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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:
(Court Seal)

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

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

Respondents

FACTUM OF THE RESPONDENTS DEAN SALEM AND NORRIS TECHNOLOGIES LLC

August 3, 2017

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I OVERVIEW

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

2. This case concerns a straight forward issue: do Norris Technologies LLC ("**Norris**") and its principal, Dean Salem, hold a mortgage against the matrimonial home of the individual bankrupt, Gary Bodimeade ("**Mr. Bodimeade**") and his spouse, Aimee Bodimeade ("**Mrs. Bodimeade**")?

3. This issue has been unduly complicated by uninformed and unfounded allegations made by Grant Thornton Limited (the "**receiver**" or the "**trustee**") against Norris and Dean Salem. These allegations are based on the receiver and trustee's fundamental misunderstanding of the off-lease computer business and transaction financing, and the trustee's lack of thoroughness

in conducting their review and investigation of the myriad documents evidencing the transactions between Norris and the corporate bankrupt, 1299746 Ontario Inc. o/a Compuquest2000 ("**Compuquest**").

4. Norris is one of the leading refurbishers of computers in the United States, the largest Microsoft authorized refurbisher in the world, and a large player in the off-lease computer resale business both as a reseller of computer equipment and as a broker for other resellers.

5. Norris was the key supplier to Compuquest of off-lease computers and equipment. Norris brokered sales of computer equipment to Compuquest for resale in the ordinary course of business and in the same manner in which it dealt with its other resellers. Contrary to allegations made by the receiver and trustee, Norris and Dean Salem were never involved in suspicious, questionable, or voidable preferential transactions with Compuquest or Mr. Bodimeade.

6. Norris brokered sales of off-lease computers of Compuquest and other resellers, and continues to conduct this business, as follows:

   a. Norris is advised that a manufacturer like Hewlett Packard ("**HP**") has off-lease computers to sell;
   b. Norris contacts a reseller, like Compuquest, who expresses an interest in bidding on the HP computers, and Norris bids on the computers based on the bid proposed by the reseller;

c. if HP accepts the bid, Norris purchases the computers and the reseller purchases them from Norris;

d. the reseller takes delivery of the computers directly from the manufacturer and makes all the shipping, delivery, and customs arrangements. Norris does not actually see or physically handle the computers purchased by a reseller, and is not involved with or copied on the shipping or customs documents prepared by the reseller;

e. the resale transaction may be financed through "transaction financing" which involves a loan by Norris to a reseller like Compuquest, and repayment of the loan once the reseller actually resells the computers to an end user, generally within a few days and sometimes as long as a few weeks. This involves exchanges of cheques between Norris and the reseller which are deposited and withdrawn within a few days to bridge the period between the purchase and sale;

f. Norris profits from resale transactions through the margin on the resale and the interest charged on the transaction financing.

7. Extensive documents, including spread sheets, shipping documents, purchase orders, sales orders, wire transfers, deposit slips, emails and text messages, provided to the receiver either prior to or as part of this proceeding, confirm the resale transactions between Norris and Compuquest, the delivery of off-lease computers to Compuquest, and the transaction financing provided by Norris to Compuquest. The receiver has dismissed these documents out of hand without explanation or thorough investigation.

8. The manner in which Norris conducted business with Compuquest, and the transaction financing arrangements between them, are no different from Norris' broker type relationships with other resellers in the off-lease computer equipment industry. Affidavit evidence from another of Norris' customers filed on this application underscores the ordinariness of the business relationship between Norris and Compuquest in this industry.

9. In January 2011, the Bodimeade's personal assets, including their matrimonial home at 7472 Ashburn Road, Whitby, Ontario registered in the name of Mrs. Bodimeade (the "**Property**"), were pledged to Norris and Dean Salem as security for a revolving line of credit (the "**RLOC**") necessary to enable Compuquest to purchase off-lease computer equipment from Norris.

10. In December 2015, due to matrimonial difficulties between the Bodimeades, Norris required that the January 2011 agreement be memorialized in writing and that security be registered against the Property. An agreement memorializing the January 11, 2011, pledge of security over the Property was signed by Mr. Bodimeade on December 31, 2015 *well before* his bankruptcy. A similar agreement dated as of December 31, 2015 was signed by Mrs. Bodimeade in March 2016, and Mrs. Bodimeade *never went bankrupt*. These agreements are the basis for Norris and Dean Salem's claim for a mortgage against the Property (the "**Mortgage**").

11. Neither Mr. nor Mrs. Bodimeade registered the Mortgage against title to the Property as they had contracted to do. However, pursuant to the Mortgage, Norris and Dean Salem are

entitled to an equitable mortgage against the Property and were therefore secured creditors of Compuquest and of Mr. and Mrs. Bodimeade prior to CIBC petitioning Mr. Bodimeade and Compuquest into bankruptcy in May 2016. As of the date of bankruptcy, the outstanding balance owing to Dean Salem and Norris by Compuquest was in excess of $800,000 USD.

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

13. In this proceeding the receiver and trustee seeks an order discharging both the CPL and the Glustein Order; approval of an agreement of purchase and sale to sell the Property; possession of the Property and a vesting and sealing order pending closing; and dismissal of the Application and denial of Norris and Dean Salem's claim under the Mortgage.

14. Norris and Dean Salem have consented to an order discharging the CPL and the Glustein Order from title to the Property, on a without prejudice basis, to facilitate the sale. Dean Salem and Norris seek an order in this proceeding declaring their security under the Mortgage for the full amount of the indebtedness owed by Compuquest to Norris and Dean Salem, in excess of $800,000 USD.

II THE FACTS

Dean Salem's Relationship with Gary Bodimeade

15. Dean Salem resides in Campbell, Tennessee and is the CEO of Norris, a Tennessee corporation. Norris is an asset management company in the business of redeploying and remarketing personal computers, laptops, and workstations once their lease has expired.[1] Norris is a very large player in the computer refurbishment and resale business. In particular Norris:

    a. employs 55 employees;
    b. has earned between 30 and 40 million dollars in revenue per year for each of the last three years;
    c. is the largest Microsoft Authorized Computer Refurbisher in the world;
    d. is one of the 3 top refurbishers of computers in the United States; and
    e. one of HP and Dell's top 3 vendors of excess and off-lease computers in the United States.[2]

16. The large players in the computer resale market mainly source their product from large computer manufacturers like HP and Dell, which have leasing divisions, and therefore have computers to resell once a lease ends.[3]

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[1] Responding Motion Record of Dean Salem and Norris Technologies LLC [**Salem Motion Record**], Volume 1, Affidavit of Dean Salem sworn July 14, 2017 [**Salem Affidavit**], Tab 1, para 3.
[2] Supplementary Salem Motion Record, Affidavit of Dean Salem, sworn July 20, 2017 [**Second Salem Affidavit**], Tab 1, para 17; Affidavit of Michael Spero, sworn July 20, 2017 [**Spero Affidavit**], Tab 2, para 2; Affidavit of Connie Teodorescu, sworn July 20, 2017, Tab 3, para 2 [**Teodorescu Affidavit**].
[3] Salem Motion Record, Salem Affidavit, Tab 1, paras 5 and 7.

17. Compuquest was also in the business of off-lease computer equipment resale and refurbishment.[4] Mr. Bodimeade, principal of Compuquest, started doing business with Norris in 2003, and met Dean Salem through his dealings with Norris.

Off-Lease Resale Business

18. When computer equipment comes off-lease from companies, such as accounting firms or design firms, the manufacturer of the equipment sells it to a resale and refurbishment business, such as Norris, who, in turn, resells the refurbished equipment to an end user. It is a high volume, low margin business.[5]

19. The key to success in this industry is turning orders over quickly and minimizing overhead, particularly shipping and freight costs.[6]

20. As a major player in the industry, Norris can secure a significant share of a manufacturers' off-lease equipment. Norris often sells this off-lease equipment directly to end users. When Norris does not have an end-user to sell the equipment to, Norris tries to broker a sale of the equipment to a smaller reseller, such as Compuquest, who in turn resells the equipment to an end user.[7] Sales to smaller resellers like Compuquest are not as profitable for Norris because the reseller takes part of the margin.[8]

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[4] Salem Motion Record, Salem Affidavit, Tab 1, para 3.
[5] Salem Motion Record, Salem Affidavit, Tab 1, para 7.
[6] Salem Motion Record, Salem Affidavit, Tab 1, para 7.
[7] Salem Motion Record, Salem Affidavit, Tab 1, para 8.
[8] Salem Motion Record, Salem Affidavit, Tab 1, para 8.

21. Since computer equipment declines in value as the units become older and obsolete, moving product quickly is of paramount importance. Moving product quickly also keeps the manufacturers happy because they want to reduce their off-lease inventory which is becoming obsolete.[9]

General Purchase Structure

22. The transactions which Norris brokers for smaller resellers like Compuquest have a particular structure which has evolved to serve the specific needs of the computer resale business.[10]

23. When a vendor like HP or Dell has off-lease computer equipment to sell, Norris contacts a reseller, like Compuquest, to determine their interest in the equipment. Compuquest would respond with a bid for the amount they are prepared to pay for the equipment. Norris communicates the bid to the vendor. If the bid is accepted Norris completes the sale with the vendor and resells the computers to Compuquest. This results in a either a purchase order by Compuquest or an exchange of emails evidencing the transaction.[11]

24. Norris' transactions with Compuquest and other resellers were often acknowledged verbally or electronically during the negotiation process, without a formal purchase order, because there is degree of informality between Norris and resellers with whom Norris deals on a regular basis. Norris has produced numerous purchase orders from Compuquest to Norris where they are available.[12] At the end of its operations, in particular, Compuquest was less

[9] Salem Motion Record, Salem Affidavit, Tab 1, para 8.
[10] Salem Motion Record, Salem Affidavit, Tab 1, paras 9-10.
[11] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, paras 11-12.
[12] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 10, Exhibit B.

diligent about keeping up with its paperwork.[13] Where the order was made verbally, Norris has produced the emails confirming the purchase and shipping documents showing that the computers were delivered to Compuquest.[14]

25. Computers purchased by Norris for resale to a reseller are "drop shipped" from the vendor (like HP or Dell) directly to the reseller. Drop shipping is a trade term which means that purchased goods are delivered from a manufacturer directly to a reseller or end user without going through the usual distribution channels. Drop shipping is used to save money on freight since most transactions are done on very low profit margins.[15] Consequently, Norris never took delivery of product sold to Compuquest. Computers purchased by Compuquest were delivered directly to Compuquest or to a location indicated by Compuquest, without Norris or Salem's knowledge or involvement.

26. Compuquest arranged to transport off-lease computers purchased from Norris through their own freight forwarding companies. Compuquest generally used freight forwarding companies in the Toronto area because regional freight companies offer the best terms to customers in their home region.[16]

27. Norris generated a bill of lading which described the shipment as a "Blind Shipment" which is a shipment where one or more parties to the shipment do not know the identity of the shipper, receiver, or both. In other words, they are in "the blind". Blind Shipments are used

[13] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 12; Gary Bodimeade Examination, p. 212-213.
[14] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 10, Exhibit C.
[15] Salem Motion Record, Salem Affidavit, Tab 1, para 9.
[16] Salem Motion Record, Salem Affidavit, Tab 1, para 9.

to protect confidential client information. By using a blind shipment a wholesaler can protect the identity of their customers so that the vendor of the product cannot sell directly to the wholesaler's customers and cut the wholesaler out of future transactions.[17]

28. In order to ship blind, the shipment must be prepaid and Blind Shipment service requested prior to the freight pickup.[18]

29. Information concerning the specific payment and shipping arrangements for each of Norris' vendors, including HP and Dell, is set out in Dean Salem's affidavit at paragraphs 12 through 16.[19]

30. Most purchases by Compuquest from Norris were completed by Blind Shipment. Occasionally Compuquest made purchases from Norris' inventory.[20]

31. Norris has filed hundreds of pages of supporting documents including instant messages setting out available lots from vendors and bid prices, emails from Compuquest organizing pick-up and delivery of the computers, and corresponding purchase orders, sales orders, wire confirmations and bills of lading, all of which document and confirm these transactions.[21]

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[17] Salem Motion Record, Salem Affidavit, Tab 1, para 10.
[18] Salem Motion Record, Salem Affidavit, Tab 1, para 10.
[19] Salem Motion Record, Salem Affidavit, Tab 1, paras 12-16.
[20] Salem Motion Record, Salem Affidavit, Tab 1, para 11.
[21] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 13.

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

i. Transaction Financing

32. Compuquest started doing business with Norris in 2003.[22] After Compuquest's contact at HP was terminated in late 2013, the volume increased because Norris started selling HP product to Compuquest.[23]

33. In order to facilitate the business, Norris made transaction loans to Compuquest whereby Compuquest would borrow money from Norris in order to purchase off-lease computers, then repay the loan when the computers from that transaction were sold. Compuquest generally repaid transaction loans within a few days and sometimes a few weeks.[24] Details of the transaction financing provided by Norris to Compuquest and to other resellers is more fully set out in paragraph 112(f) of Dean Salem's affidavit and in the section of this factum dealing with the receivers allegations of misconduct.[25]

34. Transaction loans are a common business practice in the computer resale business and a practice Norris used with other resellers including CDM Technologies,[26]and Memory Dogg

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[22] Salem Motion Record, Salem Affidavit, Tab 1, para 17.
[23] Salem Motion Record, Salem Affidavit, Tab 1, para 112(e).
[24] Salem Motion Record, Salem Affidavit, Tab 1, paragraph 17.
[25] Salem Motion Record, Salem Affidavit, Tab 1, paragraph 112(f).
[26] Salem Motion Record, Salem Affidavit, Tab 1, paragraph 112(f)(i)(E), Exhibit EEE.

Inc.[27]

35. Transaction financing is used in other industries as well. Many car manufacturers have financing divisions whereby they lend money to consumers to buy their cars, and generate a profit on the repayment of the loan. Most department stores do the same thing.[28]

ii. Revolving Line of Credit granted to Compuquest

36. In January 2011, Norris and Dean Salem agreed to provide a revolving line of credit to Compuquest in cash and equipment in an amount up to $1,500,000 (the "**RLOC**") in order to fund the transaction financing. In return for providing the RLOC, Mr. Bodimeade agreed that:
    a. he would be personally responsible for the debt;
    b. he would guarantee the debt;
    c. personal assets owned by Mr. and Mrs. Bodimeade would be pledged as security for the RLOC; and
    d. the pledged assets would include the Property, against which the Mortgage would be registered in favour of Dean Salem and Norris; [29]

37. When the RLOC was granted in January 2011, Mr. and Mrs. Bodimeade were happily married, both principals of Compuquest, and the business appeared to be doing very well.

[27] Salem Motion Record, Affidavit of David Galnick, **[Galnick Affidavit]**, Tab 1, paras 2-5; Salem Affidavit, paragraph 112(f)(i)(F), Exhibit FFF.
[28] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 28.
[29] Salem Motion Record, Salem Affidavit, Tab 1, para 18.

Having conducted business with Compuquest and Mr. Bodimeade for approximately ten years at this point, Dean Salem trusted Mr. Bodimeade and consequently was not concerned about formalizing the RLOC into a written agreement at that time.[30]

iii. Written Memorialization of the RLOC

38. In July 2015, Mr. Bodimeade advised Dean Salem that his marriage to Mrs. Bodimeade was failing as Mrs. Bodimeade was having an affair with her horse stable employee. In September 2015, Mrs. Bodimeade announced that she wanted a divorce.[31]

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

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

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[30] Salem Motion Record, Salem Affidavit, Tab 1, para 19.
[31] Salem Motion Record, Salem Affidavit, Tab 1, para 20.
[32] Salem Motion Record, Salem Affidavit, Tab 1, para 20, Exhibit A.
[33] Salem Motion Record, Salem Affidavit, Tab 1, para 21.

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

42. The only way that Dean Salem and Norris would continue in business with Compuquest was to obtain a signed RLOC Agreement and to get the security registered. Once Mr. Bodimeade's RLOC Agreement was executed, Dean Salem felt comfortable enough to continue to supply product and carry on business in the ordinary course. In fact, Norris continued to supply product and receive payment on account of product, in the same manner it had previously, until March 2016.[35]

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

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

   b. Mr. Bodimeade and Compuquest agreed to secure their obligation to pay the RLOC with the equity available in certain personal property and real property as detailed in Mr. Bodimeade's RLOC Agreement, including the Mortgage against the Property;

[34] Salem Motion Record, Salem Affidavit, Tab 1, paras 21-22, Exhibit B.
[35] Salem Motion Record, Salem Affidavit, Tab 1, para 21.

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

d. Mr. Bodimeade certified that all assets identified were part of his marital estate and that he was a 50% owner of all assets including the Property;

e. Mr. Bodimeade and Compuquest agreed to, at their expense, legally formalize in Canada, the Mortgage in favour of Norris and Dean Salem; and

f. Mr. Bodimeade and Compuquest guaranteed the RLOC personally and with all business inventory and assets owned by Compuquest.[36]

iv. Mrs. Bodimeade's RLOC

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

> Aimee,
>
> I apologize for having to introduce myself in this manner, however, I am forced due to circumstance. I am not sure what you know of my relationship with Gary and Compuquest 2000 (C2K), so, at the risk of redundancy, I will give you some background. I have worked with Gary and C2K for 15+ years. My company, Norris Technologies, LLC, has been a supplier for C2K for most of those years. In 2010, I also began personally financing transaction for C2K at Gary's request. As you may or may not be aware, in December 2013 and January 2014, C2K faced a major tax issue and expulsion from HP which, had I not stepped in, would have bankrupted the company- everything would have been lost. For the last 2 years, I have worked closely and diligently with Gary to rebuild C2K.

[36] Salem Motion Record, Salem Affidavit, Tab 1, para 22(f).

> Most of what Gary and I have accomplished has been on our relationship and our word. However, with the personal turmoil your family is experiencing, I can no longer rely on Gary's word, particularly in light of the fact that you are half owner in C2K and the marital assets Gary has always offered as security for our financial arrangements. With those personal assurances in jeopardy, it is necessary to formalize our line of credit to secure my investments in C2K. The purpose of Gary's visit to TN [Tennessee] was to execute a formal legal agreement to protect my position (see attached).
>
> **Due to your position with C2K and your ownership in the marital assets, I will need for you to also execute a formal legal agreement to protect my position and keep the line of credit and the HP product flow open. My goal is to keep C2K's business operating**, protect my investment and not become embroiled in any disagreement in your family. I have also attached a formal legal agreement in your name, identical to the agreement Gary executed. Please review the document and reply with any questions or concerns. We will need to execute the agreement before the end of the month. I am looking at visiting the week of the 18th, or you are certainly welcome to come to TN- please confirm this timeline works for you...[37] [emphasis added]

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

> ...I require a very reasonable level of security to keep our line of credit and vendor relationship with Compuquest 2000 open...with a contested divorce in the process, I do not care to be caught in the middle with no security... I have already sold Compuquest's orders for Feb to date ($630,000 in revenue) to other customers. I will not do business with Compuquest until the line is paid off- currently $857,927.40...[39]

[37] Salem Motion Record, Salem Affidavit, Tab 1, para 23, Exhibit C.
[38] Salem Motion Record, Salem Affidavit, Tab 1, paras 25, Exhibit D.
[39] Salem Motion Record, Salem Affidavit, Tab 1, paras 25, Exhibit E.

46. Mrs. Bodimeade swears in her affidavit that she entered into a mediation process with Mr. Bodimeade to resolve their matrimonial issues.[40] Neither Dean Salem nor Norris had notice of or were parties to these discussions, nor did they agree to their terms or to be bound by them.[41]

47. In her affidavit, Mrs. Bodimeade details discussions she had with Mr. Bodimeade whereby they negotiated the allocation of risk under the RLOC as between them.[42] Neither Dean Salem nor Norris had notice of or were parties to these negotiations. Any agreement struck between Mr. Bodimeade and Mrs. Bodimeade regarding their respective assets and liabilities is an issue between them in the matrimonial proceeding.[43]

48. Dean Salem's concern during this time was to ensure that Mrs. Bodimeade executed the RLOC, as Mr. Bodimeade had, and that it was registered on title to the Property in accordance with its terms. As explained in the January 5, 2016 email to Mrs. Bodimeade quoted above, Dean Salem and Norris required the RLOC to continue doing business with Mr. Bodimeade. Norris continued to sell off-lease computers to Compuquest and do business with Compuquest up until Compuquest was petitioned into bankruptcy only because Dean Salem believed that he and Norris held the Mortgage and security over other assets referred to in the RLOC Agreement. Compuquest continued to pay Norris on the line of credit in the ordinary course of business.[44]

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[40] Affidavit of Aimee Bodimeade sworn June 20, 2017 [**Aimee's Affidavit**], para 8.
[41] Salem Motion Record, Salem Affidavit, Tab 1, para 26.
[42] Aimee's Affidavit, paras 10-14.
[43] Salem Motion Record, Salem Affidavit, Tab 1, para 27.
[44] Salem Motion Record, Salem Affidavit, Tab 1, para 28.

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

> The Promissory Note states that the proceeds of sale of the assets will be paid to the line of credit. This is not the agreement between the parties. They have agreed that the proceeds of sale of the King Aire RV will be shared equally between the two of them. Aimee will not agree to the sale of the King Aire if the proceeds are not divided between them equally.
>
> The Promissory Note limited the collateral of the home to one million dollars but does not specify that this is from Gary's share of the home, and that Aimee's share of the home will not be used as collateral.
>
> Aimee's liability under the Promissory Note shall be limited to the assets specifically listed as collateral in the Promissory Note, and the inventory and assets of Compuquest 2000.[45]

50. Dean Salem had no notice of and was not a party to the discussions referenced in the March 3, 2016, email nor did he agree in writing or otherwise to be bound by the terms set out in this email.[46]

51. While Mr. Bodimeade and Mrs. Bodimeade may have agreed between themselves that the Mortgage against the Property be against Gary's share of the Property alone, neither Dean Salem nor Norris ever agreed to those terms, and the RLOC agreement ultimately signed by Mrs. Bodimeade does not reflect those terms. Mrs. Bodimeade, together with her counsel,

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[45] Salem Motion Record, Salem Affidavit, Tab 1, para 29, Exhibit F.

[46] Salem Motion Record, Salem Affidavit, Tab 1, para 30; Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 8.

made four modifications to the RLOC agreement and returned a copy to Dean Salem. *None of these modifications* limited the Mortgage to Mr. Bodimeade's half interest.[47]

52. On March 3, 2016, Dean Salem received a second email from Mr. Bodimeade forwarding a copy of the RLOC Agreement which was dated *December 31, 2015*, as amended and executed by Mrs. Bodimeade with the advice of her counsel. Mrs. Bodimeade's counsel, Andrea Robertson, acted as commissioner witnessing Mrs. Bodimeade's signature ("**Mrs. Bodimeade's RLOC Agreement**").[48]

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

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

    b. Mrs. Bodimeade and Compuquest agreed to secure their obligation to pay the RLOC with the equity available in certain personal property and real property owned by Mrs. Bodimeade and Compuquest, including the Mortgage against the Property;

[47] Salem Motion Record, Salem Affidavit, Tab 1, para 31.
[48] Salem Motion Record, Salem Affidavit, Tab 1, para 34, Exhibit G.

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

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

e. Mrs. Bodimeade and Compuquest agreed to, at their expense, legally formalize in Canada, the Mortgage in favour of Norris and Dean Salem in the 2nd secured position; and

f. Mrs. Bodimeade and Compuquest guaranteed the RLOC with all business inventory and assets owned by Compuquest.[49]

54. Significantly, Mrs. Bodimeade's RLOC Agreement was amended by Mrs. Bodimeade and her counsel in four separate places, none of which had the effect of limiting the Mortgage on the Property to Mr. Bodimeade's half interest. In fact, one amendment specifically changes the words *"his obligation "* to the words *"her obligation"* to pay the RLOC with respect to any and all equity in a number of assets including the Property.[50]

Efforts to Keep Compuquest in Business

55. Since Norris was Compuquest's key supplier and their continued relationship was necessary to Compuquest's survival, in February 2016, Mr. Bodimeade made every attempt to reduce

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[49] Salem Motion Record, Salem Affidavit, Tab 1, para 35, Exhibit G.
[50] Salem Motion Record, Salem Affidavit, Tab 1, para 36, Exhibit G.

the balance owing on the RLOC in order to ensure that Compuquest would continue to receive product from Norris. To this end, Mr. Bodimeade used his Amex card to make payments to Norris to reduce the balance on the RLOC. These Amex payments were disclosed on spreadsheets provided by Norris to the receiver.[51]

56. On March 15, 2016, Mr. Bodimeade flew to the United States to meet with Dean Salem, Michael Spero, Norris' Vice President, and Connie Theodorescu, Norris' CFO, regarding Compuquest's significant debt to Norris and Mr. Bodimeade's desire to try to salvage his relationship with Norris and keep Compuquest in business (the "**March 15th Meeting**").[52]

57. At the March 15th Meeting the parties discussed outstanding amounts owed by Compuquest and strategies to ensure that Compuquest would continue in business. Mr. Bodimeade promised to make payments to Norris in the amounts of $450,000 and $150,000 to reduce the outstanding RLOC and to ensure ongoing business between Compuquest and Norris. The parties also discussed a review arrangement whereby Mr. Bodimeade would have to seek Norris' approval, as Compuquest's largest supplier, to any major decision made on behalf of Compuquest. Notes taken by Dean Salem at the March 15th Meeting document these discussions and are attached as Exhibit D to Dean Salem's Supplementary Affidavit.[53]

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[51] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 31; Salem Motion Record, Tab Z, Exhibit Z.
[52] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 18; Spero Affidavit, Tab 2, para 2; Teordorescu Affidavit, Tab 3, para 2.
[53] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 19, Exhibit D; Spero Affidavit, Tab 2, para 2; Teordorescu Affidavit, Tab 3, para 2

58. Mrs. Bodimeade admitted on cross-examination that the RLOC Agreements were necessary to continue the relationship with Dean Salem and Norris and in order to keep Compuquest in business:

> "My understanding would be with this document that Gary would continue to do business and that , you know, he would be...you know, that life would go on, your know , basically Compuquest, as far as I knew, was doing great until all of this happened, you know, and he said he needed this to keep the business moving, to keep, you know, the cash flowing coming, and I just...you know, he told me that this was what he needed to run the business."[54]

Attempts to Register the Mortgage against the Property

59. In late April 2016, Mr. Bodimeade advised Dean Salem that Compuquest could not be salvaged.[55]

60. On April, 29, 2016, by Order of Madam Justice Mesbur, Grant Thornton was appointed as an interim receiver of Compuquest.[56]

61. Based on these developments Norris became concerned that the Bodimeades had not fulfilled their obligations under their RLOC Agreements to register the Mortgage on title to the Property. At the same time CIBC took steps to try to prevent Norris and Dean Salem from registering the Mortgage, which would have affected CIBC's position vis a vis the Property.[57]

62. Pursuant to Mr. Bodimeade's and Mrs Bodimeade's RLOC Agreements, on May 9, 2016, Dean Salem emailed Mr. Bodimeade the necessary mortgage documents for Mrs. Bodimeade

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[54] Cross-examination of Aimee Bodimeade, January 13, 2017, p. 59, question 254.
[55] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 20.
[56] Second Report of the Receiver, November 24, 2016 [**Receiver's second report**], Appendix 2.
[57] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 20, Exhibit E.

to execute in order to register the Mortgage against the Property.[58]

63. On May 16, 2016, Andrea Robertson, counsel for Ms. Bodimeade, requested documentation from Dean Salem showing the outstanding amounts owing to Norris and Dean Salem up to April 28, 2016, the date Compuquest ceased operations.[59]

64. On May 17, 2016, Dean Salem responded to Mrs. Robertson advising that Mr. Bodimeade had provided Mrs. Bodimeade with the Mortgage documents, that the total amount owing on the RLOC was $803,585.49 USD, and that no additional advances had been made.[60] Dean Salem received no response to this email nor did Mrs. Bodimeade execute the Mortgage documents.

65. If Mrs. Bodimeade believed that her RLOC Agreement limited the Mortgage security against the Property to Mr. Bodimeade's half interest alone, neither Mrs. Bodimeade nor her counsel would have inquired as to the outstanding balance on the RLOC, (which was within the cap contemplated in the RLOC), nor refused to execute the documents permitting the registration of the Mortgage against the Property.[61]

66. On May 25, 2016, Compuquest and Mr. Bodimeade were both petitioned into bankruptcy.[62]

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[58] Salem Motion Record, Salem Affidavit, Tab 1, para 37, Exhibit H.
[59] Salem Motion Record, Salem Affidavit, Tab 1, para 38, Exhibit I.
[60] Salem Motion Record, Salem Affidavit, Tab 1, paras 39-40, Exhibit J.
[61] Salem Motion Record, Salem Affidavit, Tab 1, para 41.
[62] Salem Motion Record, Salem Affidavit, Tab 1, para 42, Exhibit K.

67. In light of the bankruptcy, and in order to preclude Mrs. Bodimeade from conveying or refinancing the Property, Dean Salem commenced the Application in the Superior Court for an order permitting Dean Salem and Norris to register the Mortgage against Mrs. Bodimeade's interest in the Property.[63]

68. After the Application was commenced, on June 30, 2016, Dean Salem brought a motion to register the CPL against the Property. The bankruptcy was fully disclosed in the materials filed on the motion for the CPL. The trustee was not given notice of the motion because the relief sought in the motion affected only Mrs. Bodimeade's interest in the Property and not the bankrupt or trustee's interest. The Master hearing the motion did not require service of the motion materials on the trustee. An Order was obtained and the CPL was registered on title.[64]

69. On the return date of the Application on August 9, 2016, Mrs. Bodimeade's counsel sought an adjournment. As Dean Salem was concerned that Mrs. Bodimeade would declare bankruptcy before the next return date of the Application, he sought an Order allowing him to register a non-interest bearing form of the Mortgage against the Property until the Application could be decided and a determination made concerning the entitlement to and quantum of mortgage to be registered against Mrs. Bodimeade's interest in the Property. With full disclosure of the bankruptcy proceedings, Mr. Justice Glustein *granted* the Glustein Order requiring registration of the Mortgage on title to the Property, ordered that a copy of the Glustein Order be sent to the trustee and receiver, and that the Application materials be

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[63] Salem Motion Record, Salem Affidavit, Tab 1, para 43, Exhibit L.
[64] Salem Motion Record, Salem Affidavit, Tab 1, paras 43-44, Exhibits L, M and N.

served on the trustee and receiver *going forward*.[65]

70. Dean Salem was unable to register the Mortgage on title to the Property, as permitted by the Glustein Order, as Mr. Bodimeade was required to sign as a spouse but was unable to do so due to the bankruptcy. Instead, Dean Salem registered the Glustein Order on title to the Property.[66]

71. Dean Salem and Norris filed a proof of claim in the bankruptcy in respect of loan transactions commencing on January 29, 2016, because the trustee advised Dean Salem to limit the proof of claim to the last time there was zero balance in the amount owing by Compuquest to Norris and Dean Salem.[67] In addition to the proof of claim, Norris and Dean Salem provided a spread sheet showing transactions dating back to January 22, 2014, and supporting documents.[68]

Receiver's Unfounded Allegations of Non-disclosure respecting Glustein Order

72. The receiver suggests in its factum that Dean Salem should have disclosed to Justice Glustein that Mrs. Bodimeade did *not* grant Norris or Dean Salem a mortgage over *her* interest. However, that was neither Norris' nor Dean Salem's understanding. Neither Norris nor Dean Salem were parties to or agreed to any side agreements between the Bodimeades in their matrimonial proceedings. Mrs. Bodimeade's RLOC, which she signed with the benefit of legal advice, confirmed her agreement to pledge her half interest in the Property in consideration of the RLOC granted to Compuquest since January 2011. The Glustein Order

[65] Salem Motion Record, Salem Affidavit, Tab 1, para 45, Exhibit O.
[66] Salem Motion Record, Salem Affidavit, Tab 1, para 46, Exhibit P.
[67] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 4.
[68] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 5.

was obtained on the basis of that agreement and there was no lack of disclosure by Norris or Dean Salem in obtaining it.[69]

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

> *Aimee* [Mrs Bodimeade] *appears to have mortgaged whatever equity she may have to Salem/Norris Technologies*[70].

74. This statement from the receiver's third report was made after the receiver had access to emails from Mrs. Bodimeade and Mr. Bodimeade regarding their side agreement to limit security over the Property to Mr. Bodimeade's interest.[71]

75. The receiver has failed to explain why it now takes a different position, than the position stated in its third report, and instead has brought this motion to deny Norris' and Dean Salem's security against the Property. The receiver has chosen to prefer the version of events proffered by Mrs. Bodimeade who benefitted handsomely from the success of Compuquest through the continued financial support of Norris and Dean Salem, even though her evidence is inconsistent with the written documents and is contrary to common sense as more fully set

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[69] Salem Motion Record, Salem Affidavit, Tab 1, para 47.
[70] Third Report of the Receiver, para 80(d).
[71] Receiver's second report, paras 45-50.

out below. This unexplained change in the receiver's position casts doubt on the independence, impartiality, and objectivity of the receiver.[72]

Mrs. Bodimeade's Implausible Story

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

   i. approximately 5,680 square foot two-storey detached residential dwelling, excluding the basement;
   ii. approximately 3,196 square foot finished basement with dance studio, family room, gym, bedroom, and three piece bathroom;
   iii. outdoor pool with pool house;
   iv. approximately 800 square foot heated and insulated SUV garage;
   v. approximately 11,000 square foot equestrian barn complete with riding centre and stalls for 14 horses; and
   vi. approximately 2,400 square foot insulated hay/equipment barn.[73]

77. According to the receiver, the vast majority of the Property was paid for with Compuquest's money. Mrs. Bodimeade leased and/or drove luxury vehicles paid for by Compuquest, bought horses costing as much as $50,000 each, and directed Compuquest's employees to do personal work for her benefit. Mrs. Bodimeade is the beneficiary of significant improper

[72] Salem Motion Record, Salem Affidavit, Tab 1, para 49.
[73] Salem Motion Record, Salem Affidavit, Tab 1, para 110.

conduct from which she benefitted to live a life of incredible luxury for the past 8 years.[74]

78. Mrs. Bodimeade has not gone bankrupt and consequently Norris and Dean Salem assert a mortgage over her interest in the Property pursuant to Mrs. Bodimeade's RLOC Agreement.

79. After the bankruptcy of Mr. Bodimeade and Compuquest, at her initial cross examination, Mrs. Bodimeade testified that while she was initially reluctant to provide security against the Property, she ultimately executed her RLOC Agreement because it was necessary for Compuquest's survival and because she believed that the security against the Property would not be called upon. Mrs. Bodimeade never asserted at that cross examination that the Mortgage was intended as security over Mr. Bodimeade's interest alone. [75]

80. However, in her June 20, 2016 affidavit filed in response to this motion, Mrs. Bodimeade takes the position that she signed her RLOC Agreement in order to give Dean Salem and Norris security *only* over Gary's interest in the Property.[76]

81. Further, Mrs. Bodimeade claimed on cross-examination that she signed her RLOC Agreement "under duress".[77] However, in her June 20th affidavit Mrs. Bodimeade contradicts this statement and indicates that she signed her RLOC as part of a mediation process to resolve her matrimonial dispute with Mr. Bodimeade:

> "On February 11, 2016, Gary and I attended mediation to deal with the issues arising from our separation. At the mediation, I agreed that I would sign the

[74] Salem Motion Record, Salem Affidavit, Tab 1, para 111.
[75] Cross-examination of Aimee Bodimeade, January 13, 2017, p. 57, questions 253-265.
[76] Aimee's Affidavit, para 8.
[77] Cross-examination of Aimee Bodimeade, January 13, 2017, p. 58, question 253.

> Revolving Line of Credit Agreement, on the basis that I would not personally guarantee the line of credit. My liability would be limited to the assests set out in the RLOC agreement. We also agreed that the liability on the matrimonial home would be limited to $1 million CDN from Gary's share of the home."[78]

82. Mrs. Bodimeade testified on cross-examination that she always thought that "Compuquest, as far as I knew, was doing great until all of this happened".[79] However in her June 20th affidavit Mrs. Bodimeade acknowledges that she always knew that the cash flow in Compuquest was inconsistent:

> "Throughout the marriage, I was aware that the cash flow in Compuquest was very inconsistent. From time to time, Gary put out personal funds into Compuquest or borrowed money privately to get through the difficult cash flow times. I recall on one occasion that Gary withdrew a total of approximately $90,000 from the children's accounts because he needed it for Compuquest."[80]

83. Mrs. Bodimeade's evidence is inconsistent, unreliable, and self-serving and should be disregarded in deciding this motion.

Norris and Dean Salem's Business Relationship with Phase5

84. In late April 2016, when Mr. Bodimeade advised Dean Salem that Compuquest would not survive, Mr. Bodimeade introduced Dean Salem to Brad Fisher, an investor looking to get into the computer resale market. Mr. Bodimeade indicated that Brad Fisher had $400,000 in start-up capital and wanted to open an account with Norris for a new company called CQ2K/Phase5 ("**Phase5**").[81]

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[78] Aimee's Affidavit, para 8.
[79] Cross-examination of Aimee Bodimeade, January 13, 2017, p. 59, question 254.
[80] Affidavit of Aimee Bodimeade, sworn July 20, 2017, para 22.
[81] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 21; Spero Affidavit, Tab 2, para 2; Teordorescu Affidavit, Tab 3, para 2.

85. Dean Salem consulted with Mr. Spero and Mrs. Teodorescu as to whether Norris should do business with Phase5. Norris agreed to supply Phase5 to make up for orders which otherwise would have been sold to the Compuquest on the basis of the understanding that:

e. all purchases would be on a cash on delivery basis only; and

f. Mr. Bodimeade was an employee and not a principal of Phase5.[82]

86. On this basis Norris proceeded to open an account for Phase5. Mr. Bodimeade provided the particulars for the Phase5 account which included a new delivery address of 88 Beachgrove Crescent in Whitby. Dean Salem did not know then, and not until he received the receivers reports in these proceedings, that the Beachgrove address belonged to Mr. Bodimeade's girlfriend. [83]

87. The first transaction between Norris and Phase5 occurred on May 5, 2016, as a result of a bid which Phase5 made in respect of computer equipment. Norris issued a sales order to Phase5 in the amount of $38,655 which was paid for by Phase5 by cash on delivery and is fully documented by a bill of lading and wire payment confirmation.[84]

88. Norris has continued to conduct business with Phase5 only on a cash on delivery basis.[85]

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[82] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 22.
[83]Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, paras 22, 24.
[84] Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 23, Exhibit F.
[85] Salem Motion Record, Salem Affidavit, Tab 1, para 112(a)(ii).

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

89. Since the receiver was appointed on April 28, 2016, the receiver has failed to conduct a fair, balanced, and objective review of the evidence and investigation into Compuquest's affairs. The receiver's reports use words like "suspects" and "suspicion" in respect of Dean Salem and Norris without any evidence to support these words, suggesting that the receiver's position is based on speculation and innuendo rather than evidence.[86]

90. On July 29, 2016, Dean Salem filed proofs of claim in the bankruptcy and an accounting of the debt owing. As fully detailed in Dean Salem's affidavit, Norris and Dean Salem made every effort, regardless of the unreasonableness of the request, to satisfy the receiver of the legitimacy of their claims. Notwithstanding these efforts, the trustee and receiver disregarded Norris and Dean Salem's efforts to explain their business relationship with Compuquest, disregarded evidence of the legitimate business relationship between Norris and Compuquest and the sale and delivery of off-lease computers, and unfairly prejudged the validity of Dean Salem's and Norris' claims. The receiver and trustee have, despite evidence to the contrary, wrongly concluded that Dean Salem and Norris have engaged in wrongful conduct merely by virtue of their association with Mr. Bodimeade.[87]

91. In particular:

   i. Dean Salem and Norris provided spread sheets showing funds that were advanced directly from Dean Salem's personal account and in respect of product shipped to Compuquest. Both are accounted for in Compuquest's bank statements and

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[86] Salem Motion Record, Salem Affidavit, Tab 1, para 63; Receiver's second report, para 55.
[87] Salem Motion Record, Salem Affidavit, Tab 1, para 51, Salem Affidavit Exhibit Q.

accounting software which were in the receiver's possession. However, the receiver required Dean Salem to provide proofs of delivery for items shipped to Compuquest even though product was shipped in the blind and neither Norris nor Dean Salem had copies of or access to these documents in the normal course of business. Dean Salem and Norris complied with this request and provided all of the requested shipping documents;[88]

ii. in August 2016, the trustee required Norris and Dean Salem to undergo extensive document review and organization to support its claim. In the course of the review Dean Salem discovered that one of the documents provided by the receiver for review contained a notation by the receiver: "claim disallowed". This notation was obviously made even before the review was completed;[89]

iii. in its second report, at paragraph 55, the receiver states "the receiver strongly **suspects** that the debts allegedly owing by Compuquest, Bodimeade, and Aimee to Norris and Salem are unfounded." This statement does not take into account the fact that Dean Salem and Norris had submitted significant supporting documentation to the trustee and the receiver establishing the debts;[90]

iv. in order to establish delivery of off-lease computers to Compuquest and in response to the receiver's inquires, Dean Salem requested that the receiver provide freight documentation in Compuquest's possession (and therefore the receiver's possession).

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[88] Salem Motion Record, Salem Affidavit, Tab 1, paras 51-61, Salem Affidavit Exhibits Q-Z.
[89] Salem Motion Record, Salem Affidavit, Tab 1, paras 58-59, Salem Affidavit Exhibit X.
[90] Salem Motion Record, Salem Affidavit, Tab 1, para 63; Receiver's second report para 55.

Although the receiver told Dean Salem that it spent time reviewing the records and was unable to find these documents, in fact the documents, which the trustee was demanding before it would accept Norris' proofs of claim, were at all times in the receiver's possession. The receiver would not look for the freight documents despite very clear requests from Dean Salem and directions as to where they might be located. The documents for all shipments to Compuquest, except 2016 shipments, were later discovered by Dean Salem at Compuquest's premises, in the receiver's possession, and were provided by Dean Salem to the receiver. On July 13, 2017, in order to fill in the missing shipping documents for 2016, counsel for Norris and Dean Salem obtained directly from Compuquest's shipping company, QuickX Transportation, signed shipping documents which establish that off-lease computers purchased by Compuquest from Norris were in fact shipped to Compuquest in 2016. These documents, filed as exhibits in this application, directly correspond to Norris' purchase orders for the same off-lease computers and conclusively show that there were legitimate sales transactions between Norris and Compuquest;[91]

v. the receiver's conclusions concerning Dean Salem and Norris' relationship with Gary Bodimeade, as expressed in the 7 receiver reports, failed to take into account the fact that Norris was Compuquest's key supplier and therefore critical to its survival. If Norris stopped providing product to Compuquest, it would be game over. Mr. Bodimeade's assurances in email correspondence that he would pay Norris "every penny" were consistent with the fact that Norris was Compuquest's key supplier who

[91] Salem Motion Record, Salem Affidavit, Tab 1, paras 62, 73-75, 81, 112(g)(ii)(H), Exhibit AA, BB, CC, DD, EE, HH, and NNN.

had to be kept happy to keep the business operating and should have been interpreted by the receiver as confirming their ongoing business relationship;[92]

vi. in its second report the receiver ignores correspondence from Mr. Bodimeade indicating that he sold personal assets to pay outstanding amounts owing to Norris in order to continue receiving product from Norris and remain in business. The receiver instead concludes that all payments made by Mr. Bodimeade to Dean Salem or Norris were made from Compuquest's funds;[93]

vii. as of July 6, 2017, the receiver's counsel had not shared hundreds of pages of supporting documents provided by Dean Salem or Norris with the receiver;[94] and

viii. in June 2016, counsel for the receiver advised Dean Salem for the first time that the receiver had entered into an agreement of purchase and sale to sell the Property, with a closing date in September 2017.[95]

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

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

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[92] Salem Motion Record, Salem Affidavit, Tab 1, paras 66-67.
[93] Receiver's second report, paras 54-55.
[94] Salem Motion Record, Salem Affidavit, Tab 1, para 112(d)(1).
[95] Salem Motion Record, Salem Affidavit, Tab 1, para 95, Salem Affidavit Exhibit OO.

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

a. Mr. Bodimeade confirmed on his examination that he is only an employee of Phase5, not an officer, director or shareholder;[96]

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

c. no credit has been extended to Phase5; and

d. since Compuquest's insolvency, Norris has to make up for the lost orders.[97]

ii. the receiver alleges that because Norris received the proceeds of the sale of the Bodimeade's King Aire Recreational Vehicle ("**King Aire**"), Norris received a preference and has engaged in improper conduct however, the receiver has not considered or included in the reports the following:

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

[96] Examination of Gary Bodimeade, p. 75, question 453.

[97] Salem Motion Record, Salem Affidavit, Tab 1, para 112(a), Salem Affidavit Exhibit YY.

b. neither Norris nor Dean Salem knew that Compuquest would be petitioned into bankruptcy at the time of the payment. It was usual in their business relationship for Norris to receive large payments from Compuquest to pay down the RLOC (as is evident from the spreadsheets setting out the balance owing); and

c. Norris and Dean Salem understood that the King Aire was a personal asset, not a corporate asset of Compuquest, that was sold by Mr. Bodimeade to ensure Norris would continue to supply product.[98]

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

a. Norris was Compuquest's key supplier and was owed a lot of money. When Mr. Bodimeade advised Dean Salem that Compuquest was having trouble with CIBC, Dean Salem provided advice as someone who had been in the industry for decades in order to assist Compuquest and protect his investment and relationship. There was nothing nefarious about Dean Salem advising Mr. Bodimeade in how to respond to CIBC.[99]

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[98] Salem Motion Record, Salem Affidavit, Tab 1, para 112(b), Salem Affidavit Exhibit ZZ.
[99] Salem Motion Record, Salem Affidavit, Tab 1, para 112(c), Exhibit AAA.

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

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

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

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

d. these documents, together with the shipping documents provided by QuickX Transportation on July 13, 2017, respecting the 2016 shipments and included in these motion materials, conclusively prove that there was no fraudulent activity between Norris and Compuquest respecting inventory. As the documents show, in 2016, as in all the prior years, Norris purchased off-lease computers from vendors, Norris then sold the computers to Compuquest, and Compuquest arranged for the computers to be shipped by the vendors directly to Compuquest for refurbishment and resale. Norris and Dean Salem had no involvement with the computers after they were shipped and therefore no involvement with or knowledge of Compuquest's inventory;[100]

[100] Salem Motion Record, Salem Affidavit, Tab 1, para 112(d), Exhibit BBB.

e. Norris and Dean Salem were therefore not in a position to assist the receiver locate inventory that the receiver alleges should have been at Compuquest. Norris and Dean Salem have no knowledge of diverted inventory nor has the receiver produced any evidence that product was diverted. Norris has responded to every request for documentation made by the receiver and even obtained documents from QuickX which the receiver neglected to pursue.[101]

v. The receiver alleges in its fifth report that Norris and Dean Salem were involved in improper conduct because Norris' relationship with Compuquest began when Mr. Bodimeade's contact at HP was terminated for taking kickbacks. However, the receiver fails to take into account or mention in the reports the following:

a. Compuquest's HP contact was terminated in September 2013;[102] and

b. Mr. Bodimeade had a business relationship with Norris and Dean Salem since 2003.[103] Purchase and sales orders between Norris and Compuquest produced by Dean Salem date as far back as 2008, years before Compuquest's HP contact was terminated.[104]

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

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101 Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 30.
102 Fifth report of receiver, para 51c.
103 Examination of Gary Bodimeade, p. 59-60, questions 349-355.
104 Salem Motion Record, Salem Affidavit, Tab 1, para 112(e), Exhibit CCC.

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

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

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

d. Norris has provided transaction funding to other of its customers, including CDM Technologies and Memory Dogg Inc., whose former principal's affidavit is filed in this proceeding;

e. there is lengthy historical evidence of transaction financing between Norris and Compuquest in Compuquest's CIBC account history dating back to

2010 however, the trustee and receiver refused to provide Compuquest's CIBC account statements to Dean Salem despite his requests for them;

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

g. once cheques were refused, Compuquest could not acquire inventory or sell product which would result in accounts receivable. This explains why there was diminished inventory and accounts receivable in Compuquest when the receiver took over.[105]

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

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[105] Salem Motion Record, Salem Affidavit, Tab 1, para 112(f), Exhibit DDD, EEE, FFF, GGG; Salem Motion Record, Galnick Affidavit, Tab 2, paras 2-5.

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

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

c. the same day, Mr. Bodimeade, on behalf of Compuquest, contacted QuickX Transportation, a freight company, to arrange to ship the 1816 off-lease desktop computers directly from HP Financial Services to Compuquest. QuickX emailed Mr. Bodimeade indicating that Boston Creek Transportation would pick up the product and requested that Mr. Bodimeade send the Bill of Lading and custom documents as soon as possible;

d. the same day, Norris prepared the Bill of Lading and provided it to HP Financial Services, and Mr. Bodimeade, who in turn provided it to QuickX Transportation, who in turn provided it to Boston Creek Transportation. Once Boston Creek Transportation had the Bill of Lading, they were able to complete the blind shipment. The Bill of Lading identifies the shipper (HP Financial Services), the consignee (Norris), describes the product being picked up, and provides directions to the freight company on how to access the shipper's premises. Because the shipment is being done "in the blind", it did not indicate that the purchaser of the product is Compuquest. Once Boston Creek Transportation picked up the product, they delivered it directly to Compuquest;

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

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

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

h. Norris and Dean Salem are not involved with product after it is shipped to Compuquest and therefore cannot account for its whereabouts.[106]

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[106] Salem Motion Record, Salem Affidavit, Tab 1, para 112(g), Exhibit HHH, III, JJJ, KKK, LLL, MMM, NNN.

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

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

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

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

d. Mr. Bodimeade's counsel left Foglers for Miller Thomson several months ago and continues to act for Mr. Bodimeade.[107]

ix. Mrs. Bodimeade makes the bald statement in her affidavit evidence that Dean Salem and Mr. Bodimeade "did not have a normal business relationship".[108] She bases this statement on hearsay statements made by Mr. Bodimeade that Dean Salem made payments on Mr. Bodimeade's Amex credit card. Mrs. Bodimeade's statement is based on hearsay and indirect evidence, and appears to be based on a misunderstanding of the RLOC.[109] Dean Salem swears in his affidavit that he never paid Mr. Bodimeade's Amex card and never paid for anything for Mr. Bodimeade, Mrs. Bodimeade or their children. In fact Mr. Bodimeade used his Amex card to pay

[107] Salem Motion Record, Salem Affidavit, Tab 1, para 112(h).
[108] Affidavit of Aimee Bodimeade, sworn June 20, 2017, para 15.
[109] Affidavit of Aimee Bodimeade, sworn June 20, 2017, para 16.

the RLOC on several occasions which payments were fully disclosed in spreadsheets provided by Norris to the receiver and trustee.[110] Mrs. Bodimeade has not produced any evidence to support her allegation that Dean Salem and Mr. Bodimeade had something other than a business relationship.

III- STATEMENT OF ISSUES, LAW& ARGUMENT

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

    i. What is the onus of proof?

    ii. Do Norris and Dean Salem hold a mortgage over the Property?

    iii. Are equitable mortgages secured debts which take priority over the trustee in bankruptcy?

    iv. Does the equitable mortgage constitute a preference to Norris or Dean Salem?

    v. If there is a presumption of preference, is it rebutted?

i. Onus of Proof and Standard of Review

94. In assessing the secured claim filed by Norris and Dean Salem in the bankruptcy, the trustee could have proceeded in one of two ways:

    g. seek directions from the court pursuant to s. 34(1) of the BIA; or

    h. review and disallow the claim under s. 135 of the BIA.[111]

95. In its Fresh as Amended Notice of Motion the receiver and trustee sets out the relief sought in respect of Norris and Dean Salem as follows:

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[110] Salem Motion Record, Salem Affidavit, Tab 1, para 112 (j)(i); Supplementary Salem Motion Record, Second Salem Affidavit, Tab 1, para 31.

[111] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 2, looseleaf (Toronto: Thomson Reuters, 2013) C§74(4), Brief of Authorities, Tab 1, p. 1-204.1; *Re St Helen's (Vancouver) Ltd.* 1985 CarswellBC 500, Brief of Authorities, Tab 2, para 7.

The Receiver and Salem/Norris have agreed to submit the issue of Salem's and Norris' entitlement to a mortgage over the Ashburn Property for determination at the hearing scheduled for July 17, 2017[112]

96. In framing the relief in this way the trustee has clearly opted to seek directions under section 34(1) of the BIA which provides:

> **34 (1)** A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.[113]

97. As the applicant seeking a declaration, the onus lies on the trustee to establish the relief it seeks.[114]

98. Alternatively, if the Court determines that the trustee has disallowed the claim, although the disallowance procedure provided for in s.135 of the BIA has not been followed, and that this motion is to be treated as an appeal, this motion should be heard as a *de novo* appeal and not as a true appeal. Fulsome affidavit evidence as the seven receiver's reports form the basis for a full record on which to hold an appeal *de novo*. In the circumstances, the courts have held that an appeal *de novo* is warranted.[115]

99. The standard of review, if this motion constitutes an appeal, would be correctness as the trustee's decision about whether the Mortgage constitutes a secured interest against the

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[112] Salem Motion Record, Fresh as Amended Notice of Motion, Tab XX, para 65.
[113] R.S., 1985, c. B-3.
[114] *Honda of Canada Mfg. v Micro Focus (Canada),* 2015 ONSC 6264 (CanLII), Brief of Authorities, Tab 3, paras 16-17; *Re Dante Boutique Shoes Ltd.* 1981 CanLII 2967 (ONSC), Brief of Authorities, Tab 4, para 2.
[115] *Business Development Bank of Canada v. Pinder Bueckert & Associates Inc.* 2009 SKQB 458, Brief of Authorities, Tab 5, para 23.

Property is a question of law. If the Court determines that this issue is factual, the standard of review is reasonableness.[116]

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

100. Mrs. Bodimeade's RLOC and Mr. Bodimeade's RLOC evidenced a common intention among the Bodimeades, Norris, and Dean Salem to create a mortgage over both the Bodimeades' interests in the Property. These documents describe both Mr. and Mrs. Bodimeade as parties giving security, describe the Property, describe the RLOC as the debt secured, and create an obligation to execute and register a legal mortgage on the Property.

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

102. An equitable mortgage is created where parties, by written agreement, show an intention to make property security for a debt due or a present advance.[117] A written agreement to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement. The law treats as done that which was intended to be done. [118]

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[116] *Business Development Bank of Canada v. Pinder Bueckert & Associates Inc.* 2009 SKQB 458, Brief of Authorities, Tab 5, para 24.
[117] R. v. Elias 2006 CanLII 31904 (ONCA), Brief of Authorities, Tab 6 paras 63-65.
[118] Traub, *Falconbridge on Mortgages* 5th ed. looseleaf, (Toronto: Canada Law Book, 2014), Brief of Authorities, Tab 7, para 5:40.20.

103. The objective of equitable mortgages is to enforce a common intention of the mortgagor and mortgagee to secure property for either past debt or future advances, where the common intention is unenforceable under the strict demands of the common law.[119]

104. The requirements for an equitable mortgage, which are fulfilled in this case are that the document include a description of:

a. the parties;

b. the property; and

c. the principal amount secured.[120]

105. The document creating an equitable mortgage "need not use the formal wording of "transfer" or "mortgage" or "assign" but must in some manner show an intention to create a charge on property in equity or to grant a property interest to the mortgagee as security for a debt."[121]

106. All of the requirements for an equitable mortgage are met by Mrs. Bodimeade's and Mr. Bodimeade's RLOC Agreements. The RLOC Agreements use clear language to express the Bodimeades' intention to grant Norris and Dean Salem the Mortgage over the Property as security for the RLOC. The Mortgage therefore constitutes a valid equitable mortgage

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[119] Berdeklis v David Terry Associates Inc., 2017 ONSC 3209 (CanLII), Brief of Authorities, Tab 8, paras. 17- 18.
[120] *CIBC v. Saskatchewan Lawyers' Insurance Association Inc.* [1996] S.J. No. 32, (SKQB), Brief of Authorities, Tab 9, para 16; *Toronto-Dominion Bank* v. Coueslan, 2000 SKQB 396 (CanLII), Brief of Authorities, Tab 10, paras 4-8.
[121] *R. v. Elias* 2005 CanLII 30311 (ON SC), (2005) 77 OR (3rd) 461, Brief of Authorities, Tab 11, paras 31-32, appeal dismissed 2006 CanLII 31904 (ONCA).

against the Property.

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

107. The RLOC created an equitable mortgage and a secured interest over Mr. Bodimeade and Mrs. Bodimeade's interests in the Property. The trustee takes no better title to the Property than the title held by the bankrupt, Mr. Bodimeade. The Mortgage is a secured interest which takes priority over the trustee.

108. "Secured creditor" is broadly defined under the *Bankruptcy and Insolvency Act*[122] :

> means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable[123]

109. The holder of an equitable mortgage is a secured creditor in the bankruptcy.[124]

110. The trustee has no greater interest in the property under his or her responsibility than the bankrupt.[125] The trustee acquires the real property subject to any unregistered estates, rights or equities to which the property was subject at the date of bankruptcy.[126] Consequently, an

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[122] R.S.C. 1985, c. B-3 ["**BIA**"].
[123] *Ibid*, s.2(1).
[124] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 2, looseleaf (Toronto: Thomson Reuters, 2013) F§77(2), Brief of Authorities, Tab 12, p. 3-266.
[125] *Re Lefebre* (2004), 244 D.L.R. (4th) 513 (SCC), Brief of Authorities, Tab 13, para 37.
[126] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol.2, looseleaf (Toronto: Thomson Reuters) Brief of Authorities, Tab 12, p. 3-266; *Re Engineering & Contracting Co.* 1994 CarswellOnt 365, Brief of Authorities, Tab 14, para 15.

unregistered mortgage given by the bankrupt prior to the bankruptcy is effective as against the trustee. [127]

111. As holders of the Mortgage, Dean Salem and Norris have a secured interest against the Property, are secured creditors in the bankruptcy of Gary Bodimeade, and have priority over the trustee in bankruptcy.

112. As Mrs. Bodimeade has not gone bankrupt, the Mortgage against her interest in the Property stands and is not affected by the bankruptcy of Mr. Bodimeade or Compuquest. Further, Mrs. Bodimeade's RLOC is irrelevant to the trustee's preference argument because Mrs. Bodimeade's RLOC encumbers *her* interest in the Property, not Mr. Bodimeade's interest in the Property.

iv. the Equitable Mortgage Does <u>not</u> Constitute a Preference

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

[127] *Falconbridge on Mortgages*, *supra*, Brief of Authorities, Tab 15, p. 28-2; *Re Engineering & Contracting Co.*, *supra*, Brief of Authorities, Tab 14, para 15.

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

115. Three conditions precedent must be met for a mortgage to qualify as a fraudulent preference under s. 95 of the BIA[128]:

a. the mortgage must have been made within **three months** of bankruptcy if the creditor is dealing at arm's length with the insolvent person and within **twelve months** of bankruptcy if the creditor was not dealing at arm's length with the insolvent person;

b. the debtor must have been **insolvent at the time the mortgage was granted**; and

c. as a result of the mortgage, the creditor must have in fact received a preference over other creditors.[129]

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

117. When determining whether a payment constitutes a preference under s. 95, the court must consider whether the impugned payment was made with the "dominant intent" of preferring

[128] BIA, s. 95.
[129] BIA, s. 95(2).

one creditor over another. The dominant intention test is based on an objective assessment of the circumstances. In other words, what the debtor's conduct objectively demonstrates when reasonably construed. [130]

118. If the trustee satisfies the conditions under s. 95 of the BIA, a rebuttable presumption arises and the onus shifts to the creditor to establish that the debtor's dominant intent was not to prefer that creditor.[131]

v. Dean Salem and Norris were at Arm's Length with the Bodimeades and Compuquest

119. Dean Salem and Norris at all times had an arm's length business relationship with the Bodimeades and Compuquest. There has been no evidence produced in this proceeding to the contrary.

120. Section 4(4) of the BIA states: "It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length."

121. To determine whether parties are at arm's length the court considers whether there was a common mind which directed the bargaining for both parties to a transaction; were the parties to the transaction acting in concert without separate interests; and was there *de facto* control? [132]

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[130] *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce,* 2011 MBCA 41, 268 Man.R. (2d) 30, Brief of Authorities, Tab 16, para 24.

[131] *Houlden & Morawetz, supra*, F§201, Brief of Authorities, Tab 17, p.4-73.

[132] *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406 (CanLII), Brief of Authorities, Tab 18, paras 68-70; *Piikani Energy Corporation, Re* 2013 ABCA 293, Brief of Authorities, Tab 19, paras. 28, 29, 30

122. In this case Dean Salem and Norris had separate economic interests from Mr. Bodimeade and Compuquest. Dean Salem and Norris were Compuquest's key supplier and operated an independent business. There is a dearth of evidence that they operated with a common mind.[133]

vi. The Mortgage was not Granted within 3 Months of Bankruptcy

123. The trustee has not satisfied the "within 3 months of bankruptcy" condition under s. 95 of the BIA because:

a. Mr. Bodimeade's RLOC Agreement was executed on December 31, 2015, which is more than three months prior to the bankruptcy of Mr. Bodimeade and Compuquest on May 25, 2016; and

b. Mrs. Bodimeade never went bankrupt and her RLOC Agreement creates security against only *her* interest in the Property. Mrs. Bodimeade's RLOC therefore cannot possibly fulfill the "within three months of bankruptcy" requirement. In any event her RLOC Agreement was dated as of December 31, 2015.

vii. Any Presumption of Preference is Rebutted

124. The trustee's conclusion that the Mortgage is a preference is contradicted by evidence to the contrary, and even if a presumption of preference is created, the presumption is rebutted for the reasons that follow.

[133] *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406 (CanLII), Brief of Authorities, Tab 18, para 71; *Piikani Energy Corporation, Re* 2013 ABCA 293, Brief of Authorities, Tab 19, para. 39.

a. Norris and Dean Salem received payments from Compuquest as secured creditors

125. All payments received by Norris and Dean Salem in 2016 from Compuquest were payments made in the ordinary course of business under the Bodimeades' RLOC Agreements and to ensure that Norris would continue to finance transactions between Compuquest and Norris.

126. Payments received by a secured creditor under a valid security document in the three months preceding bankruptcy cannot be attached as a fraudulent preference where the payment does not exceed the value of the security.[134] Where a secured creditor is paid first there can be no fraudulent preference.[135]

b. Any Presumption of Preference is Rebutted by Prior Agreement

127. Any presumption of preference created by the execution of Mrs. Bodimeade's RLOC within three months of the bankruptcy is rebutted by the fact that the Bodimeades pledged the Property as security for the RLOC in January 2011. By executing the RLOC Agreement Mrs. Bodimeade was fulfilling a prior oral agreement and therefore the Mortgage against her interest did not create a preference.

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[134] *Houlden & Morawetz, supra,* F§202, Brief of Authorities, Tab 20, p. 4-79; *Tucker v. Aero Inventory (UK) Ltd.,* [2011] O.J. No. 3816 (S.C.), Brief of Authorities, Tab 21, para 70.

[135] *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.* (2005), 2005 NBCA 55 (CanLII), 255 D.L.R. (4th) 137 (N.B.C.A.), Brief of Authorities, Tab 22, para 18.

128. An oral agreement to give a mortgage made when the debtor was solvent more than three months before bankruptcy rebuts the presumption of a preference.[136] A presumption of preference in respect of security or payment made within three months of bankruptcy is rebutted if there was an intention to fulfil a prior agreement.[137]

c. Preference Rebutted by Payments made to keep Compuquest in Business

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

130. As Houlden and Morawetz explain, "if a creditor, who received an alleged preference, can show that the payment was made by the debtor in the *bona fide* expectation that this payment would enable the debtor to continue in business and to extricate himself or herself from his or her financial difficulties, it is a powerful circumstance in rebutting the statutory presumption of a preference."[138]

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[136] *Re Rolphe*, 1984 CarswellMan 23., Brief of Authorities, Tab 23 para 22, 23; *Re Blenkarn Planer Ltd.* 1958 CarswellBC 6, 14 D.L.R. (2d) 719, Brief of Authorities, Tab 24, paras 16-17; *Salter & Arnold Ltd. v. Dominion Bank* 1926 CarswellMan 2 (SCC), Brief of Authorities, Tab 25, paras 6-8.

[137] *A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc.,* 1999 CarswellBC 335, 10 C.B.R. (4th) 49, Brief of Authorities, Tab 26, paras 55-57; *Boutique Euphoria Inc. (Arrangement relatif à)* [2008] Q.J. No. 14591, Brief of Authorities, Tab 27, paras 48-51.

[138] *Houlden & Morawetz, supra*, F§211, Brief of Authorities, Tab 28, p.4-112.1; *Grimsby Machine Manufacturing Co.*, Re, 1971 CarswellOnt 50 (ONCA), Brief of Authorities, Tab 29, paras 4 -5; *Hodden Gray Graphics Ltd., Re* 1974 CarswellOnt 67, Brief of Authorities, Tab 30, paras 15, 20.

131. Where the debtor was genuinely anxious to stay in business, security was given to a creditor to obtain continued financial support, and the creditor continued to provide financial support, the courts have held that the security was given to enable the debtor to remain in business and consequently was not fraudulent preference.[139]

132. In all the circumstances of this case the Mortgage constitutes a secured interest over the Property which has priority over the trustee.

IV ORDER REQUESTED

Dean Salem and Norris Technologies request an Order:

(a) dismissing the receiver's motion;

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

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2017.

David W. Levangie

per. David Levangie

_Bonnie E. Fish

[139] *O & S Bronze & Metal Fabricators Ltd., Re*, 30 C.B.R. (3d) 255 (Que S.C.); Brief of Authorities, Tab 31, paras 54-56; *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc, supra,* Brief of Authorities, Tab 22, paras 15-18; *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.* [2013] A.J. No. 1026 (Alta.C.A.), Brief of Authorities, Tab 32,paras 16-17.

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SCHEDULE "A"

LIST OF AUTHORITIES

Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 2, looseleaf (Toronto: Thomson Reuters, 2013) C§74(4), p. 1-204.1
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R. v. Elias 2006 CanLII 31904 (ONCA)
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Re Blenkarn Planer Ltd. 1958 CarswellBC 6, 14 D.L.R. (2d) 719
Salter & Arnold Ltd. v. Dominion Bank 1926 CarswellMan 2 (SCC)
A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc., 1999 CarswellBC 335, 10 C.B.R. (4th) 49
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Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd. [2013] A.J. No. 1026 (Alta.C.A.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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.

Exception

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

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

Definitions

(3) In this section,

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

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

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

deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

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

Applicants Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF DEAN SALEM AND NORRIS TECHNOLOGIES

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