Court File No.: CV-12-9617-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

AND IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2819418 Ontario Inc, FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc. (collectively, the "Applicant" or "Applicants")

FACTUM OF 792873 ONTARIO LIMITED
c.o.b. as H&S EQUIPMENT
(Motion Returnable June 13, 2012)

June 4, 2012

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TO: **SERVICE LIST**

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FACTUM OF 792873 ONTARIO LIMITED
c.o.b. as H&S EQUIPMENT
(Motion Returnable June 13, 2012)

PART I - NATURE OF THE PROCEEDING AND OVERVIEW

1. 792873 Ontario Limited, c.o.b. as H&S Equipment ("H&S") seeks an order declaring that the First Leaside Expansion Limited Partnership ("FLEX") is holding a $100,000 "performance security" in trust for H&S and an order that FLEX pay the $100,000 to H&S.

2. H&S performed excavation services for FLEX at a property that was under construction. As a term of its contract, H&S was required to post a $100,000 "performance security", referred to hereafter as the "security". The security was to be held by FLEX pending 98% completion of H&S's work and then returned to H&S.

3. The security was never the property of FLEX. The express terms of the contract between the parties required that the security be held and then returned to H&S. H&S states that FLEX was a trustee holding the security in trust for H&S.

4. H&S states that there is no basis for FLEX to keep the security and states that it would be unjust for FLEX and its related companies and their creditors to benefit from H&S's security.

PART II - THE FACTS

A. BACKGROUND

5. H&S is an Ontario company that is in the business of providing erosion and sedimentation control, soil remediation, site services and excavation services.

> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 7, para. 2

6. On July 13, 2010, H&S contracted with FLEX to perform the above services on properties that were owned by entities related to FLEX (the "contract"). The properties were located in Uxbridge, Ontario.

> Contract dated July 13, 2010, Motion Record, Tab 2(A), p. 11
>
> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 7, para. 4

7. The contract price for H&S's services was $1,130,682 plus approved changes totaling $401,607.67 plus H.S.T. for a total of $1,731,487.33.

> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 7, para. 5;
>
> Contract dated July 13, 2010, Motion Record, Tab 2(A), p. 15

B. THE SECURITY DEPOSIT

8. It was a requirement of the contract that H&S provide FLEX with security, either in the form of a certified cheque or a letter of credit in the amount of $100,000. The contract states:

> "It is a condition of this Letter of Intent that 792873 Ontario Limited, carrying on business as H & S Equipment provides Performance Security in the form of a Certified Cheque or LoC [letter of credit] with a value of $100,000.00, made payable to the Owner, the cost of which is included in the value of this agreement. The Certified Cheque shall be returned when this contract reaches 98% completion."

Contract dated July 13, 2010, Motion Record, Tab 2(A), p. 47

9. H&S provided FLEX with the security by bank draft dated November 10, 2010 payable to FLEX in the amount of $100,000.

Bank draft dated November 10, 2010, Motion Record, Tab 2(B), p. 69

10. From July 21, 2010 to November 17, 2011, H&S provided the services required as set out in the contract.

Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 8, para. 10

C. FIRST LEASIDE VOLUNTARY CEASE TRADE

11. On or about November 17, 2011, H&S discovered that the First Leaside Group of Companies, for whom FLEX was overseeing the construction, had voluntarily ceased trading and stopped all construction. H&S learned from news reports that the Ontario Securities Commission ("OSC") had ordered a third party assessment of the viability of First Leaside and its investments.

Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 8, para. 11

12. As at the date First Leaside ceased trading, approximately 98% of the work that H&S was contracted to do for FLEX had been completed, and therefore the security should have been returned to H&S.

> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 8, para. 12

13. H&S retained the law offices of Wagner Sidlofsky LLP and registered construction liens against the properties for the balance of the monies owed to H&S including the security. The balance owing to H&S, including the $100,000, totals $364,028.23.

> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 8, para. 13;
>
> Construction liens, Motion Record, Tab 2(C), p. 70-75

D. MOTION TO PRESERVE PERFORMANCE SECURITY

14. H&S brought a motion to preserve the $100,000 security after it learned about the cease trade order. On January 31, 2012, counsel for H&S sought to clear return dates for the motion with counsel for FLEX. Counsel for FLEX indicated that she was unavailable until February 24, 2012.

> Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 9, para. 17-18;
>
> E-mail correspondence, Motion Record, Tab 2(E), p. 78-83

15. On February 2, 2012, FLEX's counsel was served with H&S's statement of claim in the construction lien action and the motion record to preserve the security returnable on February 24, 2012 (the first available date for FLEX's counsel).

Correspondence dated February 2, 2012, Motion Record, Tab 2(F), p. 84

16. On February 21, 2012, FLEX's counsel advised that there would be an application under the CCAA returnable February 23, 2012, the day before the return of H&S's preservation motion.

Correspondence dated February 21, 2012, Motion Record, Tab 2(H), p. 91

E. CCAA APPLICATION

17. On February 23, 2012, the Honourable Mr. Justice Brown granted a stay order sought by the applicants pursuant to the CCAA. The order permitted the applicants to restructure their business under the protection of the CCAA.

Order dated February 23, 2012, Motion Record, Tab 2(I), p. 94

18. Spreadsheets prepared and filed by the monitor in this proceeding disclose that FLEX is holding, as of April 2012, $777,093.70 in the bank account to which the H&S security would have been deposited.

Spreadsheet from the first report of the monitor, Motion Record, Tab 2(J), p. 116-117

19. H&S's evidence on the within motion is that it was always its understanding that the security would be held as trust funds by FLEX. The $100,000 was never FLEX's money and it never belonged to any of the other entities comprising the First Leaside Group of Companies.

Affidavit of Allen Waichenberg affirmed April 2, 2012, Motion Record, Tab 2, p. 10, para. 24

PART III - ISSUES AND THE LAW

A. SECURITY CONSTITUTES TRUST FUNDS

20. The evidence of H&S's representative is that H&S understood the security would be held in trust by FLEX. No evidence has been filed by anyone who negotiated the contract on behalf of FLEX or the First Leaside Group of companies as to their understanding of the agreement with H&S and how the security would be treated.

21. The contract itself contemplates that the actual certified cheque for the security amount would be returned to H&S upon 98% completion of the construction work. As such, the contract required FLEX to hold the cheque, not deposit it.

22. The uncontradicted evidence of H&S is that it completed approximately 98% of the work and was entitled to the return of the security prior to the CCAA order.

23. In *Howitt v. Howden* Madam Justice Weiler stated:

> Trust law requires that three "certainties" exist before a trust will be found. There must be certainty of intention to create a trust, certainty of subject matter in the sense that the subject matter is ascertained or ascertainable, and certainty as to the objects of the trust, namely the beneficiaries.
>
> *Howitt v. Howden Group Canada Ltd.,* 1999 CarswellOnt 659 (Ont. C.A.) at para. 8

24. It is not necessary for the word "trust" to be used to create a trust. As cited by Justice Newbould in *American Axle & Manufacturing* v. *Durable Release Coaters Ltd,:*

> "Equity is concerned with discovering the intention to create a trust; provided it can be established that the ***transferor*** had such an intention, a trust is set up." [emphasis added]

American Axle & Manufacturing v. *Durable Release Coaters Ltd,*
2010 CarswellOnt 3939 (Ont. S.C.J.) at para. 18

25. H&S is the transferor of the security. Its evidence is that it understood that the security would be held in trust. There is no evidence from the individuals at FLEX who negotiated the contract with H&S as to their understanding. As such, H&S's evidence concerning its intention is uncontradicted.

26. Further, H&S submits that the wording of the contract and the obligations it imposes on FLEX to return the certified cheque, rather than simply pay $100,000 to H&S, evidences the intention of the parties to create a trust.

27. With respect to the remaining certainties, the subject matter of the trust is clear – it is the $100,000 bank draft. The object of the trust is H&S itself, to which the bank draft was to be returned following 98% completion of the construction work.

28. As such, H&S submits that the certainties for creating a trust have been satisfied and that the security constitutes trust funds being held for H&S.

B. CONSTRUCTIVE TRUST

29. If the court determines that the certainties for creating an express trust have not been satisfied, H&S submits that a constructive trust ought to be imposed over the security in favour of H&S.

30. Permitting FLEX to retain the $100,000 security would constitute an unjust enrichment that warrants the imposition of a constructive trust in favour of H&S.

31. There are three basic requirements to establish an unjust enrichment:

a) an enrichment;

b) a corresponding deprivation; and

c) the absence of any juristic reason for the enrichment.

Garland v. *Consumers' Gas Co.,* 2004 CarswellOnt 1558 (S.C.C.) at para. 30

32. FLEX was enriched when it deposited the $100,000 bank draft from H&S into its general account. H&S suffered a corresponding deprivation.

33. With respect to the absence of juristic reason component, the Supreme Court of Canada in *Garland* v. *Consumers' Gas Co.* states:

> [T]he proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery... The established categories that can constitute juristic reasons include a contract [*Pettkus*], a disposition of law [*Pettkus*], a nonnative intent [*Peter*], and other valid common law, equitable or statutory obligations [*Peter*]. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

Garland v. *Consumers' Gas Co.,* supra at para. 44

34. It is submitted that there is no juristic reason for the enrichment of FLEX. The contract between H&S and FLEX required the security to be held and then returned to H&S when H&S's construction work was 98% complete. There was no provision, expectation or contemplation that FLEX would under any circumstances be able to keep the security for itself.

35. It is submitted that H&S has made out a *prima facie* case that there is an absence of juristic reason for FLEX to maintain the benefit. As such, the onus is on FLEX to prove otherwise and it has not done so.

36. Once unjust enrichment is found, the court must determine the appropriate remedy. It is submitted that a monetary award is not sufficient in these circumstances given the CCAA order and that as such, a constructive trust is the just and appropriate remedy.

37. There are no factors present that would render the imposition of a constructive trust unjust in this case.

C. EFFECT OF A TRUST

38. The effect of determining that the $100,000 security is being held in trust for H&S, either by an express or constructive trust, is to remove the security from the assets of FLEX and the applicants.

> Section 67(1)(a) of the *Bankruptcy and Insolvency Act*;
>
> Sections 2 and 19 of the *CCAA;*
>
> *Credifinance Securities Ltd., Re,* 2011 CarswellOnt 1218 (Ont. C.A.) at para. 41 and 44

D. EQUITY

39. The caselaw makes it clear that a trustee in bankruptcy or a receiver must act in an equitable manner.

40. The courts have stated that "The court will not allow the trustee, as an officer of the court, to stand on his legal rights if to do so would offend natural justice". Enriching creditors with a windfall and depriving another of its interest in property has been found to be an offence to natural justice.

> *Elez, Re*, 2010 CarswellOnt 874 (Ont. S.C.J.) at para. 14-15;
>
> *Greenstreet Management Inc., Re,* 2007 CarswellOnt 7514 (Ont. S.C.J.) at para. 18;
>
> *Credifinance*, supra at para. 38

41. It is submitted that the restructuring officer appointed by the court and acting under court supervision, as well as the applicants, are subject to the same considerations.

42. H&S states that it would be an offence to natural justice for FLEX and the applicants to use H&S's $100,000 security to enrich creditors and fund its restructuring.

E. EFFECT OF COMINGLING THE SECURITY

43. FLEX states in its affidavit that it comingled the security with its operating funds. H&S submits that such comingling should not and does not prohibit the court from granting an equitable order in favour of H&S.

44. A constructive trust may be imposed over comingled funds. There is also authority that any loss from a co-mingled account must be allocated first against the trustee's interest (in this case, FLEX).

> *Goodbody* v. *Bank of Montreal*, 1974 CarswellOnt 308 (Ontario Supreme Court) at para. 15-16;

Law Society of Upper Canada v. *Toronto Dominion Bank,* 1998 CarswellOnt 4757 (Ont. C.A.) at para. 47, 49;

Credifinance, supra at para. 36

45. H&S submits that this is an appropriate case to determine that FLEX holds the security in trust for H&S, either based on the principles of an express trust or a constructive trust.

46. FLEX and its related companies have no claim to the security. The security was never intended to be the property of FLEX and the contract did not ever contemplate the security being retained by FLEX. Further, there is no basis to enrich FLEX, its related companies or their creditors by giving them access to the security.

47. Should a trust be found or imposed in favour of H&S, H&S submits that the trust funds, the $100,000 security, ought to be released to H&S from the FLEX account in which the security was deposited.

PART IV - ORDER REQUESTED

48. 792873 Ontario Limited, c.o.b. as H&S Equipment respectfully requests an order:

a) declaring that the First Leaside Expansion Limited Partnership is holding the $100,000 performance security in trust for H&S;

b) an order that First Leaside Expansion Limited Partnership pay the $100,000 to H&S; and

c) costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Gregory M. Sidlofsky
Lawyers for 792873 Ontario Limited

SCHEDULE "A"

1. *Howitt v. Howden Group Canada Ltd.,* 1999 CarswellOnt 659 (Ont. C.A.)

2. *American Axle & Manufacturing* v. *Durable Release Coaters Ltd,* 2010 CarswellOnt 3939 (Ont. S.C.J.)

3. *Garland* v. *Consumers' Gas Co.,* 2004 CarswellOnt 1558 (S.C.C.)

4. *Credifinance Securities Ltd., Re,* 2011 CarswellOnt 1218 (Ont. C.A.)

5. *Elez, Re*, 2010 CarswellOnt 874 (Ont. S.C.J.)

6. *Greenstreet Management Inc., Re,* 2007 CarswellOnt 7514 (Ont. S.C.J.)

7. *Goodbody* v. *Bank of Montreal*, 1974 CarswellOnt 308 (Ontario Supreme Court)

8. *Law Society of Upper Canada* v. *Toronto Dominion Bank,* 1998 CarswellOnt 4757 (Ont. C.A.)

SCHEDULE "B"

Section 67(1)(a) of the *Bankruptcy and Insolvency Act*

Property of bankrupt

67. (1) The property of a bankrupt divisible among his creditors shall not Comprise

(*a*) property held by the bankrupt in trust for any other person;

Sections 2 and 19 of the *Companies' Creditors Arrangement Act*

Definitions

2. (1) In this Act,

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

Claims that may be dealt with by a compromise or arrangement

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(*a*) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(*b*) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(*c*) any debt or liability arising out of fraud, embezzlement, ***misappropriation*** or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(*d*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(*e*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*d*).

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Proceedings commenced at Toronto

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