

Court File No.: CV-19-002629694-00CL

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

IN THE MATTER OF THE PROPOSAL OF  
WILLIAM PLAYER  
OF THE TOWN OF MINESING, IN THE COUNTY OF SIMCOE,  
IN THE PROVINCE OF ONTARIO

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**FACTUM OF RAY JARVIS**  
**and on behalf of 1923129 Ontario Inc., 1981262 Ontario Inc., 2209326 Ontario Ltd.,**  
**2307400 Ontario Inc., and 2557295 Ontario Inc.**

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## **PART I – STATEMENT OF THE CASE**

1. This application, to be heard on April 15, 2020, is for removal of the cautions placed by the trustee, BDO Canada Limited (“BDO”), allegedly on behalf of the estate of William Player (“Player”), on the following properties (the “Cautioned Properties”):
  - i. 2049 Horseshoe Valley Road W., Craighurst, Ontario (PIN No.: 58534-0008 LT);
  - ii. 2019 Horseshoe Valley Road, Craighurst, Ontario (PIN No.: 58534-0205 LT);
  - iii. 205 Ontario Street, Burks Falls, Ontario (PIN No.: 52139-0183 LT);
  - iv. 89 Ontario Street, Burks Falls, Ontario (PIN No.: 52142-0217 LT);
  - v. 14 Manitoba Street, Bracebridge, Ontario (PIN No.: 48114-0337 LT);
  - vi. 3 Crescent Road, Huntsville, Ontario (PIN Nos.: 48880-0001 LT – 48880-0014 LT);
  - vii. 3239 Penetanguishene Road, Craighurst, Ontario (PIN No.: 58534-0205 LT).

which are not held, controlled, owned or in any way the real property of Player pursuant to s.37 of the *Bankruptcy and Insolvency Act*.

## **PART II – THE PARTIES**

2. The Applicant, Ray Jarvis, is the Applicant personally and on behalf of 1923129 Ontario Inc., 1981262 Ontario Inc., 2209326 Ontario Ltd., 2307400 Ontario Inc., and 2557295 Ontario Inc. (“Noblehouse”). Ray Jarvis has been a licensed realtor since 1986 and was owner of RE/MAX North Country Realty Inc., which operated 10 offices throughout the Muskoka, Haliburton and Parry Sound areas.
3. 1923129 Ontario Inc. (“192”) is a subsidiary of 1981262 Ontario Inc. (“198”). The shares of 198 are split 50% with Noblehouse, whose only shareholder is Ray Jarvis, and 50% with Table Rock Holdings Inc., whose only shareholder is Ron Williamson.

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit A*

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit B*

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit C*

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit D*

4. 2307400 Ontario Inc. ("230") is a subsidiary of 2209326 Ontario Ltd. ("220"), whose only shareholders are Glenn Jarvis and the Jarvis Family Trust.

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit E*

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit F*

5. Jarvis is not the bankrupt and is not involved in the bankruptcy in any capacity, including as a creditor.
6. In January 9, 2019, Justice Penny appointed BDO Canada Limited as trustee for the creditors of Player.
7. Player holds no shares in 192, 198 or 220, 230, or Noblehouse, . Player holds no ownership in the Cautioned Properties.

### **PART III – SUMMARY OF THE FACTS**

8. In March 2019, without consultation, discussion or notice to the creditors or the corporations listed above, BDO, as trustee for the creditors of Player, placed cautions on real properties that are not owned or encumbered by Player.

#### **Background:**

9. On April 2, 2018, Jarvis executed a Letter of Intent to purchase a portion of Player's bankruptcy estate from Morgan and Partners Inc. ("MPI"). He paid a \$50,000.00 deposit. The Letter of Intent was conditional on Brian Tattersall releasing his interest, creditor approval and court approval. MPI and the bankruptcy estate of Player never received court

approval, or the release of Brian Tattersall's interest, and they failed to meet their conditions. The bankruptcy estate of Player, now administered through BDO, as Trustee, refused to return Jarvis's deposit despite their inability to complete the sale.

10. In December 2018, Jarvis threatened to bring a motion for the return of the funds.
11. Negotiations occurred during January and February 2019, but then broke down. Jarvis on behalf of 198 subsequently brought a motion for return of funds, but was not successful.
12. On February 15, 2019, Larry Dunn, acting as sole inspector, signed an Inspectors Resolution to register cautions on the Cautioned Properties. This action was not reviewed with any other creditors, including the only secured creditor Brian Tattersall.
13. The ownership of the Cautioned Properties is as follows:
  1. 2049 Horseshoe Valley Road W., Craighurst, Ontario – owned by 192;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit G*
  2. 2019 Horseshoe Valley Road, Craighurst, Ontario – owned by 192;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit H*
  3. 205 Ontario Street, Burks Falls, Ontario – owned by 220;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit I*
  4. 89 Ontario Street, Burks Falls, Ontario – owned by 220;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit J*
  5. 14 Manitoba Street, Bracebridge, Ontario – owned by 220 and Jarvis;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit K*
  6. 3 Crescent Road, Huntsville, Ontario – owned by 220;  
*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit L*
  7. 3239 Penetanguishene Road, Craighurst, Ontario – owned by 198.

14. Player owned none of the Cautioned Properties directly or through any other entity.
15. On March 29, 2019, Jarvis received a letter from legal counsel for BDO, Ian Klaiman, indicating that cautions were placed on the Cautioned Properties. Despite having duly retained counsel involved in the deposit matter, Mr. Klaiman did not advise Jarvis's counsel, seek any information, or provide counsel with confirmation that the cautions were being placed on the Cautioned Properties. Instead, in a letter dated March 20, 2019, Jarvis was informed that the Cautioned Properties now had a caution registered on title on March 5, 2019. The letter provided no explanation why it took 3 weeks to inform him of the cautions placed on title or why the cautions were placed on title when they were not the property of Player.

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit M*

16. Counsel for Jarvis wrote to counsel for BDO to remove the cautions but BDO refused.
17. On October 10, 2019 as part of the motion record for return of the deposit funds, BDO produced the unsworn First Report of BDO Canada Limited in its capacity as trustee of William Player dated October 8, 2019 ("BDO Report").

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit N*

18. The BDO Report suggested that Jarvis was "business partners" with Player. At paragraph 7 and 8, it describes that Player is a shareholder and director in Costellos of Craighurst Inc. ("Costellos"), which it claims owns 50% of Noblehouse.
19. BDO is incorrect about the corporate structure of both of these corporations.
20. At the time of the proposal and the bankruptcy of Player, Player was only a director of Costellos and no longer held any shares in Costellos, as those shares had been assigned to Brian Tattersall in exchange for a \$850,000.00 loan pursuant to a loan agreement dated

September 6, 2016 executed by William Player, Brian Tattersall and a debtor of Costellos, John Dulvendorden. The agreement states:

*Player is assigning the share of Costellos of Craighurst to Tattersall as security for this loan and upon full repayment of the loan the shares will be reassigned to Player.*

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit O*

21. Player never repaid the loan and the loan is listed in the proposal of William Player dated June 18, 2018, with Brian Tattersall as the only secured creditor of William Player.
22. Costellos owns no shares in Noblehouse. In its report, at Tab B, BDO relies on a 3 page corporate profile report. After the corporate profile report, an additional page was added purporting to name Costellos and Ray Jarvis as shareholders by way of some hand-written notation of unidentified source. This documentation is of unknown origin. Jarvis had never seen it before, and it does not appear in the minute books of any of the subject corporations. Costellos holds no shares in Noblehouse. Despite requests, BDO has not provided information or evidence as to the origins of the document or why it believes a document with no signatures would be binding, especially when it is not in the minute books or part of the corporate profile.
23. From paragraph 14 to 24, the BDO report suggest that it requires additional time and information to track funds from the Costellos bank account. BDO has been the trustee for 9 months and has had ample time and opportunity to investigate. Further, their investigation does not require them to place cautions on the properties that are not owned by William Player.

**Aggrieved**

24. 192, 198, 220 and 230 earn income and profits through buying, renting, selling and building capital in real property. Having cautions on all the real property held by these corporations has caused significant financial distress to Jarvis personally and to these corporations. The cautions have hampered ongoing efforts to do business.
25. In July 2019, Dael Thermal Group Inc. issued a Statement of Claim against 220, 230, Noblehouse and other associated entities related to non-payment of the install of an HVAC system at 3 Crescent Road, Huntsville that was completed May 8, 2019. The non-payment was caused due to an inability to gather financing to pay for the upgrade as all of the real properties held by the corporations were cautioned.

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit P*

26. The units at 3 Crescent Road, Huntsville, owned by 220, require further repairs and upkeep, which cannot be completed until the cautions are removed and the property's equity can be utilized to gather credit.
27. Jarvis has also received interest from an individual who wishes to purchase 3 Crescent Road, Huntsville. He cannot commit to an Agreement of Purchase and Sale until he can ensure that the cautions are removed.
28. Prior to the cautions being placed on the Cautioned Properties, 14 Manitoba Street, Bracebridge, owned by 220 and Jarvis was listed for sale. Jarvis had to take the property off the market and missed the opportunity to sell the property in the summer months, which is the most popular season for sales in Bracebridge.

*Affidavit of Ray Jarvis, sworn October 11, 2019, Exhibit Q*



29. As a shareholder and director in these corporation, Jarvis needs to be able to access the equity in the properties in order to maintain and operate the businesses. These cautions continue to hamper business and BDO refuses to remove them.
30. Since serving the original Application, the development corporations requesting relief in this Application, and set out in the Affidavit of Ray Jarvis sworn October 23, 2019, and Jarvis have been financially strangled by BDO's actions in placing the cautions on title. As a director, Jarvis has been unable to mortgage these properties, refinance these properties, get any credit for these properties, or sell them. He is now subjected to several lawsuits on behalf of these corporations for failure to pay. Jarvis has also received foreclosure notices and has suffered losses and damages personally and through his corporations.

*Affidavit of Ray Jarvis, sworn March 26, 2020*

#### **PART IV – ISSUES AND THE LAW**

##### **The Law**

31. Pursuant to s. 74(3) of the *Bankruptcy and Insolvency Act (BIA)*

##### **Caveat may be filed**

*74(3) If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, and for any reason a copy of the bankruptcy order or assignment has not been registered as provided in subsection (1), a caveat or caution may be filed with the official in charge of the land registry by the trustee, and any registration made after the filing of the caveat or caution in respect of the real property, immovable or charge is subject to the caveat or caution unless it has been removed or cancelled under the provisions of the Act under which the real property, immovable, charge, interest, estate or right is registered. (Emphasis Added)*

32. Pursuant to s. 67 of the *BIA*

##### **Property of bankrupt**

- **67 (1) The property of a bankrupt divisible among his creditors shall not comprise..... but it shall comprise**
  - (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
    - (i) is not subject to the operation of this Act, or
    - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

33. Pursuant to s. 37 of the BIA

*Where the bankrupt or any of the creditors or **any other person is aggrieved** by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just. (Emphasis Added)*

34. Courts have accepted that a party can be aggrieved pursuant to s. 37 when a trustee attempts or continues to hold a caveat (caution) on title to a property without right to the property.

*Johnson (Re), (2006) N.S.J. No. 519 para 8, 19, 24 and 25*

35. Pursuant to s. 40 of the BIA

Disposal of unrealizable property

*40(1) Any property of a bankrupt that is listed in the statement of affairs referred to in paragraph 158(d) or otherwise disclosed to the trustee before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the trustee's application for discharge, but if inspectors have been appointed, the trustee may do so only with their permission.*

Final disposition of property

*40(2) Where a trustee is unable to dispose of any property as provided in this section, the court may make such order as it may consider necessary.*

**Argument**

36. This matter is proceeding unopposed by BDO. BDO registered the cautions in March 2019 and have since provided no explanation, documentation and/or response why the registration was required or how it is valid. Despite not filing a notice of appearance, based on the practice direction, BDO was included in a conference call with the Honourable Justice Gilmore to confirm a schedule. It participated in the call, but failed to file a notice of appearance or any responding materials.
37. The Applicants have no interest as creditors or otherwise in the bankruptcy of William Player.
38. Pursuant to s.67(1)(c) of the *BIA* the subject properties of this application are not property of the bankrupt. William Player holds no shares in any of the corporations that are listed on title to any of the properties at issues. William Player is not an owner of these properties and he does not have any interest in these properties. Again, this is not opposed by BDO
39. Subsection 74(3) of the *BIA* empowers the trustee to register a "caveat or caution" affecting a **bankrupt's interest** in the land titles registry. **(emphasis added)** While the primary objective of these provisions is to ensure the trustee's priority over subsequent interests acquired in the bankrupt's interest, it is also used to provide public notice of the trustee's claim to the value of a bankrupt's or former bankrupt's interest that exceeds the fifty-thousand-dollar exemption.
40. As the bankrupt has no interest in the subject properties, BDO had no valid reason or authority under the *BIA* to put cautions on the subject properties. Even if at the time of

registration BDO considered the bankrupt to have a potential interest in the subject property, it failed to confirm any potential interest in the property. As it has provided no contrary evidence or requested any information from the Applicants, the lack of interest by William Player must now be accepted.

41. It is our position that based on the above, the court has jurisdiction to remove the cautions pursuant to s.37. Section 37 the BIA allows the court to consider not only the bankrupt, but “any other person aggrieved by an act of the trustee” when asserting jurisdiction. In this case, the Applicants are particularly aggrieved by the actions of the trustee. The Applicants have suffered restraint of trade, and in particular the inability to refinance, inability to sell property, inability of leverage property and lawsuits and foreclosures due to BDO’s actions.
42. Further, if the above is not sufficient to satisfy the requirement of s.37 BIA, the court shall also consider that the property is “incapable of realization.” Courts have generally reviewed the issue of caveats on title when it comes to registration or removal of the caveat by the trustee, against the bankrupt’s title. While there is a lack of case law regarding caveats placed against property owned by a third party (as this is not available under the BIA), below is a further analysis of why the caveats should be removed.
43. Pursuant to s.40(1) BIA a trustee has an obligation to return any property that “*is found incapable of realization.*” Courts have accepted this section when reviewing caveats that are held on title post-discharge, but this principle can also be applied in this situation. The Supreme Court of Canada has held that if property is incapable of realization then the trustee is “obliged to return it.” In this situation it is unclear why BDO has not taken the

appropriate steps to remove the cautions, but the court has the ability to remedy this situation.

*Royal Bank of Canada v North American Life Assurance Co*, [1996] 1 SCR 325  
at para 52

*Deloitte, Haskins & Sells Ltd V Zemplak (Bankrupt)*, [1987] Sj No 881 at para 9  
and 11

*Shelson v Gowling Lafleur Henderson LLP*, 70 OR (3d) 171 at para 29-31.

#### **PART V – ORDER REQUESTED**

44. Jarvis is requesting that the Court order that the trustee immediately remove the cautions placed on the Cautioned Properties;
45. Alternatively, an Order that the Land Registrar immediately remove all cautions registered by the trustee on the Cautioned Properties;
46. A declaration that the Applicant is aggrieved by the trustee, BDO, on behalf of the estate of Player, through its decision to place cautions on the Cautioned Properties which are not held, controlled, owned or in any way the real property of Player pursuant to s.37 of the *Bankruptcy and Insolvency Act*;
47. A declaration that Player has no legal or equitable interest in the Cautioned Properties;
48. A declaration that the Cautioned Properties do not constitute property of the bankrupt within the meaning of s.67(1)(c) of the *Bankruptcy and Insolvency Act*;
49. An Order for costs on a substantial indemnity basis payable forthwith by BDO or alternatively by the bankruptcy estate of Player.
50. Any further and other Order this Honourable Court deems just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

This 27<sup>th</sup> day of March, 2020.



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Jay Herbert

In the Matter of the Proposal of William Player  
Of the Town of Minesing, in the County of Simcoe  
In the Province of Ontario

Court File No.: CV-19-002629694-00CL

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF RAY JARVIS**  
**and on behalf of 1923129 Ontario Inc., 1981262 Ontario Inc.,**  
**2209326 Ontario Ltd., 2307400 Ontario Inc., and 2557295**  
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