Court File No. CV-23-00702043-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Plaintiff

and

2668144 ONTARIO INC., ASMINUR RAHAMAN and SHAKIVE RAHAMAN

Defendants

FACTUM

(Motion for an Order appointing Receiver
Hearing Date: Friday, August 4, 2023 at 12:00 p.m., Via Video Conference)

July 25, 2023

MINDEN GROSS LLP
Barristers and Solicitors
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Lawyers for the Plaintiff,
Royal Bank of Canada

TO: **SERVICE LIST**

FACTUM OF THE PLAINTIFF

PART I - OVERVIEW

1. The Plaintiff, Royal Bank of Canada ("**RBC**"), is seeking to appoint msi Spergel inc. as receiver of 2668144 Ontario Inc. (the "**Debtor**") pursuant to section 243 of the Bankruptcy and Insolvency Act ("**BIA**") and section 101 of the Courts of Justice Act.

PART II - SUMMARY OF FACTS

Parties

2. The Debtor operates an Esso Gas station at 989 Ward Street, Bridgenorth, Ontario (the "**Bridegnorth Property**").[1]

3. Asminur Rahaman and Shakive Rahaman are directors of the Debtor. They guaranteed the debts of the Debtor to RBC.[2]

Credit Facilities and Security

4. Pursuant to a credit facilities letter agreement dated June 22, 2021 (the "**Credit Agreement**"), RBC established in favour of the Debtor:

(a) $1,273,852.04 Fixed Rate Term Facility (non-revolving) ("**Term Facility**")

(b) $65,000.00 Demand Operating Facility ("**Operating Facility**")

(c) $15,000.00 Visa Business Facility ("**Visa Facility**").[3]

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[1] Affidavit of Michael Foster sworn June 30, 2023 ("**Foster Affidavit**"), para. 9.
[2] Foster Affidavit, para. 10.
[3] Foster Affidavit, para. 11, Exhibit B.

5. The Debtor is further indebted to RBC in connection with a non-revolving term facility in the amount of $100,000.00 under the Highly Affected Sectors Credit Availability Program made available by RBC to the Debtor pursuant to a credit facilities agreement dated January 24, 2022.[4]

6. Pursuant to the "Repayment" section of the Credit Agreement, the Debtor agreed to repay the Operating Facility on demand.[5]

7. Pursuant to the "Reporting Covenants" section of the Credit Agreement, the Debtor agreed to provide certain financial information to RBC.[6]

8. Pursuant to the "General Covenants" section of the Credit Agreement, the Debtor agreed with RBC that it would, among other things, pay all sums of money when due under the terms of the Credit Agreement.[7]

9. Pursuant to the "Events of Default" section of the Credit Agreement, the following events, among others, constitute an "Event of Default" entitling RBC, in its sole discretion, to realize on all or any portion of any Security (as defined in the Credit Agreement):

(a) failure of the Debtor to pay any principal, interest or other amount when due pursuant to the Credit Agreement; and

(b) failure of the Debtor, or any Guarantor if applicable, to observe any covenant, term or condition contained in the Credit Agreement, the

[4] Foster Affidavit, para. 12, Exhibit C.
[5] Foster Affidavit, para. 13.
[6] Foster Affidavit, para 14.
[7] Foster Affidavit, para. 15.

Security, or any other agreement delivered to RBC or in any documentation relating hereto or thereto.[8]

10. As security for the credit facilities, the Debtor granted RBC a general security agreement ("**GSA**").[9]

11. The GSA expressly entitles RBC to appoint a receiver upon default.[10]

12. The Debtor also granted a Charge/Mortgage to RBC, in the principal amount of $1,445,000.00, payable on demand, in connection with the Bridgenorth Property. RBC Standard Charge Terms 20015 forms part of the Charge/Mortgage (collectively, the "**Mortgage Security**").[11]

13. The Mortgage Security, section 42 "Receivership", entitles RBC to appoint a receiver upon default.[12]

14. Effective June 27, 2023, outstanding realty taxes, with interest and fees for 2022, 2021, 2020 and prior, and 2023-03-06 and 2023-05-01, in the total amount of $29,813.11 are owing by the Debtor in connection with the Bridgenorth Property.[13]

Transfer to SLAS

15. The accounts of the Debtor were transferred to RBC's Special Loans & Advisory Services Group ("**SLAS**") in March, 2022.[14]

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[8] Foster Affidavit, para 16.
[9] Foster Affidavit, para 17, Exhibit D.
[10] Foster Affidavit, para. 19.
[11] Foster Affidavit, para. 20, Exhibit E.
[12] Foster Affidavit, para 21.
[13] Foster Affidavit, para. 25, Exhibit H.
[14] Foster Affidavit, para. 26.

16. In transferring the accounts to SLAS, RBC's main concerns, included:

- Cash flow difficulties
- Late financial reporting
- Debtor's inability to meet certain covenants and conditions under the Credit Agreement, i.e., debt servicing and postponement of shareholders' loans
- Realty tax arrears in connection with the Bridgenorth Property
- Potential litigation on Vendor-Take-Back financing in connection with the Bridgenorth Property[15]

17. In April, 2022, RBC made various requests to the Debtor to provide information in connection with priority payables. Despite RBC's requests, the information was not provided by the Debtor."[16]

18. On May 16, 2022, RBC issued a non-tolerance and reservation of rights letter (the "**Non-Tolerance and Reservation of Rights Letter**") to the Debtor advising of various breaches under the Credit Agreement, including reporting defaults. RBC required the Debtor to remedy the reporting defaults by June 1, 2022.[17]

19. On October 20, 2022, RBC notified the Debtor that the Term Facility would not be renewed on maturity (March 21, 2023) and strongly advised the Debtor to make

[15] Foster Affidavit, para. 26.
[16] Foster Affidavit, para. 28.
[17] Foster Affidavit, para. 29, Exhibit J.

arrangements with another lender to repay the Term Facility (the "**Non-Renewal Letter**").[18]

20. After the issuance of the Non-Renewal Letter, RBC continued to advise the Debtor that the Term Facility would not be renewed and all indebtedness must be paid on maturity. Despite the Non-Renewal Letter and subsequent notices, the Debtor failed to repay the Term Facility when it matured on March 21, 2023.[19]

21. On April 10, 2023, RBC issued payment demands and Notices of Intention to Enforce Security pursuant to section 244 of the BIA (the "**Section 244 Notices**").[20]

22. Upon receiving the payment demands and Section 244 Notice, the Debtor advised "I'm doing refinancing for another bank give me some time I'm working on it. Environment report is done and the appraisal is under process, appraisal inspection is done, appraisal report is awaited, refinancing process will take some more time. Please allow us more time and do not start the recovery process."[21]

23. The Debtors requested "more time" to repay the indebtedness. RBC agreed to provide more time, subject to terms and conditions under a forbearance agreement with the Debtor and Messrs. Rahaman (the Debtor and Messrs. Rahaman are collectively the "**Credit Parties**").[22]

24. On May 11, 2023, RBC provided the Credit Parties' lawyer, Craig Lewis of RZCD Law Firm LLP, with a copy of the proposed forbearance agreement with a sign back

[18] Foster Affidavit, para. 31, Exhibit K.
[19] Foster Affidavit, paras. 33-36.
[20] Foster Affidavit, para. 37, Exhibit O.
[21] Foster Affidavit, para 38.
[22] Foster Affidavit, para. 39.

deadline of May 16, 2023. Under the forbearance agreement, RBC agreed to forbear until July 25, 2023 (four months since maturity of the Term Facility) and required a consent to receivership. By reply email, Mr. Lewis requested that RBC extend the forbearance to May 2024 (more than one year since maturity). The Credit Parties' request for a one year forbearance was unacceptable to RBC. By email sent on May 11, 2023, Ms. Moses advised:

> "The Bank is not prepared to grant any additional time, beyond July 25, 2023, for the matured Term Facility to be repaid by the Borrower. As you are aware, on May 16, 2022, the Bank sent a default letter to the Borrower in connection with the Borrower's failure to provide certain information regarding potential arrears in HST remittances and source deductions in accordance with the Reporting Requirements established under the Credit Agreement.
>
> On October 20, 2022, the Bank advised the Borrower that upon maturity in March 2023, the Term Facility would not be renewed and strongly advised the Borrower to make arrangements with another lender to repay the Term Facility. The Borrower asked the Bank for extensions and the Bank repeated its position that all indebtedness must be repaid on maturity as the Term Facility would not be renewed. The Borrower failed to repay the indebtedness on maturity.
>
> The Bank has been fair and reasonable in its actions and has provided your client with ample notice of its position. Please advise if your clients will execute the forbearance agreement and appropriate schedules.
>
> In the interim, the Bank reserves all of its rights and remedies."[23]

25. Mr. Lewis confirmed that the Credit Parties "will be signing the Forbearance Agreement. We have asked that he send it to us today, but it may not get to you until tomorrow."[24]

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[23] Foster Affidavit, para. 40.
[24] Foster Affidavit, paras. 41 and 42.

26. Despite Mr. Lewis confirmation, the Credit Parties failed or refused to sign the proposed forbearance agreement. By email sent on May 18, 2023, Mr. Lewis requested that RBC renew the matured Term Facility for either a one or two year period to give the Debtor time to market and sell the Bridgenorth Property. The decision to sell the Bridgenorth Property was new information since in prior communications the Debtor advised that it was seeking to refinance with another lender. RBC requested information with respect to the proposed listing of the Bridgenorth Property.[25]

27. After further consideration, RBC agreed to revise the proposed forbearance agreement to allow the Debtor time to sell the Bridgenorth Property but on strict terms acceptable to RBC. A key term required that the Debtor pay the amount of $27,453.36 which comprised the bi-weekly payment of $4,575.56 owing under the Term Facility since maturity (the "**Term Facility Payment**"). In other words, during the forbearance period, the Debtor is required to continue to make all bi-weekly and/or monthly payments required under the Credit Agreement and keep the credit facilities in good standing.[26]

28. The sign-back deadline was extended to June 12, 2023 and the forbearance period was extended to October 31, 2023.[27]

29. The sign-back deadline expired. After the expiry of the sign-back deadline, Mr. Lewis on behalf of the Credit Parties asked for an extension of the forbearance agreement to December 31, 2023 and represented "[i]f that extension [is] granted, I

[25] Foster Affidavit, para. 42., Exhibit S.
[26] Foster Affidavit, para. 43.
[27] Foster Affidavit, para. 44.

guarantee you that there [will] be no problem in signing the revised forbearance agreement with that date."[28]

30. RBC was not prepared to further extend the forbearance period. By email sent on June 13, 2023, Ms. Moses advised:

> "With all due respect, your clients are in default under the Credit Agreement and Security and the Bank has been more than reasonable in providing them with notice of i) requirement to repay on maturity (about 3 months ago) and ii) time under the proposed forbearance agreement to repay the indebtedness. The request for further time to December 31, 2023 is unreasonable and unacceptable to the Bank. Specifically:
>
> - On May 16, 2022, a default letter was issued by the Bank to the Borrower in connection with priority payables.
> - On October 20, 2022, the Bank advised the Borrower that upon maturity in March 2023, the Term Facility would not be renewed and strongly advised the Borrower to make arrangements with another lender to repay the Term Facility.
> - The Borrower failed to repay the Term Facility upon maturity even though the Bank advised five months earlier that it would not renew the Term Facility.
> - On April 10, 2023, the Bank made demand on the Borrower and Guarantors for repayment of the Indebtedness and issued to the Borrower an NOI Notice. Demands expired two months ago and the indebtedness has not been repaid.
>
> The Bank is entitled to appoint a Receiver over the assets, undertakings and properties of the Borrower and realize on its security. Your clients have been provided with ample time to consider the terms of the forbearance agreement which they initially agreed to and then sought changes which were accommodated by the Bank. Please be advised that the Bank is prepared to extend the **sign back deadline to noon on Friday, June 16, 2023** but no other changes will be accepted. If your clients do not sign the forbearance agreement, the Bank will be considering enforcement of its rights and remedies.
>
> The Bank reserves all of its rights and remedies."[29]

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[28] Foster Affidavit, para. 45.
[29] Foster Affidavit, para. 46.

31. The Credit Parties delivered the signed forbearance agreement (the "**Forbearance Agreement**") to RBC, with the signed Consent to Receivership and Consent to Judgment on June 15, 2023. However, the Debtor failed to make the Term Facility Payment resulting in immediate default under the Forbearance Agreement.[30]

32. On June 19, 2023, RBC advised the Debtor that it was enforcing the Consent to Receivership and Consent to Judgment as it is entitled to under the Forbearance Agreement.[31]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Nature of this Motion

33. RBC, as secured creditor, seeks to appoint msi Spergel inc. as receiver of the Debtor. The Debtor consented to the appointment of a receiver upon default under the Forbearance Agreement. Further, the GSA and the Mortgage Security expressly provide for the appointment of a receiver upon default.

The Test for Appointing a Receiver

34. Pursuant to section 243(1) of the BIA and section 101 of the CJA, a court may appoint a receiver if it "is just and convenient" to do so.

35. In deciding whether or not to appoint a receiver, the court must have regard to all of the circumstances, including "the nature of the property and the rights and interests of

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[30] Foster Affidavit, para. 49, Exhibit U.
[31] Foster Affidavit, para. 52, Exhibit V

all parties in relation thereto." These include the rights of the secured creditor pursuant to its security.[32]

36. In *Sherco Properties*, Morawetz J. (as he then was) confirmed that where the security instrument provides for a right to appoint a receiver upon default, the burden on the applicant seeking to have the receiver appointed is relaxed:

> "… While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd*., 2011 ONSC 1007."[33]

37. In 2806401 Ontario Inc. o/a Allied Track Services Inc., Osborne J. stated at paragraph 13:

> "Factors considered by courts when determining whether it is just or convenient to appoint a receiver include: the existence of a debt and a default, the quality of the security in issue, the fact that the creditor has a

[32] Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023 CanLII ("***Sherco Properties***") at para. 41 and Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007 (CanLII) at para. 24.
[33] Sherco Properties, para. 42.

right to appoint a receiver under the loan documentation, the likelihood of maximizing the return to the parties, and the risk to the security holder, among others. [See, for example: *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 (Commercial List) at para 22; *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List) at para 28; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (Commercial List) at paras 24 and 27 [*Carnival Leasing*]; and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para 25]."[34]

38. RBC issued payment demands and the Section 244 Notice to the Debtor on April 10, 2023, after the Debtor failed to repay all indebtedness owing under the matured Term Facility.

39. Under the Credit Agreement, the Debtor agreed to pay all indebtedness owing under the Term Facility on maturity. The Term Facility matured on March 21, 2023, and the Debtor failed to repay all indebtedness constituting an Event of Default under the Credit Agreement.

40. With respect to the Demand Facility, on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days.[35]

[34] 2806401 Ontario Inc. o/a Allied Track Services Inc., 2022 ONSC 5509 CanLII at para. 13.
[35] Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007 (CanLII) at para. 13.

41. Under the Credit Agreement, the Debtor agreed to repay the Demand Facility and the Visa Facility on demand, if RBC demands repayment. RBC has demanded payment. The failure to pay constitutes an Event of Default under the Credit Agreement.

42. In addition to the payment defaults in connection with the credit facilities, the Debtor also failed to remedy the reporting defaults as detailed in the Non-Tolerance and Reservation of Rights Letter. The Debtor's failure to provide certain financial information to RBC as required under the Credit Agreement constitutes a breach under the Credit Agreement.

43. Under the Forbearance Agreement, the Debtor promised and agreed to, among other things:

a) contemporaneously with its execution of the Forbearance Agreement, bring the Term Facility current, specifically, by making the bi-weekly payments of $4,575.56 due on April 3, 2023 and bi-weekly thereafter which remain outstanding since maturity of the Term Facility on March 21, 2023 in the amount of $27,453.36 (the "**Term Facility Payment**") (Section 5.04(b) of the Forbearance Agreement);

b) provide reporting on payment of priority payables due on June 19, 2023 and July 14, 2023 (Section 6.01(l) of the Forbearance Agreement).

44. The Forbearance Agreement was heavily negotiated between RBC's lawyers and the Debtor's lawyers. Under the Forbearance Agreement, the Debtor agreed and

consented to the appointment of a receiver and to judgment in the event of default under the Credit Agreement and/or the GSA and/or the Mortgage Security and/or the Forbearance Agreement.

45. The Debtor has have failed to comply with its contractual obligations owed to RBC under the Credit Agreement, the GSA, the Mortgage Security and the Forbearance Agreement. Justifiably, RBC has lost confidence in the Debtor.

46. RBC has met the test for the appointment of a Receiver. RBC is a secured creditor. It is owed under the credit facilities in excess of $1.3 million. RBC has made payment demand and issued the Section 244 Notices. RBC is entitled to appoint a receiver under its security and under the Consent to Receivership. RBC requires the assistance of a court-appointed receiver to realize on its security.

47. RBC respectfully submits that it is just and convenient to appoint msi Spergel inc. as receiver at this time for the following reasons:

(a) under the Non-Renewal Letter, RBC provided the Debtor with five months' notice of its decision not to renew the Term Facility;

(b) the Term Facility matured on March 21, 2023 and remains outstanding in full;

(c) the Operating Facility and Visa Facility are repayable on demand and remains outstanding in full;

(d) under the Forbearance Agreement, RBC provided the Debtor with time to repay the indebtedness provided, among other things, that the Debtor make the Term Facility Payment;

(e) the Debtor immediately defaulted under the Forbearance Agreement by failing to make the Term Facility Payment;

(f) the Debtor is unable to make the Term Facility Payment;

(g) the Debtor has demonstrated a serious failure to comply with its obligations under the Credit Agreement, the GSA, the Mortgage Security and the Forbearance Agreement, as evidenced by the payment defaults, failing to keep current realty taxes in connection with the Bridgenorth Property, failing to comply with its financial and reporting information, including advising RBC on the status of Priority Payables and generally failing to respond to and address RBC's concerns;

(h) the Debtor's actions have resulted in Events of Default under the Credit Agreement, the GSA, the Mortgage Security and the Forbearance Agreement and the Events of Default still continue;

(i) the terms of the GSA and the Mortgage Security expressly permit the appointment of a receiver on default and the Debtor agreed to these contractual terms when it signed and delivered the GSA and the Mortgage Security to RBC in consideration of the credit facilities;

(j) RBC bargained for and relied upon enforcing the Consent to Receivership upon an Event of Default and the Debtor agreed when it signed and delivered the Consent to Receivership to RBC in consideration of the forbearance;

(k) payment demands and the Section 244 Notices to the Debtor have long since expired;

(l) the indebtedness remains outstanding in full;

(m) RBC has provided the Debtor with more than sufficient time to repay the indebtedness;

(n) the receiver will be in a position to market and sell the Bridgenorth Property for the benefit of all stakeholders;

(o) RBC has no line of sight on Priority Payables (other than realty taxes which is in arrears) as the Debtor has failed and/or refused to provide the financial information requested by RBC under the Credit Agreement; and

(p) msi Spergel inc. has consented to act as receiver.

Test to Vary Consent to Receivership Order

48. The Debtor executed and delivered the Consent to Receivership to RBC under the Forbearance Agreement. The Debtor was represented by legal counsel during the negotiations and execution of the Consent to Receivership.

49. The Courts have consistently held:

"A consent judgment [receivership] is final and binding and can only be amended when it does not express the real intentions of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified."[36]

"It is argued that a consent order can only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract, and that none of these grounds is present in this case. Counsel argued that a consent order is a contract and must be treated as such. In support of this submission was cited Australaisan Automatic Weighing Machine Co. v, Walter, [1891] W.N. 170; Devlin v. Boon [1929] 3 W.W.R. 541, 24 Sask. L.R. 149, [1930] 1 D.L.R. 910 (C.A.); Huddersfield Banking Co. V. Henry Lister & Son Ltd., [1895] 2 Ch. D. 273 (C.A.) and C.I.B.C. v. Whites Lake Services Ltd. (1982), 56 N.S.R. (2d) 236, 32 C.P.C. 128, 117 A.P.R. 236 (Co. Ct.). I agree with this submission based upon the cases cited."[37]

"A consent judgment is not a judicial determination on the merits of the case, but an agreement elevated to the status of an order on consent. The basis of the order is the parties' agreement and not a judicial determination of what is fair and reasonable in the circumstances. A consent order may be set aside on the same basis for setting aside a

[36] *Monarch Construction Ltd. v. Buildevco Ltd.*, 1988 CarswellOnt 369 at paragraph 3.
[37] *Chitel v. Rothbart,* 1984 CarswellOnt 358 at paragraph 25.

contract: *Teitelbaum v. Dyson* (2000), 7 CPC (5th) 356 (Ont. S.C.), at para. 38, aff'd (2001) CanLII 32771 (ON Ca), 151 O.A.C. 399 (C.A.). A self-induced unilateral mistake is not ordinarily a basis for setting aside a contract."[38]

"A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be set aside on the same grounds as the agreement giving rise to the judgment. These grounds go to the formation of the agreement, not to its subsequent performance. A self-induced unilateral mistake is not ordinarily a basis for setting aside a contract. See *McCowan v. McCowan* (1995), 24 O.R. (3d) 707, 1995 CanLII 1085 (C.A.), *Monarch Construction Ltd. v. Buildevco Ltd.* (1998), 26 C.P.C. (2d) 164 at 165-166 (Ont. C.A.), *Royal Bank of Canada v. Korman*, 2009 ONCA 590 at para. 15 and *Verge Insurance Brokers Limited et al. v. Sherk*, 2015 ONSC 4044 at paras. 54-57."[39]

50. In this case, the Consent to Receivership was negotiated between the lawyers for the parties. There is no evidence of common mistake, misrepresentation or fraud. There is no evidence that the Consent to Receivership is unfair or unreasonable based on the record before the Court. It is respectfully submitted that there is no basis for the Court to intervene to vary or set aside the Consent to Receivership.

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[38] *Royal Bank of Canada v. Korman*, 2009 ONCA 590 (CanLII) at paragraph 15.
[39] *Settlement Lenders Inc. v. Grillone*, 2022 ONSC 6275 (CanLII)

51. RBC requests that the Court give effect to the Consent to Receivership.

PART IV - ORDER REQUESTED

52. It is respectfully requested that RBC be granted the relief sought in the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2023.

Rachel Moses

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Monarch Construction Ltd. v. Buildevco Ltd.

1988 CarswellOnt 369, [1988] O.J. No. 332, 26 C.P.C. (2d) 164, 9 A.C.W.S. (3d) 321

MONARCH CONSTRUCTION LTD. v. BUILDEVCO LTD. et al.

Houlden, Morden and Robbins JJ.A.

Judgment: March 31, 1988
Docket: No. CA 22/87

Counsel: *W.I.C. Binnie*, Q.C., and *T. Curry*, for appellant (defendant) Buildevco Ltd.
W.V. Sasso and *A.D. Griffin*, for respondent (plaintiff).

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.d Consent orders
Headnote
Practice --- Judgments and orders — Amending or varying — Consent orders
Judgments and orders — Amending or varying — After judgment entered — Error or inadvertance — Consent order — Order not reflecting agreement between parties — Leave granted to amend — Order granting leave set aside on appeal.
Judgments and orders — Amending or varying — Consent orders — Possible where not reflecting real intention of parties or where there being fraud.
Pursuant to a joint venture agreement, where one party failed to provide funding and the other party provided the amount in default, the party advancing the funds would be reimbursed before any moneys owing to the defaulting party were repaid. In consideration of advancing the funds, the party would obtain a charge on the interest of the defaulting party. A buy-out clause provided that either party could purchase or sell their respective interest pursuant to a written offer. Failure to accept would deem an irrevocable counter-offer to have been made. As a condition of the sale, the purchaser was to pay the vendor the sale price and, in addition, all amounts, if any, then owing by the purchaser to the vendor under the joint venture agreement.
The defendant defaulted and the plaintiff assumed payment of expenses. The plaintiff triggered the buy-out clause and offered to sell its share to the defendant for the amount owing by the defendant. The plaintiff commenced an action to realize on its security interest. The plaintiff obtained an order for summary judgment on consent. The defendant learned that there was an error in the calculations in the judgment. The plaintiff obtained an order amending the consent order. The defendant appealed.
Held:
The appeal was allowed; leave to amend was set aside and the motion to amend the judgment was dismissed.
The learned Local Judge hearing the motion held that the deemed counter-offer was to sell the defendant's interest for what the defendant owed to the plaintiff. The agreement provided that the defendant would on closing pay the plaintiff all amounts, if any, owing by the defendant to the plaintiff. It was contemplated that there would be an accounting by the plaintiff of the amount alleged to be owing by the defendant. The accounts which had been prepared by the plaintiff were forwarded to the defendant's auditors. However, the auditor's report was not received until after the consent judgment.
A consent judgment was final and binding unless the judgment did not express the real intention of the parties or where there was fraud. There was no basis upon which to order rectification. The agreement was unambiguous on its face. It had been incorporated into the consent judgment and was to be performed pursuant to its terms.

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APPEAL by defendant from order of Scott L.J.S.C. dated December 10, 1986, granting leave to amend consent order.

***Per curiam* (orally):**

1 The offer to sell was made pursuant to s. 8(*b*) of the joint venture agreement. It was initiated by the respondent Monarch Construction Limited ("Monarch"), a large land development company. It was Monarch's obligation to draw the agreement properly. The appellant Buildevco Limited ("Buildevco") had no power under the agreement to make any alteration in the offer. Unfortunately, Monarch made an error in calculating the amount owing by Buildevco pursuant to the joint venture agreement.

2 The offer to sell was embodied in a consent judgment of the Court which was obtained on Monarch's motion. When Monarch discovered its error, it moved to amend the consent order. The Local Judge who heard the motion was of the opinion that the deemed counter-offer was to sell Buildevco's interest for what Buildevco owed Monarch. With respect, we do not agree. The agreement specifically provided that Buildevco would on closing pay to Monarch all amounts, *if any*, owing by Buildevco to Monarch; thus, it contemplated that there would be an accounting by Monarch of the amount alleged to be owing by Buildevco. The accounts were prepared by Monarch and forwarded to Buildevco's auditors to be checked. Regrettably, the auditors did not report to Buildevco until after the consent order had been entered. The parties, and the Local Judge noted, are still not ad idem as to the amount owing. Rescission is no longer possible because Monarch forced the transfer of the property to it pursuant to the consent judgment.

3 A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.

4 In the result, the appeal will be allowed, the order below set aside, and in its place there will be an order dismissing the motion to amend the judgment. The appellant will be entitled to its costs here and below.

Appeal allowed.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Verge Insurance Brokers Ltd. v. Sherk | 2015 ONSC 4044, 2015 CarswellOnt 9757, [2015] O.J. No. 3413, 255 A.C.W.S. (3d) 976 | (Ont. S.C.J., Jun 29, 2015)

1984 CarswellOnt 358
Ontario Supreme Court

Chitel v. Rothbart

1984 CarswellOnt 358, [1984] O.J. No. 2238, 25 A.C.W.S. (2d) 215, 42 C.P.C. 217

Chitel et al. v. Rothbart et al.

Rothbart et al. v. Chitel et al. *

Master Sandler

Heard: March 21 and 22, 1984
Judgment: April 26, 1984
Docket: Nos. 1123/82 and 2187/82

Counsel: *F.P. Morrison*, for plaintiffs and defendant by counterclaim.
R.A. Harris and *D.G. Christie*, for defendants and plaintiffs by counterclaim.
B. Haines, Q.C., for defendant Carol Rothbart.

Subject: Civil Practice and Procedure; Evidence
Related Abridgment Classifications
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.a Use of affidavit evidence
XIV.7.a.i Supplemental or further affidavits
Civil practice and procedure
XXII Judgments and orders
XXII.13 Consent judgments or orders
XXII.13.a Nature, interpretations and effect
Evidence
XVII Affidavits
XVII.7 Miscellaneous
Headnote
Evidence --- Affidavits
Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Supplemental or further affidavits
Practice --- Judgments and orders — Consent judgments or orders — Nature, interpretations and effect
Judgments and Orders — Consent — Nature, interpretation and effect — Counsel for parties consenting to order respecting affidavit on production — Consent order made for further and better affidavit on production — Failure by party to comply with order — Other party authorized by consent order to apply ex parte for action to be dismissed if order not complied with — Ex parte order granted — Consent order being contract and can only be varied by subsequent consent or mistake or fraud — Even if respective clients not fully informed, counsel having ostensible authority to agree to consent order.

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Interlocutory motions — Evidence on motions — Affidavit evidence — Effect of double hearsay — Discretion of Court to reject hearsay evidence under Ont. R. 292 — No reason given why direct affidavit evidence could not have been delivered prior to motion.

Evidence — Affidavits — Supplementary — Motion adjourned overnight — Additional affidavit tendered to buttress plaintiffs' case — Power of Court to reject affidavit on grounds of unfairness — No satisfactory explanation why affidavit could not have been delivered prior to motion.

The plaintiffs and defendants in two actions consented to orders of February 22, 1984 requiring the plaintiff to file an affidavit on production by March 5, 1984 in one action and a further and better affidavit on production in the other action and in the event she failed to do so the defendants were at liberty to apply ex parte to dismiss the action. During late February 1984 there was an exchange of telephone conversations and letters wherein new lawyers for the plaintiffs requested additional time to file the affidavit on production and this request was refused by the defendants' lawyers.

The defendants' lawyers then brought a motion ex parte on March 6, 1984 to have one action dismissed and a caution vacated. The Court dismissed the action but did not vacate the caution though it did give leave to re-apply once certain requirements of its order were fulfilled. The plaintiffs' lawyers then brought motions to set aside the ex parte order of March 6, 1984 and to vary the consent orders of February 22, 1984 to extend the dates for filing the affidavits on production to April 12, 1984 in each case.

Held:

The plaintiffs' motions were dismissed and the plaintiffs' actions were dismissed, and the caution in one action was vacated.

A consent order was a contract and must be treated as such. Therefore, it could only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract and none of those grounds was present in this case. Even if the plaintiffs were wholly unaware of the demands for the additional documents and they did not know about and would not have agreed to the consent orders their solicitors at the date of the order had ostensible or apparent authority to consent to the two orders of February 22 and the defendants' solicitors had no knowledge of any limitation or restriction on the lawyer of the plaintiffs' retainer.

The motion was adjourned overnight. The following morning the plaintiffs sought to tender an affidavit prepared during the adjournment. The Court rejected the affidavit. There was no satisfactory explanation why the affidavit could not have been delivered prior to the motion. It was wrong, except in the most unusual circumstances, to allow counsel to repair damage to his case by allowing further evidence to be introduced as the motion was being argued.

Annotation

This Case is important for the Court's characterization of consent orders as contracts and capable of being varied or set aside only on the same grounds as a contract. A particular aspect of this is the Court's refusal to intervene because it was alleged that the lawyer for the plaintiff at the time of the consent order did not have actual authority from his clients to consent to the order. Master Sandler held instead that the ostensible or apparent authority of the lawyer in these circumstances was sufficient to bind the clients.

There is an interesting conflict developing in the case law concerning when settlements should be enforced by a Court where they have been reached without full knowledge or consent of the client. This conflict is referred to by Master Sandler in his judgment.

The Ontario cases, with the exception of the dissenting judgment of Mr. Justice Galligan in Fabian v. Bud Mervyn Const. Ltd. (1982), 23 C.P.C. 140, 35 O.R. (2d) 132, 127 D.L.R. (3d) 119 (Div. Ct.), held that a Court should never set aside a settlement only because a client later demonstrates that the settlement was not reached without his or her actual consent. Instead the dissatisfied client is limited to attacking the settlement on the same grounds available for setting aside or varying a contract. Therefore, presumably a settlement could be set aside if unconscionability, for instance, were proven. In addition, clients might very well have an action against their own lawyer for negligence in settling the lawsuit or some aspect of it without their consent.

The British Columbia cases, on the other hand, are more willing to investigate the circumstances surrounding the settlement when it has been made in the absence of consent of one of the parties. These cases draw a distinction between two classes of settlements. The one occurs where a settlement has been effected by counsel acting within the scope of their authority. In that situation the British Columbia cases, for example, Hawitt v. Campbell, 37 C.P.C. 52, [1983] 5 W.W.R. 760, 46 B.C.L.R. 260, 148 D.L.R. (3d) 341 (C.A.) [note Hawitt] would also hold the dissatisfied client to the terms of the settlement. The other

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class involves situations where a consent order has been drafted but not yet approved by the Court and the client then realizes that the terms are not consistent with his or her instructions. In these cases the British Columbia cases have relied on old English authority, for instance, Shepherd v. Robinson, [1919] 1 K.B. 474 and held that a Court should not passively approve the impugned consent order but may refuse to do so if the settlement would result in injustice or make it unreasonable or unfair to enforce the settlement.

One has sympathy with clients who discover that their actions have been settled on terms which are unsatisfactory. At the same time there are difficulties with the distinction drawn by the British Columbia cases. The fact that a Court has to make an order before a settlement between the parties can be effected should not in and of itself give rise to a more searching review of the means by which the settlement was reached. If any intervention by a Court were the critical aspect it would mean that many other settlements would not be subject to this heightened scrutiny simply because the settlement has been effected and thus required no further Court order before a client realized something was amiss. See, for example, Thomson v. Gough, (1977), 17 O.R. (2d) 420, 5 C.P.C. 43, 80 D.L.R. (3d) 598 (H.C.). Moreover, many contracts are brought before a Court to be enforced when a party has not complied but, obviously, no one would suggest that that kind of judicial intervention should, by itself, give rise to the enhanced review of the circumstances surrounding the making of the contract which the British Columbia cases contemplate for settlements in the second class just described. See, for example, Bank of Montreal v. Arvee Cedar Mills Ltd., 9 C.P.C. 249, [1979] 1 W.W.R. 219, 93 D.L.R. (3d) 58 (B.C.S.C.).

Settlements where the enhanced scrutiny contemplated by the British Columbia Cases could be justified are those where the Court must approve the settlement such as in infant cases or derivative suits. In these cases it can be argued that there is simply no binding settlement until the Court has scrutinized the terms and the manner in which it has been reached.

There are good reasons for the position taken by the Ontario Courts respecting settlements including the promotion of quick and inexpensive means by which parties can agree to dispose of lawsuits or aspects of them as in the instant case. It may be counsel of perfection but lawyers can protect themselves from a later questioning of settlements by their clients by stipulating that the settlement has no effect until explicitly agreed to by the client.

W.A. Bogart

Table of Authorities

Cases considered:

Australasian Automatic Weighing Machine Co. v. Walter, [1891] W.N. 170 — *referred to*

Bank of Montreal v. Arvee Cedar Mills Ltd., [1979] 1 W.W.R. 219, 9 C.P.C. 249, 93 D.L.R. (3d) 58 (B.C. S.C.) — *disapproved*

Bongard v. Parry Sound, [1968] 2 O.R. 137 (H.C.) — *referred to*

C.I.B.C. v. Whites Lake Services Ltd. (1982), 56 N.S.R. (2d) 236, 32 C.P.C. 128, 117 A.P.R. 236 (Co. Ct.) — *referred to*

Devlin v. Boon, [1929] 3 W.W.R. 541, 24 Sask. L.R. 149, [1930] 1 D.L.R. 910 (C.A.) — *referred to*

Fabian v. Bud Mervyn Const. Ltd. (1982), 35 O.R. (2d) 132, 23 C.P.C. 140, 127 D.L.R. (3d) 119 (Div. Ct.) — *followed*

Hawitt v. Campbell, [1983] 5 W.W.R. 760, 37 C.P.C. 52, 46 B.C.L.R. 260, 148 D.L.R. (3d) 341 (C.A.) — *disapproved*

Huddersfield v. Lister, [1895] 2 Ch. D. 273 (C.A.) — *referred to*

Scherer v. Paletta, [1966] 2 O.R. 524, 57 D.L.R. (2d) 532 (C.A.) — *applied*

Thomson v. Gough (1977), 17 O.R. (2d) 420, 5 C.P.C. 43, 80 D.L.R. (3d) 598 (H.C.) — *followed*

Wiley, Lowe & Co. v. Gould, [1958] O.W.N. 316 (H.C.) — *referred to*

Rules considered:

Ont. Rr. 292, 373(1)(d).

Motions brought by plaintiffs to set aside ex parte order and to vary consent orders.

***Master Sandler*:**

1 These motions raise the issue as to the significance, enforceability and reliability of consent orders issued by this Court. There are two actions, the first being S.C.O. 1123/82 wherein Leona Chitel and her company are plaintiffs and Peter Rothbart

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and his company are defendants, which also contains a counterclaim between the same parties and the second being S.C.O. 2187/82, wherein Leona Chitel is plaintiff and Peter Rothbart and Carol Rothbart are defendants. This second action is known as the "house case" and alleges a fraudulent conveyance between the defendants to defeat the claims of the plaintiff that are raised in the first action. The first action concerns complex financial transactions between the plaintiff and her company and the defendant and his company. A brief description of this action and the issues in it can be found in the judgment of MacKinnon, A.C.J.O. reported in (1982), 30 C.P.C. 205, 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62 (C.A.) . The second action alleges a fraudulent conveyance and a lis pendens has been obtained by the plaintiff and registered against the title to the property in that action.

2 Both actions are at the discovery stage. The defendant, Peter Rothbart, has been examined for discovery and has delivered a voluminous affidavit on production. The plaintiff delivered an affidavit on production, sworn in November of 1982, in the first action, discovering 13 items.

3 As soon as this affidavit on production had been delivered, the defendants' solicitors, by letter dated December 8, 1982, expressed dissatisfaction with it, pointed out where it was deficient and required a further and better affidavit on production.

4 Further, in January of 1983, these solicitors requested delivery of an affidavit on production in the second action.

5 In May of 1983, these solicitors wrote a further letter to the plaintiffs' solicitors reiterating their earlier demands.

6 In early 1984, the plaintiffs' then solicitors wrote to the defendants' solicitors advising that they anticipated that a notice of change of solicitors would be filed shortly by a new solicitor, one Glenn Erikson. The defendants' solicitors replied by letter of January 25, 1984, repeating their previous demands for the additional documents and a further and better affidavit on production in the first action, and for an affidavit on production in the second action, and made reference to the 18 months that had passed without proper documentary production, and set a further limit of 10 days for the delivery of this material.

7 When there was no response by early February of 1984, the defendants' solicitors swore affidavits on February 14, 1984, in support of applications in both actions, to obtain orders compelling delivery of the further and better affidavit on production and affidavit on production, and these motions were served by delivery on the plaintiffs' then solicitors of record on February 15, 1984, returnable February 22, 1984.

8 On February 16, 1984, notices of change of solicitors were prepared by Erikson & Associates, the new solicitors for the plaintiffs, and were mailed that day and were filed, with proof of service, on February 17, 1984.

9 On February 22, 1984, the defendants' motions came before me and Mr. Haines appeared for the defendant Craol Rothbart, Mr. D. Christie appeared for the defendants P. Rothbart and Roprop Foundation Inc., and Mr. R. Lachcik appeared for the plaintiffs. I was advised by all counsel that a consent for each motion had been arrived at in each action, and draft orders with the consent and approval of all counsel endorsed thereon were filed, and I did then and there issue two orders exactly as requested by counsel. The text of these two orders is critical and I set them out fully. In action 1123/82, the order provided as follows:

> 1. IT IS ORDERED that the Plaintiff, Leona Chitel, do, on or before the 14th day of March, 1984, deliver to the Defendants herein a further and better Affidavit as to Production of Documents making reference to those documents referred to in paragraph 5 of the Affidavit of R. Alan Harris, sworn the 14th day of February, 1984.
>
> 2. AND IT IS ORDERED that the Plaintiff, Leona Chitel, be required to deposit true copies of such documents with the Defendants on or before the 14th day of March, 1984.
>
> 3. AND IT IS FURTHER ORDERED that should the Plaintiff, Leona Chitel, fail to comply with the requirements set out in paragraphs 1 or 2 herein, the Defendants shall be at liberty to apply ex parte to dismiss the action as against them.
>
> 4. AND IT IS FURTHER ORDERED that the costs of this application be to the Defendants in any event of the cause.

10 In action 2187/82, the order provided as follows:

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> 1. IT IS ORDERED that the Plaintiff make discovery on oath of the documents in possession (sic) of the Plaintiff and produce and deposit the same as required and deliver her Affidavit as to Production of Documents, all of which shall be completed before the 5th day of March, 1984.
>
> 2. AND IT IS ORDERED that in the event the Plaintiff is in default of the provisions of paragraph 1 herein, the Defendants, or either of them, shall be at liberty to apply ex parte to dismiss this action.
>
> 3. AND IT IS FURTHER ORDERED that the costs of this application shall be costs to the Defendants in any event of the cause.

11 These two orders were issued by me on February 22, 1984 and entered the same day.

12 On Monday, February 27, 1984, the solicitors for the defendant Peter Rothbart had delivered by hand a letter, dated Friday, February 24, to the new solicitors for the plaintiffs, Erikson & Associates, to the attention of Peter J. Lachik, which read as follows:

> We enclose herewith a photostat copy of the entered Orders of Master Sandler, with respect to the above-captioned actions.
>
> Please be advised that in the event the productions required of the plaintiff in each action are not delivered within the time specified in the applicable Order, we will proceed strictly in accordance with the terms of the Order, in order to enforce our clients' rights.
>
> In particular, please take notice that in default of compliance with the Orders, we will be moving ex parte to strike the claims against our clients.

13 From this point on, events moved swiftly indeed.

14 On Tuesday, February 28, 1984, one L.T. Forbes, a solicitor with McCarthy & McCarthy, telephoned Mr. Haines to advise that McCarthy's had now been retained by Erikson & Associates and he requested an extension of the time for the delivery of the further and better affidavit on production and affidavit on production required by my orders of February 22. This request was refused.

15 On Tuesday, February 28, 1984, Mr. Harris delivered to Mr. Forbes a letter dated February 28, 1984, explaining why the defendants would not grant Mr. Forbes any further indulgences. After setting out the history of the defendants' attempts to obtain proper productions since September of 1982, the letter continued as follows:

> Mr. Douglas Christie of our firm, together with Mr. Bruce Haines, Q.C., the solicitor for Mrs. Rothbart, met with a representative of Erikson & Associates early on February 22nd, 1984, to negotiate the terms of a proposed Order by the Master with respect to the three Motions that were brought with regard to these two cases. A draft form of Order was approved by all three counsel in the house case and by Mr. Christie and the plaintiffs' solicitor in the main case and submitted to the Master. I am advised by Mr. Christie that the question of the time limits was well discussed by all three solicitors and a resolution of each case was agreed upon, depending on the time required for each case.
>
> I should point out to you that Erikson & Associates held themselves out as being experts with respect to securities work and therefore they must have been aware as to the amount of time that would be required to comply with the requirements of the Master's Orders and counsel for the plaintiffs was specifically asked if he had read paragraph 5 of my affidavit sworn February 14th, and he replied that he had.
>
> I thought I should point out to you the history of this case since you might not be fully familiar with it and the reasons why I had to tell you that I would not be in a position to grant you any indulgences and that we were in fact relying upon the time limits set out in Master Sandler's Orders. The plaintiffs have had in excess of one year to obtain and prepare and

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collate the requisite documentation, or at very least to have prepared an Affidavit on Production in the form that they knew was required of them. They have also had the benefit of our productions, which were delivered to their first solicitors.

In sum, I must again advise you that we are relying upon the time limits in the Orders of Master Sandler.

16 On Friday, March 2, 1984, Mr. Forbes wrote and had delivered a letter to the defendants' solicitors reading as follows:

Enclosed for service upon you pursuant to Rule 201 is a Notice of Change of Solicitors.

Also enclosed is an Affidavit on Production which is being transported to Mrs. Chitel who is absent from the country for execution and return for the purpose of delivery. Delivery of the executed affidavit may not take place until Tuesday next. May we have your undertaking not to move ex parte if the circumstances are such that we cannot deliver the affidavit on Monday.

In my discussion by telephone with you this week, I mentioned our difficulty having received three boxes of documents on Wednesday, attempting to appreciate the issues in both actions and prepare the Affidavit on Production.

While we are attempting to be able to meet the March 14 deadline in action number 1123/82 in that arrangements have been made to collect all of the records in relation to Mrs. Chitel during the years 1979, 1980 and 1981 and arrangements have been made for the delivery of the documents from Switzerland, we cannot have all of these records available on Monday, March 5.

We enclose copies of the deeds referred to in the affidavit in action number 2187/82. We understand that you have copies of the documents referred to in the affidavit which has been delivered in action number 1123/82.

We have made references in the affidavit on action number 2187/82 to the documents in action number 1123/82 as that action is referred to in the pleadings in action number 2187/82. However, we cannot give you copies of these documents by March 5. We are striving to do so by March 14.

Please let me know if this is satisfactory to you because if it is not, I feel we must bring a motion before the Master on Monday to extend the time for delivery of the affidavit and lodging of the documents in action 1123/82 until March 14.

17 On Tuesday, March 6, the defendants in 2187/82 had sworn an affidavit of one Patricia Harrison, in support of their ex parte application in 2187/82 for the order contemplated in my order of February 22, 1984, namely for an order dismissing the action and vacating the lis pendens, and counsel appeared before me that day, ex parte, to obtain this order.

18 Counsel for the applicant-defendants disclosed all the recent developments between themselves and Mr. Forbes of McCarthy & McCarthy, and showed me Mr. Forbes' said letter of March 2nd and I made the following order:

1. AND IT IS ORDERED that this action be and the same is hereby dismissed with costs, including the cost of this application, to be paid to the Defendants by the Plaintiff forthwith after taxation, for failure of the Plaintiff to make discovery on oath of the documents in possession of the Plaintiff and produce and deposit the same as required and for failure to deliver her Affidavit as to Production of Documents on or before the 5th day of March, 1984.

2. AND IT IS FURTHER ORDERED that a copy of this Order be served on the new solicitors for the plaintiff, pursuant to Rule 201, by delivery, forthwith after entry thereof, and no other ex parte proceeding be taken until after the expiry of 7 days from the date of service.

19 I refused on that day to vacate the caution that had been registered, but provided that the defendants could re-apply for that relief in accordance with para. 2 of my order aforesaid.

20 On March 6, the defendants' solicitors wrote a letter to Mr. Forbes at McCarthy & McCarthy which was hand-delivered on March 7, reading as follows:

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We acknowledge receipt of your letter dated March 2nd, 1984, respecting the above-captioned matter.

As you are aware from the letter last week from Mr. Harris, our client is not prepared to grant any indulgence in this matter. Accordingly, both counsel for Carol Rothbart and the undersigned attended before Master Sandler sitting as ex parte Master on Tuesday, March 6th, 1984, and obtained an Order dismissing this action.

A true copy of the entered Order of Master Sandler dated the 6th day of March, 1984, was delivered to your office that same day.

Please note that Master Sandler was presented with a copy of your letter of March 2nd, 1984, which was filed with the Court and he was advised of the fact that an unsworn Affidavit on Production was delivered together with your Notice of Change of Solicitors.

In accordance with paragraph 2 of the Order of Master Sandler given on March 6th, 1984, the defendants, or either of them, will be in a position to move ex parte to vacate the caution registered by your client on the eighth day next following the date of the Order. Please note that it is our intention to seek such an Order upon the expiry of the time limit set by the Court.

21 Now McCarthy & McCarthy, as the latest solicitors for the plaintiffs, started their own interlocutory motions. Two affidavits of one V. James Bristow, a law clerk in their offices, were sworn on March 9, 1984, in support two motions, one in 2187/82 to set aside my ex parte order of March 6, 1984 and to vary my order of February 22, 1984 (the "consent order") to change the date of March 6 to April 12, 1984; and the other in 1123/82, to vary my other order of February 22nd (the "consent order") to change the date from March 14 to April 12. These motions were served Friday, March 9, returnable Monday, March 12.

22 On March 12, these two motions were adjourned to March 21, because the defendants were considering cross-examining on the affidavits in support, but subsequently decided not to proceed with such cross-examinations and the motions were argued before me on Wednesday, March 21 and Thursday, March 22, 1984.

23 The affidavits of V. James Bristow, in support of each of these two applications, is practically identical, and read as follows:

I, V. JAMES BRISTOW, of the city of Etobicoke, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Law Clerk employed by McCarthy & McCarthy, solicitors to Leona Chitel ("Chitel") and Garadur Anstalt ("Garadur") and as such have knowledge of the matters hereinafter deposed to.

2. I am advised by L. Thomas Forbes, Q.C., counsel to Chitel and Garadur in both Actions No. 1123/82 and 2187/82 and do verily believe the following:

(a) That he was first contacted by Chitel on Thursday, February 23, 1984, requesting that he take on the carriage of these actions;

(b) He agreed to take on these actions on Friday, February 24, 1984;

(c) He met with Mr. Glen H. Erikson, Esq., on February 27, 1984, at 4:30 p.m. in his offices. At that time it was explained to Mr. Forbes that Mr. Erikson had become solicitor of record merely to facilitate the service of documents as the previous solicitors, Messrs. Atlin, Goldenberg, had ceased to act and had not been acting since the early fall of 1983;

(d) He called Mr. Erikson on February 28, 1984, and asked him to forward the files in this action to him;

(e) Mr. Forbes thereafter received three large boxes of files;

(f) On February 28, 1984, he called Mr. Bruce Haines, Q.C. and Mr. Alan Harris concerning this action, but was unable to reach them;

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(g) He called both gentlemen again on February 29, 1984 and spoke to them and advised then that we would try our best to prepare an Affidavit on Production and deliver such Affidavit together with the documents in relation to action no. 1123/82 involving Garadur and that we could get an Affidavit on Production and certain documents to them in relation to action no. 2187/82, but that we had concern that an Affidavit on Production in the fraudulent conveyance action would require reference to the documents in the action involving Garadur; that he would be unable to get the Swiss documents to them until the later date; that he had some doubts as to whether he could get the Swiss documents to them by March 14th in action no. 1123/82 and certainly not by March 7th with respect to the fraudulent conveyance action;

(h) On March 2, Mr. Forbes delivered a letter dated March 2, 1984, to both Mr. Harris and Mr. Haines enclosing, inter alia, Notices of Change of Solicitors in both actions, an unsworn Affidavit on Production which was then being transported to Chitel in California for the purpose of execution and explaining in part the difficulties which we were facing. That letter further requested an undertaking of Messrs. Harris and Haines not to move ex parte if the circumstances were such that we could not deliver the Affidavit on Monday, March 5, 1984;

(i) On Monday, March 5, 1984, Mr. Forbes called both Mr. Haines and Mr. Harris and left word to return his call. Mr. Haines did not return his call. Mr. Forbes was advised that Mr. Harris' secretary or the person who was going to deal with the matter for Mr. Harris in his absence would call him. The messages were clearly to the effect that he was calling with respect to these particular actions. Mr. Forbes mentioned to at least Mr. Haines that he wished to hear from him, as he may have to bring an application before the Master that day to extend the time provided by the Orders of February 22, 1984, if the letter referred to in subparagraph (h) above was not satisfactory.

(j) Mr. Forbes received no response from either Mr. Harris, his representative or from Mr. Haines.

3. Now shown to me and appended hereto as Exhibit 'A' to this my Affidavit is a true copy of the said letter of March 2, 1984.

4. Now shown to me and appended hereto as Exhibit 'B' to this my Affidavit is a true copy of the Affidavit of Production of Leona Chitel sworn in Action No. 2187/82.

5. On March 6, 1984, our office was served with an Order of Master Sandler, dated Tuesday, the 6th day of March, 1984. Now shown to me and appended hereto as Exhibit 'C' to this my Affidavit is a true copy of the said Order.

6. That Order refers to the Affidavit of Patricia Harrison. I instructed our Process Servers to search the Court file for such an Affidavit. Now shown to me and appended hereto as Exhibit 'D' to this my Affidavit is a true copy of the said Affidavit of Patricia Harrison, which I am advised by our Process Servers, and do verily believe, was filed in support of this application. It contains as Exhibit 'B' thereto a letter of February 24, 1984, from the solicitors for Peter Rothbart to Glen Erikson, which prior to obtaining such Affidavit, we had not previously seen.

7. On March 7, 1984, we received a letter of March 6, 1984, marked 'Delivered by Hand' from the solicitors for Mr. Rothbart. Now shown to me and appended hereto as Exhibit 'E' is a true copy of the said letter of March 6, 1984.

8. On March 7, 1984, a letter dated March 1, 1984, from Mr. Haines to Mr. Forbes was received in our offices. I am advised by Margaret Radzick, secretary to Mr. Forbes, and do verily believe that the envelope containing such letter was marked 'Delivered'. Such delivery occurred six days after the date upon such letter and after the Order of Master Sandler.

9. I am advised by Mr. Charles McGrath, an associate of Chitel, and do verily believe that neither he nor Chitel had received a request from any solicitors prior to retaining McCarthy & McCarthy to provide bank documents or other records with respect to transactions taking place in Switzerland respecting Garadur.

10. I am further advised by Mr. McGrath and do verily believe that the first time that he saw the affidavit of R. Alan Harris sworn the 14th day of February, 1984, was after retaining McCarthy & McCarthy and that Chitel has never been provided with a copy of that affidavit or made aware of its content before McCarthy & McCarthy was retained.

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> 11. I am further advised by Charles McGrath and do verily believe that neither he nor Chitel was aware that the Orders of February 22, 1984, were being consented to by Mr. Erikson.
>
> 12. I am further advised by Charles McGrath and do verily believe that neither he nor Chitel would have agreed to the dates set out in the order of February 22, 1984, in these actions as it would be impossible to accumulate the documents referred to in the Affidavit of R. Alan Harris sworn February 14, 1984, within the time limit set out.
>
> 13. I am further advised by Charles McGrath and do verily believe that as soon as he became aware of the documents which were being sought in these proceedings he immediately requested that the documents required from Switzerland be forthwith transmitted to Toronto for the use of McCarthy & McCarthy. Shortly thereafter he was advised that the consent of Chitel was required for such documents to be sent to Toronto. Such consent was immediately given by Chitel.
>
> 14. I am further advised by Charles McGrath and do verily believe that he has been advised by representatives of Garadur in Switzerland that the documents were being accumulated and sent to Toronto as quickly as possible.
>
> 15. Since being retained by Chitel and Garadur, I have been engaged with counsel in attempting to gather together the documents referred to in the Orders of February 22, 1984, so as to comply as quickly as possible therewith. It is clear that insofar as Action No. 2187/82 is concerned that the documents comprising the Affidavit on Production in action No. 1123/82 are equally documents relevant to the proceedings in the fraudulent conveyance action. For this reason, it is impossible to provide a more complete Affidavit on Production or the documents referred to in the Affidavit of Alan Harris until the documents are received from Switzerland and a final Affidavit on Production prepared for both actions. It is impossible to deal with one separately from the other.
>
> 16. I verily believe from my review of the documentation and our attempts to gather together the productions required to this date that the Plaintiffs require in both actions a further 30 days for purposes of providing to the Defendants the Affidavits on Production as ordered and the productions.
>
> 17. This Affidavit is sworn in support of an application to set aside the Order of Master Sandler dated Tuesday, the 6th day of March, 1984, in Action No. 2187/82, and to vary the Orders of Master Sandler in Actions No. 1123/82 and 2187/82 dated Wednesday, the 22nd day of February, 1984.

24 That is the state of the record in these two actions as I embarked upon hearing the motion on March 21. The defendants argued that I should dismiss the plaintiffs' motions and also asked that I dismiss the plaintiffs' action in 1123/82 pursuant to my order of February 22, 1984, since the plaintiffs' further and better affidavit on production had not been delivered by March 14, nor by March 21 for that matter. They also asked that I vacate the caution in 2187/82, as contemplated by my order of March 6.

25 The first submission counsel for the defendants-respondents to resist the applications to vary my orders of February 22, centre around the legal impact of a consent order. It is argued that a consent order can only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract, and that none of these grounds is present in this case. Counsel argued that a consent order is a contract and must be treated as such. In support of this submission was cited Australasian Automatic Weighing Machine Co. v. Walter, [1891] W.N. 170; Devlin v. Boon, [1929] 3 W.W.R. 541, 24 Sask. L.R. 149, [1930] 1 D.L.R. 910 (C.A.); Huddersfield Banking Co. v. Henry Lister & Son Ltd., [1895] 2 Ch. D. 273 (C.A.) and C.I.B.C. v. Whites Lake Services Ltd. (1982), 56 N.S.R. (2d) 236, 32 C.P.C. 128, 117 A.P.R. 236 (Co. Ct.). I agree with this submission based upon the cases cited.

26 But then, Mr. Morrison refers to paras. 9, 10, 11, 12, 13 and 14 of the Bristow affidavits as grounds for making the order. The suggestion in this evidence is that the plaintiffs were wholly unaware of the demands for the additional documents and that they didn't know about and wouldn't have agreed to the orders that their solicitors agreed to on February 22, 1984.

27 Firstly, this evidence itself is very strongly attacked by the defendants' counsel. Bristow is advised by "Charles McGrath". Who is he? He tells Bristow that Chitel told him that she never received any request from any of her solicitors prior to McCarthy

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& McCarthy, to provide these documents. This is double hearsay and is in conflict with the inferences that can fairly be drawn from the evidence of R.A. Harris in his affidavits of February 14, 1984 in support of the February 22nd motions. The evidence in para. 10 of the Bristow affidavit is open to the same criticism.

28 Paragraphs 11 and 12 again contain double hearsay as to what Chitel told McGrath about what solicitor Erikson was doing. Paragraph 2(c) contains double hearsay as to what solicitor Erikson told solicitor Forbes as to the circumstances surrounding his becoming the solicitor of record and how this was narrated by solicitor Forbes to Bristow for use in his affidavit.

29 There is no direct evidence from Chitel, McGrath (whoever he is), Erikson or Forbes, and no explanation for these omissions. I am asked by counsel for the defendants that in the circumstances of this case, I should reject all this hearsay and double hearsay evidence under the discretion I have under R. 292. I am strongly inclined to accept these submissions, since there is absolutely no reason why Forbes, Erikson or McGrath could not have given their own direct evidence on these issues: Wiley, Lowe & Co. v. Gould, [1958] O.W.N. 316 (H.C.); Bongard v. Parry Sound, [1968] 2 O.R. 137 at pp. 141-142 (H.C.). It appears that the plaintiffs are in Switzerland or California, so communication with them and obtaining affidavit evidence from them is obviously more difficult. I give very little weight to this double hearsay evidence, but in view of the position that I take as to the impact of what solicitor Erikson did on behalf of his clients, the plaintiffs, it really doesn't matter whether these paragraphs are given weight or not.

30 The case of Scherer v. Paletta, [1966] 2 O.R. 524, 57 D.L.R. (2d) 532 (C.A.) lays down the principles governing the enforcement of a settlement worked out between solicitors for parties. In the present case there is no question that Erikson is a solicitor and was retained by the plaintiffs. The defendants' solicitors had no knowledge of any limitation or restriction on Erikson's retainer. Erikson had ostensible or apparent authority to consent to the two orders of February 22.

31 It is argued by plaintiff's counsel that there is discretionary power in the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention as it sees fit. Firstly, it is my view that no such intervention is required. My orders were made on February 22, 1984, and contemplated only subsequent ex parte orders to dismiss each action if the orders were not complied with. These subsequent ex parte orders cannot be considered to be an opportunity for Court intervention in the same way as Court intervention is required to give judgment pursuant to settlement. The Court already "intervened" on February 22 when the "settlement" or "consent" was given effect to by my orders. Thus, no further discretion exists.

32 Even if I am wrong in this, I am only to refuse to implement the consent orders if the agreement was unfair or unreasonable, or a mistake was made. There is no credible, persuasive evidence before me that a mistake was made by Erikson. Was the consent unfair or unreasonable? The defendants had been trying to get the documents since September of 1982, and had made very specific requests since December of 1982. The plaintiffs were being given 22 days to deliver a further and better affidavit on production disclosing very specific documents which had already been isolated and described; and 13 days to deliver an original affidavit on production in the "house case". I cannot find in the circumstances that these time limits were unfair or unreasonable notwithstanding Mr. Morrison's submissions or Mr. McGrath's and Mr. Bristow's characterization of these time limits as "impossible" - see para. 12 of Bristow's affidavit.

33 I also rely on Thomson v. Gough (1978), 17 O.R. (2d) 420, 5 C.P.C. 43 (H.C.) and Fabian v. Bud Mervyn Const. Ltd. (1982), 35 O.R. 2d. 132, 23 C.P.C. 140, 127 D.L.R. (3d) 119 (Div. Ct.). The dissenting judgment of Galligan J. in the last mentioned case, and Bank of Montreal v. Arvee Cedar Mills Ltd., [1979] 1 W.W.R. 219, 9 C.P.C. 249, 93 D.L.R. (3d) 58 (B.C.S.C.) and Hawitt v. Campbell, [1983] 5 W.W.R. 760, 46 B.C.L.R. 260, 37 C.P.C. 52, 148 D.L.R. (2d) 341 (C.A.), are not the law of Ontario.

34 One other issue arose during this motion. I began hearing the motion about 3 p.m. on Wednesday, March 21 and at 5 p.m., I adjourned the motion until 11 a.m. the following morning for continuation of the argument. When the motion resumed on the 22nd, Mr. Morrison tendered to the Court an affidavit of Glen Erikson which had been prepared overnight. It was argued that this affidavit would repair some of the defects in the Bristow affidavit that were raised by defendants' counsel on the previous day. Strong objection was taken to the introduction of this additional affidavit by counsel for all defendants. I decided to reject the affidavit. The applicants launched their motions on March 9, originally returnable March 12. They chose the evidence they

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wished to rely on and the deponent of that evidence. They had from March 12 to March 21 to tender additional evidence but chose not to do so. The respondents framed their response to the motion, based upon the evidence presented, and argued the motion accordingly. After two hours argument, certain holes were starting to develop in the applicants' case. I think it wrong, except in the most unusual circumstances, to allow a counsel to repair damage to his case by allowing further evidence to be introduced as the motion is being argued none because holes are being punched into the structure by opposing counsel's submissions. If the motion had not been adjourned on the 21st because of the lateness of the hour, the applicants would not have had an opportunity to prepare and tender this latest affidavit. The respondents should not be prejudiced by the vagaries of the clock. There is no satisfactory explanation as to why Erikson's affidavit could not have been delivered prior to the commencement of the motion. The procedure attempted to be adopted by Mr. Morrison is essentially unfair and I refuse to accept this affidavit of Erikson.

35 Mr. Morrison argues that it does not make sense for action 1123/82 to be struck out and yet for the counterclaim to proceed and that such a result is impractical. This submission cannot apply to 2187/82 which does not contain a counterclaim. And further, if action 1123/82 is dismissed, then the defendants are no longer defendants but only plaintiffs by counterclaims, a much better position to be in. They may choose to discontinue the counterclaim.

36 Mr. Morrison argues that the order is futile since it would not prevent a further action. This might well be so, but I would think that R. 373(1)(d) would become applicable if the costs of the first action are not paid.

37 I am satisfied that my consent orders of February 22, 1984 should remain fully effective. Thus, I dismiss the plaintiffs' motions in both actions. Further, I vacate the caution in 2187/82, Instrument No. A976246 and dismiss the plaintiffs' action in 1123/82 with costs, including the costs of this application. The costs of this motion in 2187/82 shall be paid by the plaintiff to the defendants forthwith after taxation.

38 I also have ascertained that two affidavits on production of Leona Chitel, one in 1123/82, sworn March 26, 1984 in California, and one in 2187/82, sworn March 26, 1984 in California, the first containing 24 items and the second containing 27 items, were served on the defendants' solicitors on March 28, 1984 and filed with this Court on March 29, seven days after I reserved judgment on these motions. These subsequent actions do not have any impact on my judgment.

Motions dismissed and actions dismissed.

Footnotes

* The plaintiffs have filed an appeal with the Divisional Court.

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B E T W E E N

ROYAL BANK OF CANADA Plaintiff	-and-	2668144 ONTARIO INC., et al. Defendants

Court File No. CV-23-00702043-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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