to these conditions.[56]

66. Salem alleges that he did not read the Side Letter on March 3, 2016.[57] This is irrelevant. The onus is on Salem and Norris to establish a common intention to mortgage Aimee's interest in the Ashburn Property and they cannot do so. As such, they cannot meet the tests for an equitable mortgage.

[55] *Family Law Act* RSO 1990, c F.3, section 21
[56] Receiver's Fifth Report, paras. 98-105
[57] See Answers to Undertakings of Dean Salem

No Consideration

67. There was no consideration for the RLOC Agreements and the purported security granted to Salem/Norris thereunder. The exposure of Salem and Norris did not increase after December 31, 2015. To the contrary, the indebtedness declined by at least USD $480,000 after Gary executed the RLOC Agreement – without considering the fact that the Receiver has been unable to account for the product allegedly delivered by Norris after December 31, 2015.[58]

Material Non-Disclosure

68. An *ex parte* order including a CPL obtained without making full and fair disclosure of all material facts should be set aside.[59]

69. Salem and Norris failed to disclose very material facts in obtaining the *ex parte* Order for leave to register the CPL. Among other things, they failed to disclose the Side Letter, Salem's involvement in Gary's negotiations with Aimee and CIBC, the secret sale of the King Aire and diversion of the proceeds to Norris or the letter from CIBC's counsel dated May 18, 2016 expressly advising that it would be improper to encumber the Ashburn Property in the face of the bankruptcy applications.

70. Critically, Salem and Norris also did not disclose that they intended to claim priority over the rights of the Receiver and the Trustee in the Ashburn Property.

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

[59] Rule 39.01(6) of the Rules of Civil Procedure; *Ranger House Inc. et al v. Dash Domi et al,* 2013 ONSC 1154; *Levy v. Fitzgerald*, 2012 ONSC 2105 (CanLII)

71. As such, the CPL (and the subsequent Glustein Order) were properly discharged *with prejudice* to the rights of Salem and Norris to claim an interest in the proceeds of sale of the Ashburn Property. Salem and Norris are not entitled to an interest in land as a result of these improper *ex parte* registrations.

Clean Hands

72. As with any equitable relief, the party seeking such relief must come to court with "clean hands".[60]

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

74. Among other things, Salem obtained Aimee's signature on the RLOC Agreement by means of repeated pressure, threats and misrepresentations, without disclosing to Aimee that CIBC had pulled its loans, that Compuquest did not have the ability to repay its debt to CIBC and other creditors, and that they would be seeking to hold Aimee personally responsible for the entire indebtedness owing by Compuquest to Salem and Norris.

75. It appears that the Glustein Order may have been part of a strategy devised by Salem to defeat the interests of the Trustee in the Ashburn Property. In an email dated September 1, 2016, Salem wrote to Aimee:

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

> Regarding the trustees – they do not have the ability to help you in any way – financially or otherwise. The trustees have only 1 interest – to secure money for the bankruptcy. Every dollar they secure is 1 less dollar you and your family will receive. You can speak to them at your discretion, but I would not advise it. They have caused enough damage already. …
>
> Unfortunately, I do not have all the answers and I have to consult with my attorneys to devise the best strategy to move forward. I know and understand the situation and I have asked the questions to ask to get us there. As soon as I receive answers, we will be able to set a sound plan in motion.[61]

76. Neither Salem/Norris nor Aimee disclosed the Side Letter at the hearing to obtain the Glustein Order. The Receiver discovered the Side Letter through Gary's email records, including the fact that Gary had sent it to Salem on March 3, 2016.

77. Having coerced Aimee into signing the RLOC Agreement in the first place, obtained *ex parte* orders encumbering the Ashburn Property without making full and fair disclosure of material facts and engaged in the other activities detailed in the Receiver's reports, Salem and Norris cannot now rely on equitable principles to obtain priority over the interests of Aimee, the Receiver or the Trustee in the Ashburn Property.

Violation of the Stay of Proceedings

78. Paragraphs 9 and 10 of the Receivership Order provided as follows:

> 9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court …
>
> 10. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property are hereby stayed and suspended except with the written consent of the

[61] Affidavit of Aimee Bodimeade sworn June 20, 2017; Exhibit "H"

Receiver or leave of this Court …

79. On bankruptcy, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.[62]

80. Salem and Norris issued the Norris Application, obtained the CPL and obtained the Glustein Order after the Receiver was appointed, after the bankruptcies and in the face of express communication from CIBC counsel that it would be improper to mortgage the Ashburn Property given the then-pending bankruptcy proceedings.

81. Salem and Norris did not name Gary's estate, the Trustee or the Receiver as respondents in the Norris Application, did not seek priority for their purported "equitable mortgage" over the interests of the Trustee or the Receiver and did not file secured claims in the estates of Gary or Compuquest.

82. Having brought the proceeding without leave of the court and without notice to the Receiver or the Trustee, Salem and Norris cannot now claim that the court orders they obtained in the proceeding are binding on the Receiver or the Trustee or that the orders entitle them to an interest in the Ashburn Property in priority to the rights and interests of the Trustee or the Receiver.

The Secured Proofs of Claims

83. It is submitted that the secured proofs of claim fail for the same reasons that the Norris Application must be dismissed.

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[62] BIA, section 69.3(1)

84. In addition, even if Salem and Norris could establish that the combined effect of the RLOC Agreements executed by Gary on December 31, 2015 and Aimee on March 3, 2016 would, but for the insolvency, have been sufficient to support an equitable mortgage over the Ashburn Property, the mortgage would be void and unenforceable as a fraudulent conveyance, fraudulent preference and/or transfer at undervalue.

85. Every conveyance of real or personal property with the intent to defeat, hinder, delay or defraud creditors or others is void against such persons or their assigns.[63]

86. Every conveyance or transfer made by an insolvent person to a creditor with the intent to give such creditor an unjust preference over other creditors is void as against the other creditors.[64]

87. These provisions are remedial in nature and are to be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects.[65]

88. On bankruptcy, the Trustee is entitled to make use of the rights and remedies provided under provincial legislation, as well as the BIA provisions.[66]

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

89. Pursuant to the BIA, any transfer or payment made by an insolvent person to a creditor within three months before the date of the initial bankruptcy event is void against the trustee. This period is extended to one year if the debtor and creditor are not dealing at arm's length.[67]

90. If the transfer or payment has the effect of giving a creditor a preference it is presumed to have been made with a view to giving a preference absent evidence to the contrary, and evidence of pressure is not admissible to support the transaction.[68]

91. Every transfer at undervalue is void against the trustee if made within one year before the date of the initial bankruptcy event, if the parties were not dealing at arm's length or if the debtor was insolvent at the time and the debtor intended to defraud, defeat or delay a creditor.[69]

92. A finding of concurrent intent is not necessary in order to set aside a payment as a fraudulent preference under the BIA.[70]

93. The distribution of funds obtained under a preference claim is subject to the rights of secured creditors.[71]

94. The date of the initial bankruptcy event with respect to Gary and Compuquest is May 3, 2016, the date CIBC filed the bankruptcy applications.[72]

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[67] BIA, section 95(1)
[68] BIA, section 95(2)
[69] BIA, section 96
[70] *Hudson v. Benallack*, [1976] 2 SCR 168, 1975 CanLII 158 (SCC)
[71] *Tucker v. Aero Inventory (UK) Limited*, 2011 ONSC 4223 (CanLII)
[72] "*date of the initial bankruptcy event*, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be: … (d) the first application for a bankruptcy order against the person …"

95. Despite the voluminous material filed by Salem and Norris, there is not a shred of evidence that Gary executed a guarantee of Compuquest's debts to Salem and Norris prior to signing the RLOC Agreement on December 31, 2015.[73]

96. The evidence is overwhelming that both Gary and Compuquest were insolvent as of December 31, 2015. Gary's personal statement of affairs, which did not include either the BDC debt or the alleged indebtedness to Salem and Norris, reflected liabilities of $2,350,963.64.[74]

97. The Receiver recovered virtually nothing on Compuquest's assets. CIBC's secured debt alone is approximately $1.750 million. Gary's only material asset on his bankruptcy was his interest, if any, in the Ashburn Property.

98. There is also overwhelming evidence that Gary and Salem were not dealing with each other at arm's length. The circular cheque transactions, Salem's role as advisor to Gary and their apparent joint retainer of Fogler Rubinoff LLP in response to CIBC calling its loans are just some examples of non-arm's length dealings.

99. Salem and Norris were clearly aware of Compuquest's and Gary's insolvency. This is reflected in Salem's increasingly desperate attempts to obtain security over the Ashburn Property and other assets. It was a matter of public record that CIBC and BDC held security over Compuquest's assets. In the circumstances, if Salem did not know the state of Compuquest's finances, he should have known.

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

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

100. Given Compuquest's financial situation, Salem should not have been helping Compuquest to obtain overdrafts in the CIBC account, stall the appointment of GTL as consultant, run up Gary's Amex card to pay for shipments of product and sell assets outside the ordinary course of business.[75]

101. It is highly suspicious that Compuquest's inventory and accounts receivable seem to have vanished while Gary and Salem were engaged in circular cheque transactions, selling off assets to pay down the debt owing to Salem and Norris and stalling the appointment of GTL. Yet, just days after GTL was appointed as Interim Receiver, CQ2K was able to pay for product shipped by Norris to it on a COD basis.[76]

102. In any event, Gary's intention is the only governing intention. His intention to pay Salem and Norris in priority to CIBC, BDC, Amex and other creditors is patent. His motivation for doing so is clear. Not only did he and Salem have a close personal relationship, but Norris is now the principal supplier to Gary's new business venture, CQ2K, which commenced operations immediately after the appointment of GTL as Interim Receiver of Compuquest on April 29, 2016.

103. As such, the RLOC Agreement executed by Gary is void both under the provincial *Fraudulent Conveyances Act* and *Assignments and Preferences Act* and the preference and transfer at undervalue provisions of the BIA.

104. The RLOC Agreement executed by Aimee on March 3, 2016 cannot form the basis for an equitable mortgage over Gary's interest in the Ashburn Property. Even if Aimee had the legal capacity to encumber Gary's interests, which she did not, Aimee

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[75] Salem cross-examination, qs. 341-344, 367
[76] Affidavit of Dean Salem sworn July 20, 2017, Exhibit "F"

executed the RLOC Agreement just two months before the date of the initial bankruptcy event. The RLOC Agreement is void against the Trustee under section 95 of the BIA.

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

106. The Trustee has commenced separate proceedings challenging the preferential payments made to Salem and Norris after December 31, 2017. This will be scheduled after determination of the issues on November 6, 2017.

The Interests of the Receiver

107. The interests of Salem and Norris are, at best, only in respect of the interests of Aimee and/or Gary in the Ashburn Property.

108. The Receiver's investigation into the diversion of Compuquest funds to the Bodimeades and the Ashburn Property is incomplete. In the event that Salem and Norris are entitled to priority over Aimee's and/or Gary's interests, the distribution of proceeds will be subject to a determination of the Receiver's tracing rights on completion of the Receiver's investigation.

PART IV - ORDER REQUESTED

109. It is respectfully requested that both the Norris Application and the appeals from disallowance be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2017.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. North American Assurance Co.*, 1996 CanLII 219 (SCC), [1996] S.C.J. No. 17
2. *Cambone v Okoakih*, 2016 ONSC 792 (CanLII),
3. *Optical Recording Laboratories Inc. v. Digital Recording Corp*. (C.A.), 1990 CanLII 6672 (ON CA)
4. *Hudson v. Benallack*, [1976] 2 SCR 168, 1975 CanLII 158 (SCC)
5. *Tucker v. Aero Inventory (UK) Limited*, 2011 ONSC 4223 (CanLII)
6. *Elias Markets Ltd., Re,* 2006 CanLII 31904 (ON CA), [2006] O.J. No. 3689
7. *Ontario Securities Commission v Kotton,* 2017 ONSC 1379 (CanLII)
8. *Ranger House Inc. et al v. Dash Domi et al,* 2013 ONSC 1154
9. *Levy v. Fitzgerald*, 2012 ONSC 2105 (CanLII)
10. *Taylor v. Guindon,* 2005 CanLII 25894 (ON SC),
11. *Craiggs v. Owens*, 2012 BCSC 29 (CanLII)
12. *DBCD Spadina Ltd et al v Norma Walton et al*, 2015 ONSC 5608 (CanLII)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

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

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

4 *Family Law Act*, RSO 1990, c F.3, sections 14 and 21

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

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

Section 2

Where conveyances void as against creditors

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

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

Sections 4(1) and (2)

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

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

Unjust preferences

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

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

Section 69.3(1)

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

Section 95(1) and (2)

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Section 96

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

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

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

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

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

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

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

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

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

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

***Family Law Act*, RSO 1990, c F.3, sections 14 and 21**

Section 14

Presumptions

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

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

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

Alienation of matrimonial home

21 (1) No spouse shall dispose of or encumber an interest in a matrimonial home unless,

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) a court order has authorized the transaction or has released the property from the application of this Part; or

(d) the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled. R.S.O. 1990, c. F.3, s. 21 (1).

Setting aside transaction

(2) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 23, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home. R.S.O. 1990, c. F.3, s. 21 (2).

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

Rule 39.01(6)

Full and Fair Disclosure on Motion or Application Without Notice

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

B E T W E E N

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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