



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: BK-22-00208582-OT31 DATE: 29 September 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: **BANKRUPTCY of PLETERSKI/AP PRIVATE EQUITY LTD.**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Leanne Williams	Trustee	lwilliams@tgf.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Trustee in Bankruptcy of Aiden Pleterski and AP Private Equity Limited moves for relief from forfeiture and for an order directing that the Westney Deposit (as defined below) be paid over to the Trustee, pursuant to section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C,43.
2. This motion represents but one step in the long and complicated series of events that flows from the actions of the Bankrupts. The parties, being the Trustee on the one hand and the vendor of a property sought to be purchased by the Bankrupts on the other hand, are in a sense, both victims of the conduct of the Bankrupts.
3. The motion is thus somewhat unusual: many claims for relief from forfeiture arise in circumstances where the issue turns on the relative conduct of those two parties. Here, the dispute is between two innocent parties. The issue on this motion is who, as between those two parties, should be entitled to a deposit paid by one of the Bankrupts to the vendor in respect of a proposed property purchase, when the deposit came from funds of investors with Pleterski that he misappropriated.
4. The Trustee relies upon the Third Report of the Trustee dated March 14, 2023, together with Appendices thereto. The Respondent, 2649360 Ontario Inc. (“264” or the “Respondent”) relies on the affidavit of Thomas Fairfull sworn May 19, 2023 together with Exhibits thereto. Mr. Fairfull is the president of 264.

Context

5. There is no disagreement on the basic facts underlying this motion.
6. The motion relates to a property located at 725 Westney Road, Ajax, Ontario (the “Westney Property”). Initially, Pleterski and Colin Murphy (“Murphy”) rented commercial space at the Westney Property purportedly for use as a place to store their exotic cars.
7. Pleterski and Murphy each signed five year rental agreements with 264.
8. Later, on October 26, 2021, Pleterski and Murphy entered into an agreement to purchase the Westney Property from 264 for \$5.5 million. A deposit of \$500,000 was paid (the “Westney Deposit”). It came exclusively from Pleterski. Closing was scheduled for September 28, 2022. The transaction contemplated in that agreement of purchase and sale, however, never closed and the sale was not completed.
9. Upon learning of the Westney Deposit, the Trustee put both the real estate broker and 264 on notice of its appointment and its claim to the Westney Deposit. As a result, the proceeds of sale are being held in escrow by the listing agent pending a resolution or determination as to the entitlement thereto.
10. On September 13, 2022, 264 delivered an anticipatory breach letter to the Trustee since both Murphy and the Trustee confirmed to 264 that they would not be completing the transaction to purchase the Westney Property. Closing had been scheduled to take place approximately two weeks later on September 28, 2022.
11. On November 24, 2022, the Westney Property was sold by 264 for a purchase price of \$5.8 million - \$300,000 greater than the amount offered in the proposed agreement of purchase and sale by Pleterski and Murphy (the “Surplus”).

The Positions of the Parties

12. 264 takes the position that it incurred damages during the period in which Pleterski and Murphy rented the premises at the Westney Property, with the result that it (264) is entitled to retain and keep both the Westney Deposit and the Surplus.
13. 264 asserts that it incurred repair costs of \$138,500 in respect of which it has provided some backup to the Trustee. 264 further asserts that it incurred additional costs (repair costs, legal costs in rent) in respect of which backup was not provided.

14. The Trustee takes the position that the Westney Deposit should be returned to it for the benefit of creditors in the bankruptcies for the following principal reasons:
- a. 264 does not appear to have incurred any damages due to the failure to close in excess of the Surplus, notwithstanding its claim for such damages, since it's demonstrated costs of \$138,500 are far less than the Surplus of \$300,000;
 - b. any costs incurred by 264 have been mitigated by the Surplus;
 - c. the Westney Deposit came from the funds of investors whose money was used by Pleterski in an unauthorized manner to fund the Westney Deposit;
 - d. most of the investors of the Bankrupts will see minimal recovery from their investments and yet, 264 stands to gain a significant profit from its own dealings with Pleterski; and
 - e. retention by 264 of the Westney Deposit would result in an unjust and inequitable unfairness to the investors of the Bankrupts.
15. The Trustee submits that if 264 is entitled to keep the Westney Deposit (funded by investors), it will have profited by \$661,000 (being the amount of the Westney Deposit of \$500,000 plus the Surplus of \$300,000 net of the demonstrated repair costs of \$138,500).

The Test

16. Section 98 of the *Courts of Justice Act*, on which the Trustee relies, provides that a court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. The jurisdiction of the court is equitable in nature.
17. A two-part test is to be applied when determining whether discretion pursuant to s. 98 should be exercised:
- a. whether the forfeited amount is out of all proportion to the damages suffered; and
 - b. whether would be unconscionable for the vendor to retain the benefit.
- See: *Redstone Enterprises Simple Technology Inc.*, 2017 ONCA 282 (“*Redstone*”) at para. 15, quoting with approval *Varajao v. Azish*, 2015 ONCA 218 at para. 11.
18. In the absence of evidence of damages, it is fair for the court to infer that none were suffered. However, that alone does not render the forfeiture unconscionable: *Redstone*, at para. 17.
19. The finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case. While in some circumstances, a disproportionately large deposit, without more, could be found to be unconscionable, such is not always the case: *Redstone*, at paras. 25 and 26.
20. While the list of the indicia of unconscionability is never closed, especially since they are context-specific, useful factors include:
- a. an inequality of bargaining power;
 - b. a substantially unfair bargain;
 - c. the relative sophistication of the parties; existence of *bona fide* negotiations;
 - d. the nature of the relationship between the parties;
 - e. the gravity of the breach, and

f. the conduct of the parties.

See: *Redstone*, at para. 30.

21. The analysis is conducted as of the time of the default rather than at the time at which the parties entered into the contract, and not on the basis of a hypothetical situation: *Kechnie v. Sun Life Assurance Company of Canada*, 2016 ONCA 434 at para. 21.
22. The term “unconscionability” has been defined to mean “that which is contrary to the conscience of the court” and “something that is shockingly unfair or unjust ... and not in keeping with a caring society”: *Dar v. The Yards Corporation*, 2018 ONSC 5043 at para. 27, citing *Scheel v. Henkelman*, 2001 CanLII 24133 (ON CA) at para. 19.

Positions of the Parties and Analysis

23. The Trustee submits that, first, as occurred in *Redstone*, 264 as the party seeking to keep the funds has put forward no evidence that it suffered any loss as a result of the breach of the agreement (in this case, the failure to close the agreement of purchase and sale). Accordingly, this court should infer that it has not suffered any such damages.
24. Second, the Trustee submits that it would be unconscionable for 264 to retain the Westney Deposit in the circumstances of this case. The Trustee, recognizing that this case involves two innocent parties, submits that the court is not being asked to grant relief from forfeiture to a party who breached an agreement at the expense of an innocent vendor. Rather, the court is being asked to grant relief from forfeiture for the benefit of the innocent investors of the Bankrupts.
25. It is undisputed that the Westney Deposit came from funds provided to Pleterski by investors¹. The agreements pursuant to which those investor funds were advanced are clear that the purpose of the advances were for investments in crypto currency and foreign exchange hedges. There is no dispute that Pleterski was not authorized by the investors to use their funds to finance the Westney Deposit.
26. The position of the Trustee is that it would be unconscionable and manifestly unfair for 264 to retain the Westney Deposit, in addition to the Surplus. Such would amount to a windfall profit for 264, in contradistinction to the massive losses suffered by the investors of the Bankrupts, most of whom will see minimal recovery on their lost investments.
27. The Trustee argues that relief from forfeiture, if granted, would not unfairly enrich the estate of the Bankrupts for the benefit of creditors, at the expense of the vendor. The vendor, 264, would not be unjustly deprived because there is no evidence that it suffered damages as a result of the anticipatory breach.
28. Further, 264 still stands to gain a significant profit from having sold the Westney Property for the Surplus of \$300,000. Even if relief from forfeiture is granted, that profit will still be \$161,500 (Surplus net of demonstrated expenses and losses). That profit would balloon to \$661,500 if no relief from forfeiture is granted, while investor recoveries are minimal, resulting in an unconscionable outcome.
29. 264 submits that relief from forfeiture should not be granted. It submits that in reliance on the agreement of purchase and sale, it permitted the purchasers (Pleterski and Murphy) to carry out significant destruction as part of an intended remodeling of the property. 264 submits that if the damage was not repaired, the agreement provided that the Westney Deposit would also be used as security for the cost of repairs.
30. 264 also submits that the purchase price as agreed was less than the fair market value of the property at the time, since the buyers had originally agreed to permit 264 to continue to use the back portion of the

¹ At least 99.8 of the Westney Deposit came from investor funds. The delta between that proportion and 100% is immaterial and was not argued as a significant point by either party on this motion.

parking lot located on the property for storage. Moreover, it submits that the fair market value of the property was higher based on the evidence of Mr. Fairfull to the effect that 264 could have sold the property for substantially more, since at the relevant time in the fall of 2022 there was significant demand for commercial properties.

31. In short, 264 submits that the Trustee is in no better position than would be Pleterski. Since both Murphy and the Trustee confirmed they would not be closing on the purchase, the Trustee knew or ought to have known that such anticipatory breach would result in a forfeiture of the deposit.
32. I accept that the law has long recognized that in usual circumstances, a deposit paid pursuant to an agreement of purchase and sale for real property is forfeited unless the parties bargained to the contrary. 264 makes extensive submissions to this effect.
33. In my view, however, those submissions (and the well-settled authorities on which they are based) do not advance the analysis very far because this fundamental point is not at the heart of the dispute. It is indeed the rare case when the law that typically applies to deposits ought not to be applied. That is precisely why, in my view, the equitable remedy of relief from forfeiture exists in the first place, and it is also why such equitable relief is granted only sparingly and in rare cases.
34. 264 also submits that, unlike in *Redstone*, the deposit at issue here represents an amount that is less than “the customary” ten percent of the purchase price, with the result that it is not excessive (or, to use the phrase in the case law, disproportionate), with the result that on this basis alone, the present case is distinguishable from *Redstone*.
35. I disagree, for two reasons. First, the proportionality referred to in the first branch of the *Redstone* test relates to the proportionality of the forfeited amount to the damages suffered, not to the balance of the purchase price for the property. Those may or may not be the same. Second, even if those amounts were the same, the proportionality issue is only the first part of the analysis. The second branch of the *Redstone* test requires the consideration of unconscionability.
36. 264 submits that, while the creditors of the Bankrupts maybe innocent parties, the Westney Deposit did not constitute proceeds of crime. I am not persuaded that this distinction is relevant. There is no requirement that relief from forfeiture requires a finding that the amount to be forfeited constitute proceeds of crime, although, as the Trustee submits in 264 concedes, the funds used to pay the Westney Deposit here may in fact be proceeds of crime. I need not make any determination in that regard.
37. 264 further submits that until such time as that (i.e., whether the Westney Deposit constitutes proceeds of crime) is determined, this motion is premature. I reject this argument for the same reason as above.
38. Finally, 264 submits that the investors were “merely persons investing in a very high risk and speculative investment, albeit possibly fraudulent”. 264 contrasts that with its own role as a “*bona fide* vendor who entered into the agreement in good faith”.
39. I cannot accept this relative characterization of the role of the investors. Even if the investors willingly undertook, in deciding to invest in crypto currency and foreign exchange hedges, “very high risks in speculative investments”, it is wholly unfair to those investors and the analysis to infer that the investors knowingly and willingly took the risk of fraud on the part of the Bankrupts. There is no basis for such a conclusion.
40. Acceptance by an investor of the risks that may be inherent in crypto currency and foreign exchange hedges is not an acceptance by that same investor that her or his money will be simply misappropriated. That was no part of the risks included in the agreement to invest. In fact, it was expressly not part of the agreement of the investors, which authorized the funds to be invested in those markets. The agreement did

not authorize the use of the funds for the purchase of a property to store exotic cars owned by the Bankrupts.

41. 264 submits that, even if it were later determined that the Westney Deposit constituted proceeds of crime, 264 is entitled to rely on the terms of the agreement of purchase and sale it bargained for in good faith.
42. Again, that submission does not assist me. There is no issue on this motion that 264 is an innocent party, and one that relied upon the agreement in good faith. The issue is whether, as one of two innocent parties, it should be entitled to retain the Westney Deposit or whether it would be unconscionable for it to do so.
43. Next, 264 submits that the Westney Deposit does not form property that is part of the estate to which the Trustee can claim title, since at the time of the bankruptcy, it was held in trust for the benefit of either the purchaser or vendor, and the purchaser (first Pleterski and later his successor in title, the Trustee) repudiated the agreement.
44. I do not accept that submission either. The Trustee is not claiming a right to the Westney Deposit *qua* purchaser under the agreement of purchase and sale. It is making an equitable claim for relief from forfeiture: i.e., the forfeiture that would flow from the enforcement of the agreement according to its terms, being the forfeiture of the Westney Deposit upon the failure to close.
45. Finally, 264 submits that in general, a contractual provision which requires one party to pay or forfeit a sum of money in the event of his breach of the contract, is unlawful as being a penalty unless such provision can be justified as a payment of liquidated damages (i.e., a genuine pre-estimate of the loss).
46. 264 submits that the one exception to this general rule is the very one on which it relies: the provision for the payment of a deposit by the purchaser on the contract for the sale of land. It relies on “ancient law” to the effect that a deposit on an agreement for the purchase of land can be validly forfeited even if it bears no reference to the anticipated loss to the vendor.
47. I reject that argument for the same reasons: that law is precisely why the equitable remedy of relief from forfeiture exists.
48. The Trustee accepts that the costs claimed by 264 of \$138,000 were incurred. That amount is not in dispute. Beyond that, however, 264 has offered no evidence of any other losses.
49. The bald statement in the Affidavit of Mr. Fairfull to the effect that: “but for the damages incurred to the property we could have sold the property for the substantially more as at the time in the fall of 2022 there was significant demand for commercial properties” is not sufficient. There is no market evidence, no appraisals, and no evidence from, for example, a real estate expert, appraiser or valuator, to support the statement made. No other out-of-pocket expenses or disbursements have been proven.
50. Similarly, Mr. Fairfull’s affidavit refers, without any particulars or terms, to what counsel referred to as a “gentleman’s agreement” pursuant to which the purchasers agreed to let 264 use the back portion of the parking lot for storage. There is no evidence upon which I can conclude that there was any additional loss suffered, let alone quantify the value of such a loss.
51. As stated above, even if the Westney Deposit is paid over to the Trustee, 264 will realize a net profit of \$135,500. The investors, on the other hand, will recover *de minimus* amounts on their investments. Having considered all of the circumstances, I conclude that it would be unconscionable to permit 264 to retain the additional \$500,000 of the Westney Deposit.

Result and Disposition

52. For all of these reasons, the motion for relief from forfeiture is granted.

53. At the conclusion of argument, counsel for the parties advised the Court that they had reached an agreement as to costs to the effect that the successful party should be entitled to costs in the amount of \$15,000 inclusive of fees, disbursements and HST.
54. The Trustee was successful on the motion. It is entitled to its costs, fixed in the agreed amount of \$15,000 all-inclusive, and payable by 264 within 30 days pursuant to Rule 57.03.
55. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Owen, J.