Court File No. CV-11-17088

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KEVIN D'AMORE

Applicant

- and –

BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC.

Respondents

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, C. B. 16, AS AMENDED

SUPPLEMENTARY MOTION RECORD (RE THIRTEENTH REPORT OF THE RECEIVER) (VOLUME 1 OF 2)

(RETURNABLE ON A DATE TO BE DETERMINED BY REGIONAL SENIOR JUSTICE THOMAS)

March 22, 2021

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TAB "1"

Court File No. CV-11-17088

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN D'AMORE

Applicant

- and -

BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE, ROYAL TIMBERS INC. AND M.R. DUNN CONTRACTORS LTD.

Respondents

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, C. B. 16, AS AMENDED

SUPPLEMENTARY REPORT TO THE THIRTEENTH REPORT TO THE COURT SUBMITTED BY BDO CANADA LIMITED, AS RECEIVER OF BANWELL DEVELOPMENT CORPORATION AND ROYAL TIMBERS INC.

March 22, 2021

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Appendix D	-	Letter dated March 9, 2021 from William Sasso, counsel for DAC, together with reasons of Regional Senior Justice Thomas dated June 12, 2017 in *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455
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1. Introduction and Background

1.1 Introduction

1.1.1 This report is submitted by BDO Canada Limited, in its capacity as Receiver ("**BDO**" or the "**Receiver**") of all assets, undertakings and properties (the "**Property**") of Banwell Development Corporation ("**Banwell**") and Royal Timbers Inc. ("**Royal Timbers**" and collectively with Banwell, the "**Companies**").

1.1.2 Upon application of Bank of Montreal, BDO was appointed as Receiver by the Order of Mr. Justice Thomas dated June 5, 2013 (the "**Appointment Order**").

1.1.3 The Receiver submitted a Thirteenth Report to the Court dated February 25, 2021 (the "**Thirteenth Report**")

1.1.4 Section 8.2 of the Thirteenth Report identified 3 known unsecured creditors of Royal Timbers, namely Affleck Greene McMurtry LLP ("**AGM**"), M.R. Dunn Contractors Ltd. ("**Dunn**") and the Estate of Patrick D'Amore ("**D'Amore Estate**"). The Thirteenth Report recommended authorization of the Court to distribute funds to each of these creditors, subject to the Court approving the Banwell Road Parcels 5-10 Transaction and the Banwell Road Parcels 5-10 Transaction being completed.

1.1.5 Subsequently, AGM advised the Receiver that it wished to amend its claim from that previously submitted in order to include interest to the date of payout.

1.1.6 Also, section 8.2 of the Thirteenth Report inadvertently omitted an amount owing to D'Amore Construction (2000) Ltd. ("**DAC**") pursuant to a Judgment dated February 1, 2018 (the "**DAC Judgment**"). The DAC Judgment as issued and entered is attached hereto as **Appendix A**. Although the judgment for work completed, materials and pre-judgment interest is against Banwell, paragraph 7 of the DAC Judgment awarded costs in the amount of $25,000 against Banwell and Royal Timbers jointly and severally.

1.1.7 DAC opposes the payment of post-receivership interest to unsecured creditors of Royal Timbers until such time as there is a determination of whether or not there

will be a surplus of funds available in the combined estates of Royal Timbers and Banwell after paying principal in full to unsecured creditors of both Royal Timbers and Banwell.

1.1.8 This Supplementary Report is prepared to:

(a) amend the title of proceedings to add M.R. Dunn Contractors Ltd.;

(b) update the Court as to corrections made by the Land Registrar since the Thirteenth Report was served which has resulted in changes to property descriptions and permitted encumbrances on the Banwell Parcels 5-10 and a permitted encumbrance on Part 24 (a revised draft Approval and Vesting Order for the Banwell Road Parcels 5-10 Transaction and a revised draft Amendment Order for the Part 24 Approval and Vesting Order are included in the Supplementary Motion Record);

(c) revise the Thirteenth Report to amend the recommended distribution of funds to unsecured creditors of Royal Timbers;

(d) to advise the Court of DAC's objection to the distribution of post-receivership interest on the claims of the unsecured creditors of Royal Timbers and to seek the advice and direction of Regional Senior Thomas regarding same. This has resulted in the removal of the recommended distribution to unsecured creditors of Royal Timbers from the Ancillary Order and the addition of that recommended distribution to a separate Distribution Order, together with two (2) alternate draft Distribution Orders to address the objections of DAC; and

(e) to update the Receiver's Thirteenth Report regarding the City of Windsor's response to the Receiver's proposal regarding the Pond.

1.1.9 Unless otherwise defined, capitalized terms in this report have the same meaning as the Thirteenth Report.

2. Terms of Reference

2.1 In preparing this supplementary report to the Receiver's Thirteenth Report, the Receiver has relied upon unaudited and draft, internal financial information obtained from the Companies' books and records and discussions with former management and staff (the **"Information"**). The Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information and expresses no opinion, or other form of assurance, in respect of the Information.

3. Purpose of the Supplementary Report

3.1 This constitutes the Receiver's Supplementary Report to the Thirteenth Report to the Court (the "**Thirteenth Report Supplement**") in this matter and is filed:

(a) to amend the title of proceedings to add M.R. Dunn Contractors Ltd.;

(b) to advise the Court about certain parcel identification number ("**PIN**") corrections made by the Land Registrar to the Banwell Road Parcels 5-10 and Part 24 and to provide a revised Banwell Road Parcels 5-10 Approval and Vesting Order and a revised Amendment Order re the Part 24 Approval and Vesting Order;

(c) to amend Section 8.10 of the Thirteenth Report to include the amended claim of AGM and the proposed distribution to DAC;

(d) to advise the Court of DAC's objection to the recommended distribution of post-receivership interest to unsecured creditors of Royal Timbers and to provide an amended Ancillary Order removing the Receiver's recommended distribution and, as described below, to add the Receiver's recommended distribution to a stand alone Distribution Order;

(e) in support of an Order of the Court:

(i) in the event that Regional Senior Justice determines that post-receivership interest is payable to unsecured creditors of Royal Timbers since the "interest stops rule" does not apply, authorizing the distribution of:

(A) $162,751.73 to AGM (amended from the amount set out in the Thirteenth Report to include post-receivership interest) in full satisfaction of AGM's claim against Royal Timbers, following the completion of the Banwell Road Parcels 5-10 Transaction;

(B) $166,671.41 to Dunn (including post-receivership interest, as set out in the Thirteenth Report) in full satisfaction of Dunn's

claim against Royal Timbers, following the completion of the Banwell Road Parcels 5-10 Transaction;

(C) $5,500.00 to the D'Amore Estate (as set out in the Thirteenth Report) in full satisfaction of D'Amore Estate's claim against Royal Timbers, following the completion of the Banwell Road Parcels 5-10 Transaction;

(D) $27,307.53 to DAC (including post-receivership interest, as set out in this Thirteenth Report Supplement), in full satisfaction of DAC's claim against Royal Timbers, following the completion of the Banwell Road Parcels 5-10 Transaction;

(ii) in the alternative, in the event that Regional Senior Justice Thomas determines that post-receivership interest is not payable at this time to unsecured creditors of Royal Timbers due to the application of the "interest stops rule", then an Order authorizing the distribution of the following amounts for interest to the date of the Appointment Order and principal in full satisfaction of each creditor's respective claims for same, against Royal Timbers:

(A) $129,662.34 to AGM;

(B) $50,028.46 to Dunn;

(C) $5,500.00 to the D'Amore Estate; and

(D) $25,000.00 to DAC,

with the distribution of post-receivership interest to creditors of Royal Timbers being deferred and paid only if there is a surplus in the combined receivership estates of Royal Timbers and Banwell after payment in full of all principal amounts owing to creditors of both Royal Timbers and Banwell; and

(iii) in the further alternative, in the event that Regional Senior Justice Thomas cannot decide on the materials provided and/or without submissions of counsel whether or not post-receivership interest

should be paid to unsecured creditors of Royal Timbers, an order adjourning the applicability of the interest stops rule and the distribution of post-receivership interest to a date to be determined and an order authorizing the distribution of interest to the date of the Appointment Order and principal, as follows:

(A) $129,662.34 to AGM;

(B) $50,028.46 to Dunn;

(C) $5,500 to the D'Amore Estate; and

(D) $25,000.00 to DAC;

(f) to update the Receiver's Thirteenth Report regarding the City of Windsor's response to the Receiver's proposal regarding the Pond.

4. Banwell Road Parcels 5-10 Transaction and Part 24 Transaction

4.1 Following the service of the Thirteenth Report, counsel for the Purchaser of Banwell Road Parcels 5-10 requested a number of PIN corrections.

4.2 The Receiver contacted the Land Registry Office and was able to have the requested PIN corrections made to Banwell Road Parcels 5-10. These corrections have resulted in changes to certain reference plan numbers in the property descriptions, the addition of a missing instrument on the parcel registers and a new instrument for a Land Registrar's Order relating to the PIN corrections.

4.3 As a result of these PIN corrections, the draft Approval and Vesting Order for the Banwell Road Parcels 5-10 Transaction has been amended and included at Tab 2 of the Supplementary Motion Record. A comparison of the revised draft Approval and Vesting Order for the Banwell Road Parcels 5-10 Transaction (1) to the draft Approval and Vesting Order in the Motion Record; and (2) to the Model Approval and Vesting Order, are included in the Supplementary Motion Record at Tabs 3 and 4 of the Supplementary Motion Record, respectively.

4.4 Counsel for the Purchaser of the Banwell Road Parcels 5-10 has advised that the amendments to the draft Approval and Vesting Order for the Banwell Road Parcels 5-10 Transaction are acceptable.

4.5 The Land Registrar also added a missing instrument to the Part 24 parcel register. As a result, the draft Amended Part 24 Approval and Vesting Order has been further amended. The revised draft Amendment Order for the Part 24 Transaction is included at Tab 5 of the Supplementary Motion Record. A comparison of the revised draft Amendment Order containing the revised Amended Part 24 AVO to the draft Amendment Order containing the Amended Part 24 AVO in the Motion Record is included at Tab 6 of the Supplementary Motion Record.

5. Distribution and Other Updates

5.1 AGM previously submitted a claim against Royal Timbers for both billed and unbilled professional fees and disbursements in the amount of $129,662.34. Subsequent to the service of the motion record containing the Thirteenth Report, AGM advised the Receiver that it wished to amend its claim against Royal Timbers.

5.2 AGM provided the Receiver with an accounting statement and copies of its bills, which bear interest in accordance with the *Solicitors Act,* at the rate of 3.00%.

5.3 As outlined in Sections 8.3 and 8.4 of the Thirteenth Report, subject to the completion of the Banwell Road Parcels 5-10 Transaction, after paying out the remaining Simba mortgages, sufficient funds will be available to fully pay the claims of Royal Timbers unsecured creditors. The Receiver's legal counsel has advised that since there will be sufficient funds available to fully pay the unsecured claims, including interest, the "*interest stops rule*" does not apply.

5.4 The Receiver has calculated the amount owing to AGM at February 28, 2021 to be $162,751.73 including interest, plus a per diem amount of $7.60. A schedule of the Receiver's calculation is included as **Appendix B.**

5.5 As outlined in section 1.1.6 of this Thirteenth Report Supplement, paragraph 7 of the DAC Judgment awarded costs in the amount of $25,000 against Banwell and Royal Timbers jointly and severally.

5.6 The DAC Judgment provides for interest at the rate of 3.00 per cent, commencing on February 1, 2018.

5.7 The Receiver has calculated the amount owing by Royal Timbers under the DAC Judgment at February 28, 2021 to be $27,307.53 including interest, plus a per diem amount of $2.05. A schedule of the Receiver's calculation is included as **Appendix C.**

5.8 Accordingly, Section 8.10 of the Thirteenth Report should be amended to read as follows:

> *Therefore, subject to the Court approving the Banwell Road Parcels 5-10 Transaction and the Banwell Road Parcels 5-10 Transaction being completed, the Receiver recommends to the Court that the Receiver be authorized to make the following distributions to Royal Timbers unsecured creditors:*

(a) $162,751.73 to AGM;

(b) $166,671.41 to Dunn;

(c) $5,500 to the D'Amore Estate; and

(d) $27,307.53 to DAC.

5.9 Upon the above distributions being completed, all known creditor claims against Royal Timbers will have been fully satisfied.

5.10 Subsequent to the service of the motion record containing the Thirteenth Report, counsel for DAC advised the Receiver that DAC disagreed with payment of post-receivership interest to unsecured creditors of Royal Timbers. By letter dated March 9, 2021 (the "**March 9 Sasso Letter**"), counsel for DAC, William Sasso, advised the Receiver that DAC relies upon the reasons of Regional Senior Justice Thomas dated June 12, 2017 on a motion heard on May 29, 2017 in *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455 (the "**Reasons on the May 2017 Motion**"). A copy of the March 9 Sasso Letter and the Reasons on the May 2017 Motion are included as **Appendix D**.

5.11 By letter dated March 15, 2021 to the Receiver, counsel for DAC delivered Submissions on Interest Stops Rule together with a letter to Regional Senior Justice Thomas regarding same (collectively, the "**March 15 DAC Submissions**"). A copy of the March 15 DAC Submissions are attached as **Appendix E**.

5.12 DAC takes the position that Regional Senior Justice Thomas has already decided the issue regarding the applicability of the interest stops rule to Royal Timbers. DAC is of the view that Regional Senior Justice Thomas ruled that the unsecured creditors of Royal Timbers and Banwell should be grouped together for the purpose of the

payment of post-receivership interest and, as such, there can be no distribution of post-receivership interest to creditors of either Royal Timbers or Banwell until all principal is paid to unsecured creditors of both Royal Timbers and Banwell. Effectively, this would mean that the receivership estates of Banwell and Royal Timbers would be consolidated for the purpose of applying the interest stops rule.

5.13 The Receiver does not interpret the Reasons on the May 2017 Motion to mean that there is a consolidation of the Banwell and Royal Timbers estates or that a distribution of post-receivership interest to creditors of Royal Timbers is impacted in any way by the potential future availability of funds in Banwell to pay principal in full to creditors of Banwell.

5.14 To the contrary, there has been no consolidation of the Royal Timbers and Banwell receivership estates. There was no need to consolidate the Royal Timbers and Banwell receivership estates as those estates have separate creditors, the assets of each of Banwell and Royal Timbers are easily identifiable, and separate bank accounts have been maintained by the Receiver for each of Banwell and Royal Timbers.

5.15 The Receiver remains of the view that the "interest stops rule" does not apply to the payment of interest in the Royal Timbers estate due to the anticipated surplus remaining in Royal Timbers following the completion of the Banwell Road Parcels 5-10 Transaction and the payment in full of principal to unsecured creditors of Royal Timbers. A copy of the Receiver's Statement of Issues and Law and Brief of Authorities for the May 2017 Motion are attached as **Appendix F**.

5.16 The Receiver and DAC seek clarification from Regional Senior Justice Thomas as to his intention in the Reasons on the May 2017 Motion with respect to the applicability of the interest stops rule to the distribution of interest from the Royal Timbers receivership estate, where there will be a surplus after paying principal in full to unsecured creditors of Royal Timbers.

5.17 To deal with the issue of distribution separately, the Receiver has amended the draft Ancillary Order to remove the section dealing with distribution, a copy of which is included at Tab 7 of the Supplementary Motion Record. A comparison of the Revised

draft Ancillary Order to the draft Ancillary Order in the Motion Record is included at Tab 8 of the Supplementary Motion Record.

5.18 The Receiver has prepared three new alternate versions of a Distribution Order:

(a) In the event that Regional Senior Justice Thomas decides that post-receivership interest should be paid to unsecured creditors of Royal Timbers, one version of the draft Order provides for the Receiver's recommended distribution to unsecured creditors of Royal Timbers, including pre-receivership and post-receivership interest, a copy of which is included at Tab 9 of the Supplementary Motion Record;

(b) In the event that Regional Senior Justice Thomas decides that post-receivership interest should not be paid to unsecured creditors of Royal Timbers at this time, one version of the draft Order provides for a distribution of pre-receivership interest and principal only to unsecured creditors of Royal Timbers, with the distribution of post-receivership interest to creditors of Royal Timbers being deferred and paid only if there is a surplus in the combined receivership estates of Royal Timbers and Banwell after payment in full of all principal amounts owing to creditors of Royal Timbers and Banwell, a copy of which is included at Tab 10 of the Supplementary Motion Record; and

(c) In the event that Regional Senior Justice Thomas cannot decide on the materials provided and/or without submissions of counsel whether or not post-receivership interest should be paid to unsecured creditors of Royal Timbers, one version of the draft Order provides for a distribution of pre-receivership interest and principal only to unsecured creditors of Royal Timbers, with the issue of the applicability of the interest stops rule and the payment of post-receivership interest to unsecured creditors of Royal Timbers being adjourned to a date to be determined, a copy of which is included at Tab 11 of the Supplementary Motion Record;

5.19 A summary of the amounts owing to the four known unsecured creditors of Royal Timbers, including principal and interest amounts, is as follows:

Creditor	Principal Owing	Interest calculated by Receiver	Total
AGM	$129,662.34	$33,089.39	$162,751.73
Dunn	$50,028.46	$116,642.98	$166,671.44
D'Amore Estate	$5,500.00	-	$5,500.00
DAC	$25,000.00	$2,307.53	$27,307.53

5.20 There has been no objection to the amount of interest as calculated by the Receiver. DAC, Dunn and AGM agree with the Receiver's calculation. Rather, DAC has objected to the entitlement of these four unsecured creditors of Royal Timbers to post-receivership interest as calculated by the Receiver.

5.21 The Receiver recommends proceeding with the remainder of the relief sought on this motion as that relief is not being opposed and the sale approval is time sensitive. The closing of the Banwell Road Parcels 5-10 Transaction and the Part 24 Transaction have been delayed while the reconfiguration of the lots was completed. The purchasers are anxious to proceed.

5.22 By way of update to paragraphs 4.4 to 4.16 of the Thirteenth Report, the City has now advised that it will accept the Receiver's proposal. As such, the City is prepared to assume Phases 2 and 4 of the subdivision upon the completion of the reduced scope of work by the Receiver at an approximate cost of $70,000, as described in the Receiver's letter dated November 25, 2020.

5.23 Subsequent to the service of the motion record containing the Thirteenth Report, counsel for Dunn advised the Receiver that Dunn should be added as a respondent to this receivership proceeding pursuant to the Order of Justice Thomas dated June 5, 2013. The Receiver has amended the title of proceeding on this Thirteenth Report Supplement and the draft Orders accordingly. A copy of this Order is included as **Appendix G**.

6. Conclusion

6.1 The Receiver recommends and respectfully requests that this Court:

(a) grant the Banwell Road Parcels 5-10 Approval and Vesting Order in accordance with the revised draft Banwell Road Parcels 5-10 Approval and Vesting Order attached at Tab 2 of the Supplementary Motion Record;

(b) grant the Amendment Order re the Part 24 Approval and Vesting Order in accordance with the revised draft Amendment Order attached at Tab 5 of the Supplementary Motion Record;

(c) grant the Ancillary Order in accordance with the revised draft Ancillary Order attached at Tab 7 of the Supplementary Motion Record;

(d) in the event that Regional Senior Justice determines that post-receivership interest is payable to unsecured creditors of Royal Timbers since the "interest stops rule" does not apply, an Order, in accordance with the Distribution Order attached at Tab 9 of the Supplementary Motion Record, authorizing the distribution of:

(i) $162,751.73 to AGM (amended from the amount set out in the Thirteenth Report) in full satisfaction of AGM's claim against Royal Timbers, including pre-receivership and post-receivership interest, following the completion of the Banwell Road Parcels 5-10 Transaction;

(ii) $166,671.44 to Dunn (as set out in the Thirteenth Report) in full satisfaction of Dunn's claim against Royal Timbers, including pre-receivership and post-receivership interest, following the completion of the Banwell Road Parcels 5-10 Transaction;

(iii) $5,500.00 to the D'Amore Estate (as set out in the Thirteenth Report) in full satisfaction of D'Amore Estate's claim against Royal Timbers, following the completion of the Banwell Road Parcels 5-10 Transaction;

(iv) $27,307.53 to DAC (as set out in this Thirteenth Report Supplement), in full satisfaction of DAC's claim against Royal Timbers, including pre-receivership and post-receivership interest, following the completion of the Banwell Road Parcels 5-10 Transaction;

(e) in the alternative, in the event that Regional Senior Justice determines that post-receivership interest is not payable at this time to unsecured creditors of Royal Timbers due to the application of the "interest stops rule", an Order, in accordance with the Distribution Order attached at Tab 10 of the Supplementary Motion Record, authorizing the distribution of:

(i) $129,662.34 to AGM, in full satisfaction of AGM's claim against Royal Timbers for pre-receivership interest and principal;

(ii) $50,028.46 to Dunn, in full satisfaction of Dunn's claim against Royal Timbers for pre-receivership interest and principal;

(iii) $5,500.00 to the D'Amore Estate in full satisfaction of D'Amore Estate's claim against Royal Timbers; and

(iv) $25,000.00 to DAC, in full satisfaction of DAC's claim against Royal Timbers for pre-receivership interest and principal,

with the distribution of post-receivership interest to unsecured creditors of Royal Timbers deferred and paid only if there is a surplus in the combined receivership estates of Royal Timbers and Banwell after payment in full of all principal amounts owing to creditors of Royal Timbers and Banwell;

(f) in the further alternative, in the event that Regional Senior Justice Thomas cannot decide on the materials provided and/or without submissions of counsel whether or not post-receivership interest should be paid to unsecured creditors of Royal Timbers, an Order, in accordance with the Distribution Order attached at Tab 11 of the Supplementary Motion Record, adjourning the applicability of the interest stops rule and the distribution of post-receivership interest to a date to be determined and an order authorizing the distribution of:

(i) $129,662.34 to AGM, in full satisfaction of AGM's claim against Royal Timbers for pre-receivership interest and principal;

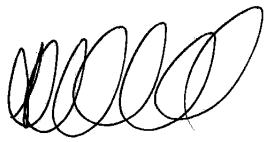
(ii) $50,028.46 to Dunn, in full satisfaction of Dunn's claim against Royal Timbers for pre-receivership interest and principal;

(iii) $5,500.00 to the D'Amore Estate in full satisfaction of D'Amore Estate's claim against Royal Timbers; and

(iv) $25,000.00 to DAC, in full satisfaction of DAC's claim against Royal Timbers for pre-receivership interest and principal.

All of which is Respectfully Submitted this 22nd day of March, 2021.

BDO Canada Limited in its capacity as Court Appointed Receiver of the property, assets and undertakings of Banwell Development Corporation and Royal Timbers Inc. and not in any personal capacity



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Per: Stephen N. Cherniak, CPA, CA, CIRP
Licensed Insolvency Trustee
Senior Vice President

APPENDIX A

Court File No. 06-CV-6763

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE REGIONAL SENIOR	)	THURSDAY, THE 1ST
	)	
JUSTICE BRUCE G. THOMAS	)	DAY OF FEBRUARY, 2018

B E T W E E N:

(Court Seal)

D'AMORE CONSTRUCTION (2000) LTD.

Plaintiff

and

BANWELL DEVELOPMENT CORPORATION and BANK OF MONTREAL

Defendants

and between

BANWELL DEVELOPMENT CORPORATION and
ROYAL TIMBERS INC.

Plaintiffs

and

D'AMORE CONSTRUCTION (2000) LTD.

Defendant

JUDGMENT

THIS MOTION made by the plaintiff, D'Amore Construction (2000) Ltd., for

(a) Judgment against Banwell Development Corporation ("Banwell") for:

(i) $487,376.73 for work done and material supplied under written agreement made between D'Amore Construction (2000) Ltd. and Banwell dated January 10, 2005 ("Contract") as certified as due and payable under the Contract;

(ii) Prejudgment interest at the Contract rate of 12% annually from the Certification dates for payment under the Contract until October 24, 2017, totalling $696,142.70 to that date, and interest thereafter accruing at the Contract rate until payment; and

(iii) Costs of D'Amore Construction (2000) Ltd.'s claim against Banwell in such amount as is determined to be fair and reasonable;

(b) Directing payment of the principal amount of the judgment, prejudgment interest at the Contract rate from the Certification dates for payment under the Contract until the date of the receivership order dated June 5, 2013 ("Receivership Order") in the amount of $439,448.72, payable forthwith from the Estate of Banwell in receivership;

(c) An order declaring that the balance of the judgment for interest from the date of the Receivership Order until the date of payment shall be payable out of any surplus of the Estate of Banwell on a *pro rata* basis with other creditors of Banwell or as may be further directed by the court;

(d) Judgment dismissing any and all claims made by Banwell and Royal Timbers Inc. ("Royal Timbers") against D'Amore Construction (2000) Ltd. in the Consolidated

Action with such costs as are determined by this Honourable Court to be fair and reasonable;

(e) Further, or in the alternative, an order extending the February 1, 2018 deadline to set the Consolidated Action down for trial and/or requiring D'Amore Construction (2000) Ltd. to take any step in the Consolidated Action as may be directed; and

(f) Such further and other relief as to this Honourable Court may seem just;

was heard this day at the Court House at 245 Windsor Avenue, Windsor, Ontario,

On reading the moving party's motion record, Volumes I and II motion for default/summary judgment of D'Amore Construction (2000) Ltd. dated October 31, 2017, the moving party's factum and authorities, and on hearing the submissions of the lawyers for D'Amore Construction (2000) Ltd. and for BDO Canada Limited as Receiver of Banwell and Royal Timbers under the Receivership Order:

1. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. the amount of $487,376.73 for work done and material supplied under the Contract as certified as due and payable under the Contract.

2. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. prejudgment interest at the Contract rate of 12% annually as follows:

(a) For the period from the Certification dates for payment under the Contract to June 5, 2013, the amount of $439,448.72; and

(b) For the period from June 5, 2013 until October 24, 2017, the amount of $256,693.98, together with additional interest after that date at the Contract rate until payment.

3. **THIS COURT ORDERS AND ADJUDGES** that the amounts payable by Banwell to D'Amore Construction (2000) Ltd. under paragraphs 1 and 2(a) of this judgment shall constitute provable claims in the receivership of Banwell and shall be accepted by the Receiver of Banwell as an unsecured claim for distribution purposes.

4. **THIS COURT ORDERS** that the amount payable by Banwell to D'Amore Construction (2000) Ltd. under paragraph 2(b) of this judgment shall constitute a provable claim in the receivership of Banwell and shall be accepted by the Receiver of Banwell as an unsecured claim for distribution purposes with respect to any surplus funds remaining available for distribution after payment in full of all claims as of June 5, 2013.

5. **THIS COURT ORDERS AND ADJUDGES** that any and all claims made by Banwell and Royal Timbers against D'Amore Construction (2000) Ltd. in the Consolidated Action are hereby dismissed.

6. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. its costs of this motion and the Contract claim in the Consolidated Action, fixed in the amount of $50,000.00, inclusive of fees, disbursements and taxes.

7. **THIS COURT ORDERS AND ADJUDGES** that Banwell and Royal Timbers, jointly and severally, pay to D'Amore Construction (2000) Ltd. its costs of this motion and the claims made by Banwell and Royal Timbers against D'Amore Construction (2000) Ltd. in the

Consolidated Action, fixed in the amount of $25,000.00, inclusive of fees, disbursements and taxes.

8. **THIS COURT ORDERS** that the amount payable by Banwell for costs in paragraph 6 above shall constitute a provable claim in the Receivership of Banwell and the amounts payable by Banwell and Royal Timbers for costs in paragraph 7 above shall constitute provable claims in the Receivership of Banwell and Royal Timbers and shall be accepted by the Receiver of Banwell and Royal Timbers as unsecured claims for distribution purposes.

THIS JUDGMENT BEARS INTEREST at the rate of 3.00 per cent per year commencing on February 1, 2018 other than the Contract rate interest payable under paragraph 2 of this judgment.

#1509927

ENTERED AT WINDSOR
In Book No. 27
re Document No. 152
on FEB 08 2018
by

D'AMORE CONSTRUCTION (2000) LTD.
Plaintiff

-and-

BANWELL DEVELOPMENT CORPORATION
Defendant

Court File No. 06-CV-6763

27

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
WINDSOR

JUDGMENT

STROSBERG SASSO SUTTS LLP
Lawyers
1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

WILLIAM V. SASSO
LSUC# 12134I
Tel: 519.561.6222
Fax: 866.316.5310

Lawyers for D'Amore Construction (2000) Ltd.

File number: 24.116.000

APPENDIX B

Royal Timbers Inc.
Affleck Greene McMurtry LLP accounts
Re J. Lepera Contracting Inc. (2789-001)
Statement at: 28-Feb-21
Prepared by Receiver

Date	Interest for period	AGM accounts		Payments		Balance	Description
08-Sep-11		Bill No. 22917	$ 47,836.18	From retainer	$ (47,836.18)	-	
25-Oct-11	-	Bill No. 23972	82,212.50	From retainer	(2,163.82)	80,048.68	
04-Oct-12	2,072.49	Bill No. 23073	68,234.49			150,355.66	Interest to 04-Oct-12
13-Jun-17	20,709.21			Monies in court	(55,797.80)	115,267.07	Interest to 13-Jun-17
28-Feb-21	10,307.68	Unbilled Fees & Disb.	37,176.97			$ 162,751.73	Interest to 28-Feb-21
	$ 33,089.39		$235,460.14		$ (105,797.80)		
Per diem						$ 7.60	

Interest rate:	3.00%	Calculated as simple interest, commencing 30 days from billing date

APPENDIX C

D'Amore Construction (2000) Ltd.
Judgment against Banwell Development Corporation ("Banwell")
Costs jointly payable by Banwell and Royal Timbers Inc. (Paragraph 7)

Date	Interest	Balance	Description
01-Feb-18		$ 25,000.00	Joint and several costs awarded
31-Dec-18	684.25	25,684.25	Interest to 31-Dec-18
31-Dec-19	750.00	26,434.25	Interest to 31-Dec-19
31-Dec-20	752.05	27,186.30	Interest to 31-Dec-20
28-Feb-21	121.23	$ 27,307.53	Interest to 28-Feb-21
Per diem		$ 2.05	

Interest rate:	3.00%	Calculated as simple interest

APPENDIX D

Strosberg Sasso Sutts LLP
LAWYERS

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March 9, 2021 Our file: 24.116.000

BY EMAIL TO skettle@millerthomson.com

Miller Thomson LLP
Lawyers
One London Place
255 Queens Avenue, Suite 2010
London, ON N6A 5R8

Attention: **Sherry Kettle**

Dear Madam:

(1) In the Matter of the Receivership of Banwell Development Corporation ("Banwell") and Royal Timbers Inc. ("Royal Timbers")
Court File No. CV-11-17088
(2) D'Amore Construction (2000) Ltd. ("DAC") v. Banwell et al
("Consolidated Action") Court File No.: 06-CV-006763CM
February 1, 2018 Judgment of the Honourable Justice Thomas

The purpose of this letter is to set out my reasons for disagreeing with the statement made in paragraph 8.4 of the Receiver's Thirteenth Report concerning the Interest Stops Rule.

To my reading, this part of the Receiver's Thirteenth Report appears inconsistent with the determination of that same issue made in Justice Thomas's reasons for judgment dated June 12, 2017 in re *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455 (attached).

This judgment on the Interest Stops Rule was not appealed and, therefore, is binding upon the Receiver and all of the creditors in this Receivership.

Central to Justice Thomas's reasons for judgment is the equitable treatment of the unsecured creditors in a single Receivership for both Banwell and Royal Timbers. He states in paragraph 3 of his reasons that, on June 5, 2013, he named an interim Receiver, BDO of Canada Limited ("BDO") for both Banwell and its related corporation Royal Timbers. BDO was stated to be put in place to satisfy their collective corporate indebtedness to the first mortgagee, Bank of Montreal ("BMO").

In dealing with the issue of interest in paragraph 11 of the reasons, he identifies the unsecured creditors who are intended to be bound by his decision. Those creditors are:

Banwell	
Estate of Patrick D'Amore	$865,000
Southridge Homes	$ 10,000
Royal Timbers	
Estate of Patrick D'Amore	$ 5,500
Affteck Green McMurtry LLP	$159,538
Dunn Paving Limited	$ 49,893

In paragraph 25 of his reasons, Justice Thomas considers the applicability of the Interest Stops Rule for the unsecured creditors defined above in paragraph 11 of his reasons. He concludes in paragraph 27 that "Application of the Interest Stops Rule to these 'other' unsecured creditors in this Receivership will provide fairness to those creditors."

In expanding on his reasoning for doing so in paragraph 28 of the reasons, he agrees with the trend in recent decisions to harmonize the Interest Stops Rule in proceedings involving bankruptcy, winding-up, and court-appointed receiverships such as the one before him in the instant case. He reiterates in paragraph 28 of his reasons "I find that the [Interest Stops] rule has application here. The ultimate effect of the rule will of course be determined by the presence or absence of a surplus after the payment of the principal debts." (emphasis added)

My client, D'Amore Construction (2000) Ltd. ("DAC") was added to the list of other creditors of Royal Timbers and Banwell when it obtained its judgment against both corporations on February 1, 2018. I have proceeded on the basis that, common with the pre-existing unsecured creditors, D'Amore Construction was bound by the prior ruling in respect of the Interest Stops Rule.

The February 1, 2018 judgment was prepared with Justice Thomas's directions to be consistent with his earlier June 12, 2017 ruling on the payment of interest, namely that the debt owing to the unsecured creditor as at the date of the Receivership constitutes the principal amount of the judgment and that interest from the date of the Receivership Order until the date of payment shall only be payable out of surplus on a *pro rata* basis with other creditors.

In the result, I believe that Justice Thomas has already ruled that no interest should be paid to creditors of Royal Timbers until the principal is paid to the Banwell unsecured creditors.

Yours truly,

William V. Sasso
WVS/kp
#1805979

cc. Tony Van Klink
Miller Thomson LLP
Via email to tvanklink@millerthomson.com

Stephen Cherniak, Receiver of Banwell and Royal Timbers
BDO Canada Limited
Via email to SCherniak@bdo.ca

CITATION: D'Amore v. Banwell Development Corporation et al 2017 ONSC 3455
COURT FILE NO.: CV-11-17088
DATE: 20170612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KEVIN D'AMORE Applicant	Cynthia Kuehl, for the Applicant
– and –	
BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC. Respondents	Tony Van Klink, for the Respondents Banwell Development Corporation and Royal Timbers Inc. Robert Reynolds, for the Respondent 928579 Ontario Limited Steven Pickard, for the Respondent Scott D'Amore
	HEARD: May 29, 2017

REASONS FOR JUDGMENT ON MOTION

THOMAS J.

[1] These are reasons on the latest motions argued in this high conflict shareholder dispute. The shareholders are J. Murray Troup ("Troup"), a 50 percent shareholder of Banwell Development Corporation ("Banwell"), Scott D'Amore ("Scott") and Kevin D'Amore ("Kevin") each 25 percent shareholders of Banwell. Scott and Kevin's shares had been held in trust by their father, Patrick D'Amore ("Patrick") until his death in July, 2011.

[2] The matter first came before me in June, 2012. The shareholders were deadlocked. No business was being done. At that time, I considered a motion to wind up Banwell

together with other requested relief, and a motion in a separate action seeking management powers for Troup. At that time, I created a buy-sell process.

[3] On June 5, 2013 I named an interim receiver, BDO of Canada Limited, ("BDO") of Banwell and a related corporation, Royal Timbers. BDO was put in place to satisfy the corporate indebtedness to the first mortgagee, Bank of Montreal ("BMO").

[4] BDO, through the sale of inventoried property, satisfied the BMO indebtedness. I subsequently extended the receiver's mandate to allow it to continue to manage the business and to sell off the real property. I rescinded my buy-sell order in my ruling of March 10, 2015. The parties were still deadlocked. I have, from time to time, approved the reports of BDO, along with the accounts of the receiver and its counsel, Miller Thomson. I have approved the sale of numerous properties as the inventory of the affected corporations dwindled.

[5] With regard to the matters before me at this time I was able, without argument, to approve BDO's tenth report and to approve the fees paid to BDO and Miller Thomson. I was able to confirm the appropriate interest date for mortgages granted to Simba Group Developments Inc., a separate corporation, wholly owned by Patrick.

[6] The focus of these reasons relates to monies provided by Patrick to the corporations in 2009. It seems to be without dispute that through a series of cheques, Patrick provided a capital infusion to the corporations to allow them to continue to operate ($865,500 to Banwell, $5,500 to Royal Timbers).

[7] For a time, there was a dispute as to whether these monies were owed by the corporation to Patrick's estate or to Kevin and Scott, the holders of the corporate shares. It was the view of Kevin at the time that the $871,000 was impressed with a trust and as such the monies should be repaid to himself and Scott. Miller Thomson, for BDO, and Scott took the opposing view.

[8] In September, 2013 Scott brought a motion seeking a declaration that the monies were repayable to the estate and seeking security. That motion was adjourned and forms part of the proceedings before me now.

[9] All parties now agree that these monies were loans. All parties agree that this loan was not captured by the "Declaration of Trust" prepared by Patrick and dealing only with the shares themselves. There is additional agreement that there is insufficient evidence to support the expansion of the trust or the creation of a separate trust. As such, the $871,000 should be paid to Patrick's estate.

INTEREST

[10] The contentious issue is as to whether this loan attracts interest. The resolution of this issue has implications for the other unsecured creditors who, while participating in the proceedings, have chosen not to attend on the argument of this motion.

[11] The following are the unsecured creditors:

Banwell	
Estate of Patrick D'Amore	$865,000
Southridge Homes	$ 10,000
Royal Timbers	
Estate of Patrick D'Amore	$ 5,500
Affleck Green McMurtry LLP	$159,538
Dunn Paving Limited	$ 49,893

[12] Of the listed unsecured creditors, only the debt owed to Patrick's Estate is without a defined and stated rate of interest.

[13] At the time the monies were advanced, Patrick and Troup were bound by the terms of a Unanimous Shareholder Agreement ("USA").

[14] Several sections of the USA consider advances made by shareholders. Section 4.1, set out below, provided an interest rate for "service financing" provided by Patrick.

> The parties hereto agree to procure servicing financing from a financial institution in such amounts as are estimated by the parties to be reasonably necessary to provide the services (the "Required Amount") for any phase of the development of the Property. Such financing shall be secured by a demand first mortgage on the lands, and if required D'Amore or 928579 shall severally provide guarantees for the Servicing Financing or additional financing per Section 4.3. Notwithstanding the foregoing,

> Patrick shall have the option to provide such Servicing Financing at the rate of interest equivalent to the Bank prime plus one (1%) percent per annum as set by the Company's bank from time to time. Partial discharges shall be available or payment of a proportionate share of the servicing costs for each lot or as required by a financial institution advancing the servicing financing plus a discharge fee in the amount of $175.00.

[15] All parties agree that the $871,000 was not service financing.

[16] Sections 4.2 and 4.3 consider other forms of advances but do not speak to interest being paid on the advance.

> 4.2 Equity advances, capital contributions or loans to the Corporation in excess of those provided in Section 4.1 hereof, shall not be required to be made to the Corporation whatsoever without the consent of all the shareholders except as expressly set forth in this Agreement.
>
> The Required Amount shall be obtained to the greatest extent possible, by term financing which shall be arranged when appropriate, having regard to the status of the Corporation and the financial markets or by borrowing from a chartered bank or other lender acceptable to the Shareholders.
>
> . . .
>
> 4.3 If the Corporation is unable to borrow the Required Amount upon terms acceptable for the Shareholders, then any Shareholder may voluntarily advance whole or part of the Required Amount to the Corporation or pay the same to third parties for the benefit of the Corporation, which such advances or payments shall be deemed a shareholders loan and debt of the Corporation.

[17] The 2009 advances made by Patrick were accomplished through a series of cheques. There is no mention of interest. Counsel for the receiver has concluded that the loans were made to assist with corporate cash flow. As such, there is no indication that they would be short term and their repayment would have to depend on the economic viability of the corporations. Clearly, the businesses have not been in a position to repay these loans. I agree with this characterization.

[18] Counsel for Scott and the receiver take the position that, although there is no apparent contractual right to interest on the monies owed to the estate, interest consistent with the post-judgment rate of interest (3%) should be payable commencing on June 5, 2013, the

date of the receivership order. The argument being that Patrick's estate was unable to move to collect the monies owed once the receivership order stayed any collection proceedings. Scott's argument goes one step further by seeking compound interest.

[19] Counsel for Kevin and Troup are of the view that the loans were never meant to attract interest and interest should not be accruing now. While they disagree with receiver's counsel on the payment of interest, they agree with his characterization of the loans as described in counsel's letter to BDO of February 2, 2017.

> The Materials do not disclose that there were any repayment terms for the loans. In those circumstances, the terms of repayment are determined having regard to the overall factual context in which the loans were made (*Animal House Investment Inc. v. Lisgar Development Ltd.*, 2009 CanLII 23886 (ONSC); affirmed 2010 ONCA322 (CanLII), paragraph 11). As a general rule, if a loan does not have terms of repayment, the loan is to be repaid on demand or within a reasonable time (*Koch v. Cactus Café Jasper Ave. Ltd.*, 1995 Carswell BC 2377, paragraph 15, *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BC SC 286 (CanLII), paragraph 58, *Surette v. Surette*, 1980 Carswell NS 186, paragraph 22, *Burgess v. 041497 (N.B.) Ltd.* 1993 CanLII 9155 (NB QB), pages 13-14 and *Skuy v. Greenhough Harbour Corporation*, 2002 ONSC 6968 (CanLII) paragraph 31).

[20] They point out that there has never been a demand for repayment. That demand needing to be clear and unequivocal (*Henry v. Greig*, 2015 ONSC 168). They note that even in the motion of September, 2013 the estate sought only security.

[21] I conclude that there was never meant to be an interest component to Patrick's loans totalling $871,000. The corporations have never had the cash flow to repay the estate. That position continues as this receivership slowly winds to a conclusion. It is not unreasonable that the amounts remain outstanding considering their purpose. No demand has been made that would trigger a repayment obligation. No interest is payable on these monies to date.

[22] I came to that conclusion having considered the comments of Blair J. in *Canada (Attorney General) v. Confederation Trust Co.*, [2003] O.J. No. 2754 ("*Confederation Trust*"). At paragraph 23, the Court discusses but does not decide the issue of whether it

should authorize interest post-liquidation where there is no contractual or other right. Presumably, the Court could exercise its common law power.

[23] In these particular circumstances I have detailed above, I decline to consider that at this point. Counsel for Scott has drawn my attention to paragraph 39 of *Bank of America Canada v. Mutual Trust Co.* 2002 SCC 43 ("*Bank of American Canada*").

> Sections 128 to 130 CJA entitle a person with an award for damages to interest on the damages for the period between the date that the cause of action arose and the judgment ("pre-judgment interest"), as well as for the period between the judgment and the time when payment is made in full ("post-judgment interest"). The legislation recognizes the unfairness of awarding a plaintiff damages, *at trial*, in the amount to which he or she was entitled as of the date that the cause of action arose, and no more for the period in between, which is frequently years. Sections 128 and 129 CJA, therefore, contain interest rates and methods of calculation to serve for pre-judgment and post-judgment interest, respectively, in those cases for which there is no evidence of a more appropriate interest rate and/or method of calculation.

[24] He encourages me to utilize the appropriate sections of the *Courts of Justice Act* to order interest on the $871,000. The passage from *Bank of American Canada* above is premised on a cause of action arising. The cause of action does not arise here until a demand is made and there has been a failure of repayment.

OTHER UNSECURED CREDITORS

[25] Consideration of the remaining unsecured creditors leads to an assessment of the applicability of the Interest Stops Rules.

[26] As described by Blair J. in *Confederation Trust*, paragraph 21, the rule historically applied to winding up proceedings.

> At common-law the "interest stops" rule applied in winding-up proceedings. The rule provided that interest on provable claims stops as at the commencement of the winding-up and that no interest is payable on claims from that date forward, unless there is a surplus in the estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, or by virtue of a course of conduct or a

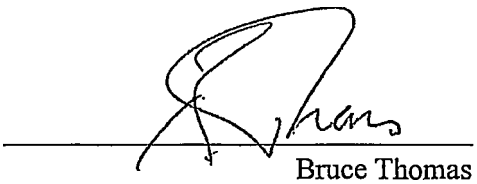
> judgment, or by some statutory provision. In the absence of such a right, however, no interest was payable for the period following the commencement of the liquidation.

[27] Application of the Interest Stops Rule to the "other" unsecured creditors in this receivership will provide fairness to those creditors.

[28] While the Interest Stops Rule was utilized historically in bankruptcy and winding up proceedings, there has been a move to harmonize these types of proceedings to provide fair treatment of creditors across the spectrum of *Bankruptcy and Insolvency Act* matters, *Companies' Creditors Agreement Act* proceedings, as well as court administered receiverships. (Re: *Nortel Networks Corporation*, 2015 ONCA 681 para. 34). I find that the rule has application here. The ultimate effect of the rule will of course be determined by the presence or absence of a surplus after the payment of the principal debts. Any other direction as to distribution and the rate of interest payable is premature at this point.

COSTS

[29] Counsel for Scott requested an opportunity to provide costs submissions. As has been pointed out by Kevin's counsel, these motions have moved along most often without claims for costs. In this particular proceeding, most issues were resolved on consent. On the argued portion, Scott has been unsuccessful. If necessary, I will receive written submissions on costs forwarded to the trial coordinator in Windsor no later than 30 days after the release of these reasons. If I do not have submissions on that schedule there will be no order as to costs.



Bruce Thomas
Regional Senior Justice

Released: June 12, 2017

CITATION: D'Amore v. Banwell Development Corporation et al 2017 ONSC 3455

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN D'AMORE

Applicant

– and –

BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC.

Respondents

REASONS FOR JUDGMENT ON MOTION

Bruce Thomas
Regional Senior Justice

Released: June 12, 2017

APPENDIX E

Strosberg Sasso Sutts LLP
LAWYERS

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March 15, 2021 Our file: 24.116.000

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
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Attn: Sherry A. Kettle
Email: skettle@millerthomson.com

Lawyers for BDO Canada Limited, Court-Appointed Receiver of Banwell Development Corporation and Royal Timbers Inc.

BDO Canada Limited
633 Colborne Street
Suite 100
London, ON N6B 2V3

Attn: Stephen N. Cherniak and **David Flett**
Email: scherniak@bdo.ca and dflett@bdo.ca

Court-appointed Receiver of Banwell Development Corporation and Royal Timbers Inc.

Dear Madam/Sirs:

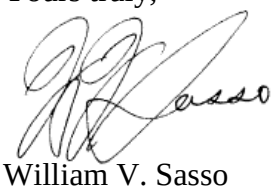
In the Matter of the Receivership of Banwell Development Corporation
("Banwell") and Royal Timbers Inc. ("Royal Timbers") - Court File No. CV-11-17088

I thank you for taking the time to discuss Receivership issues with me on Wednesday, March 10, 2021. I understand from our discussions that the Receiver acknowledges the entitlement of D'Amore Construction (2000) Ltd. ("DAC") to payment of the $25,000 costs judgment of February 1, 2018 from Royal Timbers.

I have also asked that the Receiver raise the "Interest Stops Rule" issue that we discussed with RSJ Thomas for his consideration and determination. To move this matter forward with dispatch, I attach a cover letter and brief written submissions on the Interest Stops Rule issue that I ask the Receiver to forward to RSJ Thomas for his consideration.

As further discussed, I acknowledge on behalf of DAC that it has no other issues with the Thirteenth Report or the relief sought or the Receiver's proposed series of motions.

Yours truly,



William V. Sasso
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#1806780
Encs.

Strosberg Sasso Sutts LLP
LAWYERS

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March 15, 2021 Our file: 24.116.000

Via email to Trial Coordinator

Ontario Superior Court of Justice
245 Windsor Avenue
Windsor, ON N9A 1J2

Attention: The Honourable Regional Senior Justice Bruce Thomas

Your Honour:

In the Matter of the Receivership of Banwell Development Corporation ("Banwell") and Royal Timbers Inc. ("Royal Timbers") - Court File No. CV-11-17088

On February 26, 2021, I received as lawyer for D'Amore Construction (2000) Ltd. ("DAC") a letter from Miller Thomson LLP and the Receiver's Motion Record and Thirteenth Report.

The Receiver advises that the motion will be heard by you on a date to be fixed following response from the stakeholders in this Receivership.

I have reviewed the Motion Record and Thirteenth Report and have discussed with the Receiver and its counsel the application of the "Interest Stops Rule" in this Receivership. I am of the view that the treatment of the Interest Stops Rule in paragraph 8.4 of the Receiver's Thirteenth Report – proposing payment of principal and post-Receivership interest to Royal Timbers' unsecured creditors prior to payment of principal to Banwell's unsecured creditors – appears inconsistent with the Interest Stops Rule judgment in this Receivership (*D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455).

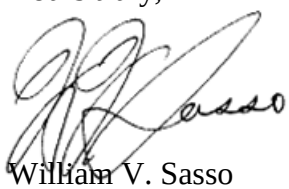
I have asked that the Receiver bring this matter to your attention. DAC does not raise issue with any other aspect of the Thirteenth Report as amended.

While the Thirteenth Report is silent on the issue of distribution to Banwell's unsecured creditors, I understand from my discussions with the Receiver that there will be a substantial shortfall in the payment of the principal owing to Banwell's unsecured creditors, with recoveries presently expected to be less, and possibly substantially less, than 50% of the principal debt.

Counsel for the Receiver has also advised in the February 26, 2021 letter that there is good reason to expedite the matters that are dealt with in the Thirteenth Report. In the interest of expediting the determination of the Interest Stops Rule, I have prepared and attach written submissions on the Interest Stops Rule issue and in support of a request by DAC that payment of interest to Royal Timbers' unsecured creditors be deferred until the Receiver is in a position to report to the Court on payment of the principal debt owed to Banwell's unsecured creditors.

All of which is respectfully submitted.

Yours truly,



William V. Sasso
WVS/kp
#1806183
Encs.

Court File No. CV-11-17088

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KEVIN D'AMORE

Applicant

- and -

BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC.

Respondents

APPLICATION UNDER SECTION 207 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, C. B. 16, AS AMENDED

SUBMISSIONS ON INTEREST STOPS RULE OF D'AMORE CONSTRUCTION (2000) LTD.

March 15, 2021

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Lawyers for BDO Canada Limited, Court-Appointed Receiver of Banwell Development Corporation and Royal Timbers Inc.

1. The issue addressed in these submissions is whether the payment of interest to the unsecured creditors of Royal Timbers Inc. ("Royal Timbers") in this Receivership in circumstances where the unsecured creditors of Banwell Development Corporation ("Banwell") will received only a portion of the principal of the debts owing to them is inconsistent with the Interest Stops Rule judgment in this Receivership. For the reasons outlined below, it is submitted that it is inconsistent and that interest ought not to be paid at this time.

2. On June 12, 2017, Regional Senior Justice Bruce Thomas delivered Reasons for Judgment on, *inter alia*, the "Interest Stops Rule" reported in *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455 ("Reasons"). [Tab 1]

3. Central to the Reasons is the equitable treatment of all the unsecured creditors in this single Receivership for both Banwell and its subsidiary, Royal Timbers. As stated in paragraph 3 of the Reasons, BDO Canada Limited ("BDO") was appointed on June 5, 2013 as Interim Receiver for both Banwell and Royal Timbers.

4. In dealing with the issue of interest in paragraph 11 of the Reasons, RSJ Thomas identifies the unsecured creditors who are bound by this decision. Those creditors are:

<u>Banwell</u>	
Estate of Patrick D'Amore	$865,000
Southridge Homes	$ 10,000
<u>Royal Timbers</u>	
Estate of Patrick D'Amore	$ 5,500
Affteck Green McMurtry LLP	$159,538
Dunn Paving Limited	$ 49,893

5. After dealing separately with the indebtedness of both Banwell and Royal Timbers to the Estate of Patrick D'Amore, RSJ Thomas considers the applicability of the Interest Stops Rule for the "other" unsecured creditors identified in paragraph 11 of the Reasons above, and concludes, in

paragraph 27 of the Reasons, that "Application of the Interest Stops Rule to the 'other' unsecured creditors in this receivership will provide fairness to those creditors."

6. In expanding on the reasons for so doing in paragraph 28 of the Reasons, RSJ Thomas agrees with the trend in recent decisions to harmonize the Interest Stops Rule in proceedings involving bankruptcy, winding up and court appointed receiverships such as the one before him in this case. He concludes by stating in paragraph 28 of the Reasons:

> I find that the [Interest Stops Rule] rule has application here. The ultimate effect of the rule will of course be determined by the presence or absence of a surplus after the payment of the principal debts.

7. D'Amore Construction (2000) Ltd. ("DAC") was added to the list of other unsecured creditors of Royal Timbers and Banwell when it obtained its judgment against these Corporations on February 1, 2018. [Tab 2]

8. It was common ground on DAC's summary judgment motion in February 2018 that DAC would be bound by the pre-existing ruling on the payment of interest to unsecured creditors. As noted in the DAC February 1, 2018 Judgment, it was prepared and approved in a manner that was consistent with RSJ Thomas's earlier June 12, 2017 ruling on the payment of interest, namely, that:

(i) The debt owing to each of the unsecured creditors at the date of the Receivership, June 5, 2013, constitutes the principal amount of the judgment, and

(ii) Interest from the date of the Receivership Order, June 5, 2013, until the date of payment shall only be payable out of surplus on a *pro rata* basis with other creditors.

9. The position stated in the aforementioned paragraph is the manner in which the terms of the February 1, 2018 judgment was prepared and approved. The written submissions filed in support of DAC's motion for summary judgment on the Interest Stops Rule read as follows:

> 61. In directing payment of the judgment, the court must take into account the interests of other creditors in respect of the payment of the interest accruing due to DAC from the date of the Receivership Order until the date of payment at the Contract rate of interest.
>
> 62. At common law, the "interest stops" rule applied in winding up proceedings. The rule provided that interest on provable claims stops at the commencement of the winding up and that no interest is payable on claims from that date forward, unless there is a surplus in the Estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, as in this case, or by virtue of a course of conduct or a judgment or some statutory provision.[1]
>
> 63. In addition to the common law exception, it has also been argued that a court has power to authorize the payment of post-liquidation interest to those claimants who do not have a contractual or other right to interest existing at the liquidation date on the basis of the court's powers granted under sections 128 and 130 of the *Courts of Justice Act* to award prejudgment interest.
>
> 64. In *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455, Thomas RSJ determined that the application of the "interest stops" rule to the other unsecured creditors in this Receivership must be done in a manner that provides fairness to those creditors. He determined that the "interest stops" rule has application to this Receivership.[2] In the application of the "interest stops" rule in respect of the Banwell and Royal Timbers Estates in Receivership, DAC asserts that the ultimate effect will be the payment of that part of its judgment for interest following the date of Receivership, June 5, 2013, will be deferred and paid out of the surplus of the Estates as may be directed by the court at a later date. (emphasis added)

10. In conclusion, DAC submits that the payment of interest, particularly the payment of post-Receivership interest to creditors at significantly different interest rates, is inconsistent with the principle that the creditors of these inter-related and interwoven companies would receive, to the extent that the Receiver's recoveries permit it, their *pro rata* share of the principal debt owed to them by the companies in Receivership as at the date of Receivership. To permit the unsecured

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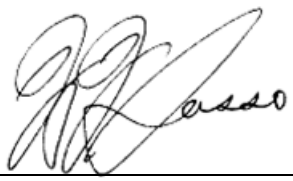
[1] See *Canada (Attorney General) v. Confederation Trust Co*., (2003) 65 O.R. (3d) 519, [2003] O.J. No. 2754, 2003 CanLII 18103 (ON SC) per Blair R.S.J. as he then was, para. 21. [Tab 3]

[2] *D'Amore v. Banwell Development Corporation et al*, 2017 ONSC 3455. [Tab 1]

creditors of the subsidiary, Royal Timbers, to recover interest of $120,000 or more in circumstances where the Receiver reasonably expects the Banwell unsecured creditors to receive less than 50% (and possibly significantly less than 50%) of the principal amount of the debts owing to them defeats the purpose of the Interest Stops Rule and is inconsistent with the Judgment dated June 12, 2017 applying that rule to this Receivership.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



March 15, 2021

William V. Sasso

#1806194

CITATION: D'Amore v. Banwell Development Corporation et al 2017 ONSC 3455
COURT FILE NO.: CV-11-17088
DATE: 20170612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KEVIN D'AMORE Applicant	Cynthia Kuchl, for the Applicant
– and –	
BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC. Respondents	Tony Van Klink, for the Respondents Banwell Development Corporation and Royal Timbers Inc. Robert Reynolds, for the Respondent 928579 Ontario Limited Steven Pickard, for the Respondent Scott D'Amore
	HEARD: May 29, 2017

REASONS FOR JUDGMENT ON MOTION

THOMAS J.

[1] These are reasons on the latest motions argued in this high conflict shareholder dispute. The shareholders are J. Murray Troup ("Troup"), a 50 percent shareholder of Banwell Development Corporation ("Banwell"), Scott D'Amore ("Scott") and Kevin D'Amore ("Kevin") each 25 percent shareholders of Banwell. Scott and Kevin's shares had been held in trust by their father, Patrick D'Amore ("Patrick") until his death in July, 2011.

[2] The matter first came before me in June, 2012. The shareholders were deadlocked. No business was being done. At that time, I considered a motion to wind up Banwell

together with other requested relief, and a motion in a separate action seeking management powers for Troup. At that time, I created a buy-sell process.

[3] On June 5, 2013 I named an interim receiver, BDO of Canada Limited, ("BDO") of Banwell and a related corporation, Royal Timbers. BDO was put in place to satisfy the corporate indebtedness to the first mortgagee, Bank of Montreal ("BMO").

[4] BDO, through the sale of inventoried property, satisfied the BMO indebtedness. I subsequently extended the receiver's mandate to allow it to continue to manage the business and to sell off the real property. I rescinded my buy-sell order in my ruling of March 10, 2015. The parties were still deadlocked. I have, from time to time, approved the reports of BDO, along with the accounts of the receiver and its counsel, Miller Thomson. I have approved the sale of numerous properties as the inventory of the affected corporations dwindled.

[5] With regard to the matters before me at this time I was able, without argument, to approve BDO's tenth report and to approve the fees paid to BDO and Miller Thomson. I was able to confirm the appropriate interest date for mortgages granted to Simba Group Developments Inc., a separate corporation, wholly owned by Patrick.

[6] The focus of these reasons relates to monies provided by Patrick to the corporations in 2009. It seems to be without dispute that through a series of cheques, Patrick provided a capital infusion to the corporations to allow them to continue to operate ($865,500 to Banwell, $5,500 to Royal Timbers).

[7] For a time, there was a dispute as to whether these monies were owed by the corporation to Patrick's estate or to Kevin and Scott, the holders of the corporate shares. It was the view of Kevin at the time that the $871,000 was impressed with a trust and as such the monies should be repaid to himself and Scott. Miller Thomson, for BDO, and Scott took the opposing view.

[8] In September, 2013 Scott brought a motion seeking a declaration that the monies were repayable to the estate and seeking security. That motion was adjourned and forms part of the proceedings before me now.

[9] All parties now agree that these monies were loans. All parties agree that this loan was not captured by the "Declaration of Trust" prepared by Patrick and dealing only with the shares themselves. There is additional agreement that there is insufficient evidence to support the expansion of the trust or the creation of a separate trust. As such, the $871,000 should be paid to Patrick's estate.

INTEREST

[10] The contentious issue is as to whether this loan attracts interest. The resolution of this issue has implications for the other unsecured creditors who, while participating in the proceedings, have chosen not to attend on the argument of this motion.

[11] The following are the unsecured creditors:

Banwell	
Estate of Patrick D'Amore	$865,000
Southridge Homes	$ 10,000
Royal Timbers	
Estate of Patrick D'Amore	$ 5,500
Affleck Green McMurtry LLP	$159,538
Dunn Paving Limited	$ 49,893

[12] Of the listed unsecured creditors, only the debt owed to Patrick's Estate is without a defined and stated rate of interest.

[13] At the time the monies were advanced, Patrick and Troup were bound by the terms of a Unanimous Shareholder Agreement ("USA").

[14] Several sections of the USA consider advances made by shareholders. Section 4.1, set out below, provided an interest rate for "service financing" provided by Patrick.

> The parties hereto agree to procure servicing financing from a financial institution in such amounts as are estimated by the parties to be reasonably necessary to provide the services (the "Required Amount") for any phase of the development of the Property. Such financing shall be secured by a demand first mortgage on the lands, and if required D'Amore or 928579 shall severally provide guarantees for the Servicing Financing or additional financing per Section 4.3. Notwithstanding the foregoing,

> Patrick shall have the option to provide such Servicing Financing at the rate of interest equivalent to the Bank prime plus one (1%) percent per annum as set by the Company's bank from time to time. Partial discharges shall be available or payment of a proportionate share of the servicing costs for each lot or as required by a financial institution advancing the servicing financing plus a discharge fee in the amount of $175.00.

[15] All parties agree that the $871,000 was not service financing.

[16] Sections 4.2 and 4.3 consider other forms of advances but do not speak to interest being paid on the advance.

> 4.2 Equity advances, capital contributions or loans to the Corporation in excess of those provided in Section 4.1 hereof, shall not be required to be made to the Corporation whatsoever without the consent of all the shareholders except as expressly set forth in this Agreement.
>
> The Required Amount shall be obtained to the greatest extent possible, by term financing which shall be arranged when appropriate, having regard to the status of the Corporation and the financial markets or by borrowing from a chartered bank or other lender acceptable to the Shareholders.
>
> . . .
>
> 4.3 If the Corporation is unable to borrow the Required Amount upon terms acceptable for the Shareholders, then any Shareholder may voluntarily advance whole or part of the Required Amount to the Corporation or pay the same to third parties for the benefit of the Corporation, which such advances or payments shall be deemed a shareholders loan and debt of the Corporation.

[17] The 2009 advances made by Patrick were accomplished through a series of cheques. There is no mention of interest. Counsel for the receiver has concluded that the loans were made to assist with corporate cash flow. As such, there is no indication that they would be short term and their repayment would have to depend on the economic viability of the corporations. Clearly, the businesses have not been in a position to repay these loans. I agree with this characterization.

[18] Counsel for Scott and the receiver take the position that, although there is no apparent contractual right to interest on the monies owed to the estate, interest consistent with the post-judgment rate of interest (3%) should be payable commencing on June 5, 2013, the

date of the receivership order. The argument being that Patrick's estate was unable to move to collect the monies owed once the receivership order stayed any collection proceedings. Scott's argument goes one step further by seeking compound interest.

[19] Counsel for Kevin and Troup are of the view that the loans were never meant to attract interest and interest should not be accruing now. While they disagree with receiver's counsel on the payment of interest, they agree with his characterization of the loans as described in counsel's letter to BDO of February 2, 2017.

> The Materials do not disclose that there were any repayment terms for the loans. In those circumstances, the terms of repayment are determined having regard to the overall factual context in which the loans were made (*Animal House Investment Inc. v. Lisgar Development Ltd.*, 2009 CanLII 23886 (ONSC); affirmed 2010 ONCA322 (CanLII), paragraph 11). As a general rule, if a loan does not have terms of repayment, the loan is to be repaid on demand or within a reasonable time (*Koch v. Cactus Café Jasper Ave. Ltd.*, 1995 Carswell BC 2377, paragraph 15, *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BC SC 286 (CanLII), paragraph 58, *Surette v. Surette*, 1980 Carswell NS 186, paragraph 22, *Burgess v. 041497 (N.B.) Ltd.* 1993 CanLII 9155 (NB QB), pages 13-14 and *Skuy v. Greenhough Harbour Corporation*, 2002 ONSC 6968 (CanLII) paragraph 31).

[20] They point out that there has never been a demand for repayment. That demand needing to be clear and unequivocal (*Henry v. Greig*, 2015 ONSC 168). They note that even in the motion of September, 2013 the estate sought only security.

[21] I conclude that there was never meant to be an interest component to Patrick's loans totalling $871,000. The corporations have never had the cash flow to repay the estate. That position continues as this receivership slowly winds to a conclusion. It is not unreasonable that the amounts remain outstanding considering their purpose. No demand has been made that would trigger a repayment obligation. No interest is payable on these monies to date.

[22] I came to that conclusion having considered the comments of Blair J. in *Canada (Attorney General) v. Confederation Trust Co.*, [2003] O.J. No. 2754 ("*Confederation Trust*"). At paragraph 23, the Court discusses but does not decide the issue of whether it

should authorize interest post-liquidation where there is no contractual or other right. Presumably, the Court could exercise its common law power.

[23] In these particular circumstances I have detailed above, I decline to consider that at this point. Counsel for Scott has drawn my attention to paragraph 39 of *Bank of America Canada v. Mutual Trust Co.* 2002 SCC 43 ("*Bank of American Canada*").

> Sections 128 to 130 CJA entitle a person with an award for damages to interest on the damages for the period between the date that the cause of action arose and the judgment ("pre-judgment interest"), as well as for the period between the judgment and the time when payment is made in full ("post-judgment interest"). The legislation recognizes the unfairness of awarding a plaintiff damages, *at trial*, in the amount to which he or she was entitled as of the date that the cause of action arose, and no more for the period in between, which is frequently years. Sections 128 and 129 CJA, therefore, contain interest rates and methods of calculation to serve for pre-judgment and post-judgment interest, respectively, in those cases for which there is no evidence of a more appropriate interest rate and/or method of calculation.

[24] He encourages me to utilize the appropriate sections of the *Courts of Justice Act* to order interest on the $871,000. The passage from *Bank of American Canada* above is premised on a cause of action arising. The cause of action does not arise here until a demand is made and there has been a failure of repayment.

OTHER UNSECURED CREDITORS

[25] Consideration of the remaining unsecured creditors leads to an assessment of the applicability of the Interest Stops Rules.

[26] As described by Blair J. in *Confederation Trust*, paragraph 21, the rule historically applied to winding up proceedings.

> At common-law the "interest stops" rule applied in winding-up proceedings. The rule provided that interest on provable claims stops as at the commencement of the winding-up and that no interest is payable on claims from that date forward, unless there is a surplus in the estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, or by virtue of a course of conduct or a

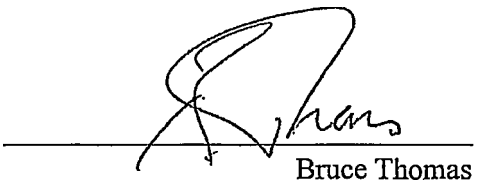
> judgment, or by some statutory provision. In the absence of such a right, however, no interest was payable for the period following the commencement of the liquidation.

[27] Application of the Interest Stops Rule to the "other" unsecured creditors in this receivership will provide fairness to those creditors.

[28] While the Interest Stops Rule was utilized historically in bankruptcy and winding up proceedings, there has been a move to harmonize these types of proceedings to provide fair treatment of creditors across the spectrum of *Bankruptcy and Insolvency Act* matters, *Companies' Creditors Agreement Act* proceedings, as well as court administered receiverships. (Re: *Nortel Networks Corporation*, 2015 ONCA 681 para. 34). I find that the rule has application here. The ultimate effect of the rule will of course be determined by the presence or absence of a surplus after the payment of the principal debts. Any other direction as to distribution and the rate of interest payable is premature at this point.

COSTS

[29] Counsel for Scott requested an opportunity to provide costs submissions. As has been pointed out by Kevin's counsel, these motions have moved along most often without claims for costs. In this particular proceeding, most issues were resolved on consent. On the argued portion, Scott has been unsuccessful. If necessary, I will receive written submissions on costs forwarded to the trial coordinator in Windsor no later than 30 days after the release of these reasons. If I do not have submissions on that schedule there will be no order as to costs.



Bruce Thomas
Regional Senior Justice

Released: June 12, 2017

CITATION: D'Amore v. Banwell Development Corporation et al 2017 ONSC 3455

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN D'AMORE

Applicant

– and –

BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC.

Respondents

REASONS FOR JUDGMENT ON MOTION

Bruce Thomas
Regional Senior Justice

Released: June 12, 2017

Court File No. 06-CV-6763

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE REGIONAL SENIOR	)	THURSDAY, THE 1ST
	)	
JUSTICE BRUCE G. THOMAS	)	DAY OF FEBRUARY, 2018

B E T W E E N:

(Court Seal)

D'AMORE CONSTRUCTION (2000) LTD.

Plaintiff

and

BANWELL DEVELOPMENT CORPORATION and BANK OF MONTREAL

Defendants

and between

BANWELL DEVELOPMENT CORPORATION and
ROYAL TIMBERS INC.

Plaintiffs

and

D'AMORE CONSTRUCTION (2000) LTD.

Defendant

JUDGMENT

THIS MOTION made by the plaintiff, D'Amore Construction (2000) Ltd., for

(a) Judgment against Banwell Development Corporation ("Banwell") for:

(i) $487,376.73 for work done and material supplied under written agreement made between D'Amore Construction (2000) Ltd. and Banwell dated January 10, 2005 ("Contract") as certified as due and payable under the Contract;

(ii) Prejudgment interest at the Contract rate of 12% annually from the Certification dates for payment under the Contract until October 24, 2017, totalling $696,142.70 to that date, and interest thereafter accruing at the Contract rate until payment; and

(iii) Costs of D'Amore Construction (2000) Ltd.'s claim against Banwell in such amount as is determined to be fair and reasonable;

(b) Directing payment of the principal amount of the judgment, prejudgment interest at the Contract rate from the Certification dates for payment under the Contract until the date of the receivership order dated June 5, 2013 ("Receivership Order") in the amount of $439,448.72, payable forthwith from the Estate of Banwell in receivership;

(c) An order declaring that the balance of the judgment for interest from the date of the Receivership Order until the date of payment shall be payable out of any surplus of the Estate of Banwell on a *pro rata* basis with other creditors of Banwell or as may be further directed by the court;

(d) Judgment dismissing any and all claims made by Banwell and Royal Timbers Inc. ("Royal Timbers") against D'Amore Construction (2000) Ltd. in the Consolidated

Action with such costs as are determined by this Honourable Court to be fair and reasonable;

(e) Further, or in the alternative, an order extending the February 1, 2018 deadline to set the Consolidated Action down for trial and/or requiring D'Amore Construction (2000) Ltd. to take any step in the Consolidated Action as may be directed; and

(f) Such further and other relief as to this Honourable Court may seem just;

was heard this day at the Court House at 245 Windsor Avenue, Windsor, Ontario,

On reading the moving party's motion record, Volumes I and II motion for default/summary judgment of D'Amore Construction (2000) Ltd. dated October 31, 2017, the moving party's factum and authorities, and on hearing the submissions of the lawyers for D'Amore Construction (2000) Ltd. and for BDO Canada Limited as Receiver of Banwell and Royal Timbers under the Receivership Order:

1. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. the amount of $487,376.73 for work done and material supplied under the Contract as certified as due and payable under the Contract.

2. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. prejudgment interest at the Contract rate of 12% annually as follows:

(a) For the period from the Certification dates for payment under the Contract to June 5, 2013, the amount of $439,448.72; and

(b) For the period from June 5, 2013 until October 24, 2017, the amount of $256,693.98, together with additional interest after that date at the Contract rate until payment.

3. **THIS COURT ORDERS AND ADJUDGES** that the amounts payable by Banwell to D'Amore Construction (2000) Ltd. under paragraphs 1 and 2(a) of this judgment shall constitute provable claims in the receivership of Banwell and shall be accepted by the Receiver of Banwell as an unsecured claim for distribution purposes.

4. **THIS COURT ORDERS** that the amount payable by Banwell to D'Amore Construction (2000) Ltd. under paragraph 2(b) of this judgment shall constitute a provable claim in the receivership of Banwell and shall be accepted by the Receiver of Banwell as an unsecured claim for distribution purposes with respect to any surplus funds remaining available for distribution after payment in full of all claims as of June 5, 2013.

5. **THIS COURT ORDERS AND ADJUDGES** that any and all claims made by Banwell and Royal Timbers against D'Amore Construction (2000) Ltd. in the Consolidated Action are hereby dismissed.

6. **THIS COURT ORDERS AND ADJUDGES** that Banwell pay to D'Amore Construction (2000) Ltd. its costs of this motion and the Contract claim in the Consolidated Action, fixed in the amount of $50,000.00, inclusive of fees, disbursements and taxes.

7. **THIS COURT ORDERS AND ADJUDGES** that Banwell and Royal Timbers, jointly and severally, pay to D'Amore Construction (2000) Ltd. its costs of this motion and the claims made by Banwell and Royal Timbers against D'Amore Construction (2000) Ltd. in the

Consolidated Action, fixed in the amount of $25,000.00, inclusive of fees, disbursements and taxes.

8. **THIS COURT ORDERS** that the amount payable by Banwell for costs in paragraph 6 above shall constitute a provable claim in the Receivership of Banwell and the amounts payable by Banwell and Royal Timbers for costs in paragraph 7 above shall constitute provable claims in the Receivership of Banwell and Royal Timbers and shall be accepted by the Receiver of Banwell and Royal Timbers as unsecured claims for distribution purposes.

THIS JUDGMENT BEARS INTEREST at the rate of 3.00 per cent per year commencing on February 1, 2018 other than the Contract rate interest payable under paragraph 2 of this judgment.

#1509927

ENTERED AT WINDSOR
In Book No. 27
re Document No. 152
on FEB 08 2018
by

D'AMORE CONSTRUCTION (2000) LTD.
Plaintiff

-and-

BANWELL DEVELOPMENT CORPORATION
Defendant

Court File No. 06-CV-6763

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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
WINDSOR

JUDGMENT

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Lawyers for D'Amore Construction (2000) Ltd.

File number: 24.116.000

The Attorney General of Canada v. Confederation Trust Company

[Indexed as: Canada (Attorney General) v. Confederation Trust Co.]

65 O.R. (3d) 519
[2003] O.J. No. 2754
Court File No. 97-CL-000543A

Ontario Superior Court of Justice
Blair R.S.J.
June 27, 2003

Corporations -- Winding up -- Liquidation -- Surplus -- Priorities -- Post-liquidation interest to be paid out of surplus -- Payment of interest first before payment of principal -- Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 95(2).

Statutes -- Interpretation -- Existing rights -- Retroactivity -- Statute amended during continuing fact situation -- Application of statute that comes into effect during continuing fact situation immediate -- Statute not having retroactive effect -- Subsection 95(2) of Winding-up and Restructuring Act applying to liquidation of trust company -- Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 95(2).

On August 14, 2003, Confederation Trust Company ("C-Trust") went into liquidation. The liquidator realized upon C-Trust's property in two funds: (1) the Guarantee Fund, being guaranteed investment certificates ("Deposit Certificates") held for depositors and insured under the Trust and Loan Companies Act; and (2) the Company Fund, being C-Trust's own property. The Liquidator anticipated that after all contested claims were

resolved there would be about a $30 million surplus available for distribution. The liquidator applied for a determination of how to calculate interest payments from the surplus. Its recommendations as to the manner of payments was opposed by KPMG Inc., the liquidator of the estate of Confederation Life Insurance Company ("C-Life"), the indirect parent of C-Trust, and by Canada Deposit Insurance Corporation ("CDIC"), C-Trust's largest creditor with a subrogated claim by reason of having complied with its obligations under the Trust and Loan Companies Act, S.C. 1991, c. 45 to guarantee the payment of the C-Trust's deposits. The dispute was over whether the interest was to be paid in accordance with the provisions of s. 95(2) of the Winding-up and Restructuring Act (the "Act") or on some other basis and whether the surplus proceeds should be applied utilizing an "interest first" or a "principal first" focus as a starting point. As between C-Life and CDIC, there was an agreement known as the "Co-operation Agreement" as to the division of the surplus proceeds.

Held, s. 95(2) of the Winding-up and Restructuring Act applied, and the surplus should be applied first to the payment of interest and then to the payment of principal.

Before the enactment of s. 95(2) of the Act, there was no provision in the Act for the payment of post-liquidation interest. Subsection 95(2) of the Act applied to the C-Trust liquidation. The application of s. 95(2) did not have a retroactive effect. The liquidation of C-Trust was ongoing and incomplete when the amendment adding the subsection came into effect. The processing of the estate was a continuing fact situation, and the application of the law that comes into effect during such a situation has immediate as opposed to retroactive effect. There was no entitlement to post-liquidation interest on the part of the claimants unless and until a surplus emerges in the estate and hence there was no vested right to payment of such interest until that condition of entitlement has been satisfied.

There was nothing in the language of s. 95 of the Act to indicate that Parliament intended to alter the traditional rule in insolvency situations that dividends [page520] are to be

applied first to the payment of interest and then to the payment of principal. Absent a stipulation as to the manner of allocation of payments on a debt -- by agreement, course of conduct, or statute -- the general rule in debtor-creditor relationships is the same as the general rule in insolvency situations. There was no reason why s. 95 should be interpreted in a fashion that departed from the traditional approach. In the rare circumstance of a winding-up surplus, creditors who have proven their claims ought to be placed -- as closely as the surplus permits -- in the same position in which they would have been if the proven claims had been paid on the date of the winding-up. The interests of fairness, equality and predictability amongst the creditors and as between the debtor company and its creditors called for the application of the generally accepted rule for the allocation of payments. Therefore, the surplus should be applied first (before the distribution of any remaining surplus to the shareholders) toward the payment of interest at the rate of 5 per cent per annum on all claims proved in the winding-up in accordance with their priority. The post-liquidation interest should be calculated on the basis of a "payment of interest first" methodology.

Cases referred to

Bower v. Marris (1841), Cr. & Ph. 351, 10 L.J. Ch. 356, 41 E.R. 525 (L.C.); Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1993), 11 Alta. L.R. (3d) 371, [1993] 7 W.W.R. 607, 21 C.B.R. (3d) 12 (Q.B.); Downey v. Maes (1992), 8 O.R. (3d) 440 (Gen. Div.); Illingworth v. Elford, [1996] O.J. No. 2893 (QL) (Gen. Div.); In re Cardelucci, 2002 U.S. App. LEXIS 6770 (U.S.C.A. Ninth Circuit); In re Fine Industrial Commodities Ltd., [1956] Ch. 256, [1955] 3 All E.R. 707, [1955] 3 W.L.R. 940, 99 Sol. Jo. 889; In re Humber Iron Works and Shipbuilding Company; Warrant Finance Company's Case (1869), 4 Ch. App. 643, 20 L.T. 859, 17 W.R. 780, 38 L.J. Ch. 712 (L.J.J.); In re McDougall (1883), 8 O.A.R. 309 (C.A.); McGregor v. Gaulin (1848), 4 U.C.R. 378; Robertson v. Carlile (Re), [1949] 2 D.L.R. 525, 30 C.B.R. 60 (Alta. C.A.); Wasserman, Arsenault Ltd. v. Sone (2002), 33 C.B.R. (4th) 145

(Ont. C.A.), supp. reasons (2002), 38 C.B.R. (4th) 119 (Ont. C.A.), affg (2000), 22 C.B.R. (4th) 153 (Ont. S.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 128, 130

Trust and Loan Companies Act, S.C. 1991, c. 45

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 [as am.], ss. 95 (now 95(1)), 95(2)

Authorities referred to

O'Donovan, J., The Law of Company Liquidation, 3rd ed. (Sydney: Law Book Co., 1987)

APPLICATION to determine how to calculate interest payments from a surplus in a liquidation under the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11.

Robb C. Heintzman and C.D. Mathias, for PricewaterhouseCoopers Inc., Liquidator for Confederation Trust Company.

Graham Smith and Gale Rubenstein, for KPMG Inc., Liquidator for Confederation Life Insurance Company.

Michael J. MacNaughton, for Canada Deposit Insurance Corporation. [page521]

BLAIR R.S.J.: --

This is a curious point which cannot often have arisen and is not likely to arise with any frequency hereafter. The strange feature of the case is that a company in the process

of being wound up on the footing that it was an insolvent company now finds itself in the position, in the person of its liquidator, being in possession of a substantial surplus [Note 1].

Overview

[1] Such is the case here.

[2] Confederation Trust Company is in liquidation. Its Liquidator reasonably expects, however, that after all contested claims have been resolved there will be about a $30 million surplus available for distribution following the payment in full of all proper claims against the estate.

[3] This application involves a fight over the quantum of interest to be paid out of that surplus, and the method by which such payments, if any, are to be calculated. The Liquidator for Confederation Trust, PricewaterhouseCoopers Inc., makes the following recommendations to this court and seeks declaratory relief accordingly. It recommends:

(a) that the holders of all proper claims against Confederation Trust's estate receive out of any surplus, post-liquidation interest on the outstanding balances of their claims for the period from the date of liquidation (August 14, 1994) to the date on which final payment of the full principal amount of their claims is made;

(b) that post-liquidation interest be paid at the rate provided for in any contract between a creditor of the estate and Confederation Trust or, in the absence of any contractual provision, at the rate provided for in the Courts of Justice Act [Note 2]; and,

(c) that, depending on the amount of the available surplus, distributions to creditors should first be made on account of interest and thereafter on account of the principal balances of their claims, all as more particularly set out in the Liquidator's Reports No. 36 and No. 36A.

[4] The Liquidator's recommendations are opposed by KPMG Inc., the Liquidator of the estate of Confederation Life Insurance Company, and by Canada Deposit Insurance Corporation. [page522]

[5] Confederation Life is the 100 per cent indirect parent of Confederation Trust, as well as a significant creditor. In its parental capacity, it thus stands to benefit to the extent that a greater portion of the Confederation Trust surplus is available for distribution to the insolvent corporation.

[6] Canada Deposit Insurance Corporation ("CDIC") is Confederation Trust's largest creditor. It has a subrogated claim against the estate by reason of having complied with its obligations under the Trust and Loan Companies Act [Note 3] to guarantee the payment of Confederation Trust's deposits.

[7] What is at issue in this application is,

(a) whether post-liquidation interest is payable out of the surplus in accordance with subsection 95(2) of the Winding-up and Restructuring Act [Note 4], (at 5 per cent per annum) or in accordance with a combination of contractual and "pre-judgment interest" type of rates; and,

(b) whether surplus payments are to be made to claimants based upon a "payment of interest first" or a "payment of principal first" methodology.

[8] Depending upon the answers to these questions, the parties calculate the range of payments to claimants to be between about $4.5 million and $35.5 million. The answers are therefore of some significance both to the claimant creditors of Confederation Trust and to Confederation Life and CDIC, as the beneficiaries of the return of any surplus to the insolvent company.

Facts

[9] Confederation Trust -- together with its parent Confederation Life -- was placed in liquidation under the

Winding-up Act in August 1994. The liquidator of Confederation Trust was required to realize upon the property of two types of funds, one known as the "Guarantee Fund", the other as the "Company Fund".

[10] The Guarantee Fund was comprised of property held by the Company in trust for depositors. These deposits were in the form of guaranteed investment certificates (the "Deposit Certificates") issued by Confederation Trust to investors. They constituted "guaranteed trust funds" under the Trust and Loan Companies Act and were insured by CDIC. They were for varying terms and called for [page523] repayment of principal on the stipulated maturity dates. Interest was payable on each of the deposits at the rate set out in the Deposit Certificates to their date of maturity, but none provided for interest after maturity. Each Deposit Certificate stated that Confederation Trust "guarantees payment of interest at the rate and terms shown from the date of issue to the date of maturity [but Confederation Trust] will not be liable for interest after maturity date".

[11] The balance of Confederation Trust's assets consisted of its own property and comprised what is known in the liquidation as the Company Fund.

[12] On February 23, 1995, the court approved a scheme of distribution for the Guaranteed Fund and, as well, a first distribution out of that Fund. In August 1997, a claims procedure was approved respecting the Company Fund claims. By order dated April 22, 1998, a fifth and final distribution from the Guarantee Fund was approved, and the shortfall claims were admitted as claims against the Company Fund.

[13] This was followed in April 2000 by what is known as "the Co-operation Agreement" between Confederation Life and CDIC, whereby they settled their respective claims as creditors of Confederation Trust. This settlement broke the logjam in the Confederation Trust liquidation and facilitated the payment of 100 cents on the dollar to Company Fund claimants on account of their proven claims, together with the payment of post-liquidation interest. Under the Cooperation Agreement,

Confederation Life and CDIC have agreed, as between themselves, on a split of the surplus proceeds. CDIC therefore finds itself in the position of supporting Confederation Life in its opposition to the recommendations put forward here by the Liquidator of Confederation Trust.

[14] By order dated January 30, 2001, the court authorized an interim payment of post-liquidation interest at the rate of 5 per cent on the proven claim amounts of all admitted claims against the Company Fund, on deposits determined by CDIC to be uninsured, and to CDIC with respect to the amounts paid by it on account of insured deposits.

Analysis

Subsection 95(2)

[15] To answer the questions posed above, it is necessary, in the first place, to determine whether or not subsection 95(2) of the Winding-up and Restructuring Act (the "Act") applies to the Confederation Trust liquidation.

[16] Prior to the enactment of subsection 95(2) in 1996, the Winding-up Act did not contain any provision for the payment of [page524] post-liquidation interest. Section 95 (now subsection 95(1)) read as follows:

> 95. The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

[17] In 1996, at the same time as the Act was renamed the Winding-up and Restructuring Act, subsection 95(2), providing for the payment of interest out of surplus, was added. It states:

> 95(2) Any surplus referred to in subsection (1) shall first be applied in payment of interest from the commencement of the winding-up at the rate of 5 per cent per annum on all claims proved in the winding-up and according to their priority.

[18] KPMG Inc., as Liquidator of the Confederation Life estate, and CDIC contend that subsection 95(2) applies to the Confederation Trust liquidation. PricewaterhouseCoopers Inc., as Liquidator of the Confederation Trust estate, contends that it does not.

[19] Counsel for PricewaterhouseCoopers Inc. submits that subsection 95(2) does not have retroactive effect and therefore does not apply to the Confederation Trust liquidation because it came into effect after August 14, 1994, the date of liquidation (the "Liquidation Date"). In this respect he relies upon two rebuttable presumptions of statutory interpretation, namely, the presumption against retroactivity and the presumption against interfering with vested rights. Parliament has not expressly stated its intentions regarding the retroactive impact of the amendment, he says, and the right to assert a claim is not to be adversely affected by a statute that comes into force after the right to assert the claim arises, in the absence of sufficient evidence of Parliament's intention to the contrary. Here, he submits, there is no sufficient evidence to the contrary and the creditors' rights to assert their claim for interest arose as at the Liquidation Date, the date as of which the validity of all claims and the rights of all claimants are to be determined. The amendment, therefore, cannot interfere with those vested rights.

[20] In rebuttal, the respondents make three submissions. First, they argue Parliament has indicated its intention in the language of subsection 95(2). When read in the context of other provisions in the Act, namely, the express choice to provide in Part III that other amendments applying to the winding-up of insurance companies would operate only prospectively, thus signalling [page525] that provisions such as subsection 95(1), which are not limited to applying only prospectively, were to

apply retroactively as well. Secondly, they claim that subsection 95(2) has immediate effect in the circumstances of this case because it is being applied to an incomplete and continuing fact situation -- the ongoing liquidation of the Confederation Trust estate -- and therefore does not have any retroactive effect at all. Finally, the respondents submit that claimants cannot be said to have acquired a "vested right" to post-liquidation interest as at the Liquidation Date because the existence and extent of any surplus is uncertain and contingent, and cannot be determined until the end of the liquidation process -- a point in time after the enactment of subsection 95(2), in the circumstances of this case.

[21] At common-law the "interest stops" rule applied in winding-up proceedings. The rule provided that interest on provable claims stops as at the commencement of the winding-up and that no interest is payable on claims from that date forward, unless there is a surplus in the estate. In the event of a surplus, post-liquidation interest was payable on debts in respect of which there was a right to interest prior to the liquidation. That right could arise contractually, or by virtue of a course of conduct or a judgment, or by some statutory provision. In the absence of such a right, however, no interest was payable for the period following the commencement of the liquidation. See In re Humber Ironworks and Shipbuilding Company; Warrant Finance Company's Case (1869), 4 Ch. App. 643, 38 L.J. Ch. 712 (L.J.J.), at pp. 645-47 Ch. App.; Bower v. Marris (1841), Cr. & Ph. 351, 10 L.J. Ch. 356 (L.C.); Re Robertson and Carlisle Ltd., [1949] 2 D.L.R. 525, 30 C.B.R. 60 (Alta. C.A.); In re McDougall (1883), 8 O.A.R. 309 (C.A.); O'Donovan J., The Law of Company Liquidation, 3rd ed. (Sydney: Law Book co., 1987), at pp. 368-69.

[22] Thus, even without specific reference to post-liquidation interest in winding-up legislation, there were circumstances at common-law where such interest could be paid out of surplus. Indeed, it is not contested that, in the Confederation Trust context, the claimants are entitled to some post-liquidation interest out of the surplus liquidation proceeds. On consent, the court approved payment of such interest, on an interim basis, at the rate of 5 per cent by

Order dated January 30, 2001. The dispute is over whether the interest is to be paid in accordance with the provisions of subsection 95(2), or on some other basis, and whether the surplus proceeds should be applied utilizing an "interest first" or a "principal first" focus as a starting point.

[23] In addition to the common-law exception, PricewaterhouseCoopers Inc. argues that the court has power to authorize [page526] the payment of post-liquidation interest to those claimants who do not have a contractual or other right to interest existing at the Liquidation Date, on the basis of its power under ss. 128 and 130 of the Courts of Justice Act to award pre-judgment interest. It is the combination of this power plus the exceptional power of the courts at common-law that forms the basis for the recommendation that post-liquidation interest should be payable at the rates provided for in the Deposit Certificates to their dates of maturity and at the Courts of Justice Act rates thereafter.

[24] It is not necessary to pursue this line of enquiry further, however, because subsection 95(2) of the Winding-up and Restructuring Act applies to the Confederation Trust liquidation, in my opinion.

[25] To say this is not to give the provision retroactive effect. Although it is not free from doubt, I do not accept the contention that the Claimants acquired a vested right to post-liquidation interest at the Liquidation Date. In my opinion, they acquired, at best, a contingent right to the payment of post-liquidation interest conditional upon there being a surplus in the liquidated estate after payment of all the Company's debts and obligations and of the costs associated with the liquidation. The condition cannot be determined and satisfied until the liquidation of the estate is at least substantially completed.

[26] Here, the liquidation of the Confederation Trust estate was active and ongoing, and far from substantially completed in June 1996, when the amendment adding subsection 95(2) to the Act came into effect. It was not known at that time there would be a surplus. The processing of the estate was a continuing

fact situation, and the application of a law that comes into effect during such a situation has "immediate", as opposed to "retroactive" effect.

[27] In Wasserman, Arsenault Ltd. v. Sone [Note 5], the Ontario Court of Appeal upheld a decision of Farley J. holding that a guardian appointed by the Superintendent of Bankruptcy under the Bankruptcy and Insolvency Act (the "BIA") [Note 6] to complete the administration of a complicated series of estates was entitled to priority for its fees over the claim of a prior trustee in bankruptcy [Note 7] for its fees. The BIA had been amended to provide specifically for such priority, but the amendment came into force after the prior [page527] trustee had substantially completed its work on the estates. The argument that to give priority to the guardian's claim would be to give the amendment retroactive application was rejected. The following passage from the judgment of Weiler J.A., at pp. 158-59 C.B.R., explains why, and the principles enunciated there apply equally to the winding-up of the Confederation Trust estate, in my opinion:

> The appellant alleges, secondly, that Farley J. applied s. 136(1)(b) [of the BIA] retroactively. Section 136(1)(b), which gives priority to the fees of a person acting under the direction of the Superintendent over the trustee, came into force on September 30, 1997. Prior to this amendment the expenses of a trustee had first priority. Rumanek submits that on a number of files its work was substantially completed, with only certain procedural or administrative steps remaining, and that it had a vested right to payment for these files prior to the coming into force of s. 136(1)(b). Accordingly, Rumanek submits that it is entitled to payment on these files in priority to the Guardian, and that Farley J. erred in not recognizing this.
>
> The commentary in Driedger on the Construction of Statutes, 3rd ed. (1994) at p. 517 is helpful in dealing with this submission. It states:
>
> Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force.

> Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of on-going facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to on-going facts is not retroactive because, to use the language of Dickson J. in [Gustavson Drilling (1964) Ltd. v. M.N.R., [1977] 1 S.C.R. 271], there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.
>
> Legislation that applies to on-going facts is said to have "immediate effect". Its application is both immediate and general: "immediate" in the sense that the new rule operates from the moment of commencement displacing whatever rule was formerly applicable to the relevant facts, and "general" in the sense that the new rule applies to all relevant facts, on-going as well as new.
>
> I agree with Farley J. that these files should be viewed as a continuing fact situation. Rumanek ceased its work prior to the enactment of s. 136(1)(b), but the files were not complete by that date. They were on-going in varying degrees. The Guardian was appointed to complete the administration of these files. Certificates of completion had not been filed. Strictly speaking, there is no entitlement to compensation and hence no vested right to payment until a certificate of completion has been filed. It is at the time of payment that priority is determined and, hence, the application of s. 136(1)(b) does not have retrospective effect. Rumanek does not have a vested right to any fees or disbursements arising from the completion of the Sone estates by the Guardian. Farley J. did not err in his appreciation of s. 136(1)(b).

(Emphasis added) [page528]

[28] Similarly, in this case, the winding-up of the

Confederation Trust estate may be "viewed as a continuing fact situation" that is "on-going in varying degrees". There is no entitlement to post-liquidation interest on the part of the Claimants unless and until a surplus emerges in the estate, and hence there is "no vested right to payment" of such interest until that condition of entitlement has been satisfied. Thus, subsection 95(2) of the Winding-up and Restructuring Act applies to the situation because it has "immediate" and not "retroactive" effect in the circumstances.

The calculation of interest under subsection 95(2)

[29] The traditional rule in insolvency situations is that dividends are to be applied first to the payment of interest and then to the payment of principal. This is said to prevent injustice, promote equity amongst the creditors, and protect the contractual relationship between the parties. See Bower v. Marris, supra, at pp. 527-28 Cr. & Ph.; In re Humber Ironworks and Shipbuilding Company, supra, at p. 645 Ch. App. PricewaterhouseCoopers Inc. submits the traditional rule should be applied to the payment of post-liquidation interest pursuant to subsection 95(2). The respondents contest this interpretation of the provision and contend for the reverse methodology.

[30] There is nothing in the language of s. 95 of the Winding-up and Restructuring Act itself to indicate that Parliament intended to alter this traditional methodology in the case of a post-liquidation surplus. The respondents submit, however, that post-liquidation interest is only payable after payment in full of all proven claims and that there is nothing in the legislation to suggest a recalculation is to be done regarding distributions already made (which would be necessary if the interest portion of the surplus is to be distributed on a "payment of interest first" basis). Section 95 therefore mandates that distributions are to be credited, first, to the proven claim amounts, they say. Consistent with its choice of a common and consistent rate of interest (5 per cent), Parliament has chosen not to differentiate between claimants based upon the composition of claims as between principal and interest. Such a methodology is also consistent with the statutory regime

of pre-judgment interest under provincial legislation, where interim payments are credited towards payment of unliquidated claims for damages first, then to interest: see, for example, Downey v. Maes (1992), 8 O.R. (3d) 440 (Gen. Div.); Illingworth v. Elford, [1996] O.J. No. 2893 (QL) (Gen. Div.).

[31] Downey v. Maes and Illingworth v. Elford, though, involved the effect of pre-payments on the calculation of pre-judgment [page529] interest in insurance cases involving claims for unliquidated damages. In my view, this principle is not of much assistance in considering the methodology for calculating interest payments out of a surplus in a winding-up proceeding. Claims proven in a liquidation are for the most part liquidated claims, arising out of a debtor-creditor relationship. In the case of the claims proven against the Confederation Trust Guaranteed Fund, they were all liquidated. Absent a stipulation as to the manner of allocation of payments on a debt -- by agreement, course of conduct, or statute -- the general rule in debtor-creditor relationships is the same as the general rule in insolvency situations, namely that payments are credited on account of interest first, then principal: see McGregor v. Gaulin (1848), 4 U.C.Q.B. 378, per Robinson C.J., at p. 384.

[32] I see no reason why s. 95 should be interpreted in a fashion that departs from the traditional approach. The general purpose of winding-up legislation is to ensure the rateable distribution of the assets of the insolvent company, in accordance with the creditors' priorities. In the rare circumstance of a winding-up surplus, creditors who have proven their claims ought to be placed -- as closely as the surplus permits -- in the same position they would have been in if the proven claims had been paid on the date of the winding-up. The comments of Wachowich A.C.J. (as he then was) in Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1993), 21 C.B.R. (3d) 12, 11 Alta. L.R. (3d) 371 (Q.B.), at p. 24 C.B.R., are apt:

> The passage of time alone should not alter the ratio of the funds available to the different classes of creditors. In the present circumstances, the priority creditors have been

> deprived of their funds for nearly a decade. As Mutual Life pointed out, the unsecured creditors as a class will be enriched with every passing year of delay in the distribution of the estate. One might add to Lord Selwyn's statement [Note 8] "that no person should be prejudiced by the accidental delay which, in consequence of the form and proceedings of the Court and other circumstances, actually occur in realizing the assets" a further caution: no person should be so prejudiced by such delay in the distribution of assets.

(Emphasis in original)

[33] In the circumstances of this case, it is not so much the unsecured creditors who will be enriched by the passing of time as it is Confederation Life in its capacity as the 100 per cent indirect shareholder of Confederation Trust (and CDIC, as a result of the Co-operation Agreement between it and Confederation Life). While I agree with the respondents' submission that there is no inherent policy or goal of maximizing post-liquidation interest so [page530] as to minimize any recovery to the debtor or the shareholder of the debtor pursuant to subsection 95(1) of the Winding-up and Restructuring Act, I do not see why the insolvent company and its shareholders should receive a windfall out of the insolvency before the Claimants have been made as whole as possible in the circumstances. I am satisfied that "the interests of fairness, equality and predictability" amongst the creditors and as between the debtor company and its creditors, call for the application of the generally accepted rule for the allocation of payments made: see In re Cardelucci, 2002 U.S. App. LEXIS 6770 (9th Cir. 2002), at p. 2.

[34] In its Report 36A, PricewaterhouseCoopers Inc. has calculated the post-liquidation interest payable from the available surplus, depending upon various assumptions respecting the rate and methodology to be applied. On the assumption that subsection 95(2) applies and that the applicable rate is 5 per cent, the Liquidator calculates the total post-liquidation interest payable in respect of all admitted claims to be as follows:

(a) $4,459,032, if distributions are applied first on account of principal; and,

(b) $17,866,181, if distributions are applied first on account of post-liquidation interest and then on account of principal.

[35] The Liquidator estimates the surplus available for the payment of post-liquidation interest will be approximately $30 million.

Conclusion and Disposition

[36] I therefore conclude that the Confederation Trust surplus should be applied first (before the distribution of any remaining surplus to the shareholders) towards the payment of interest at the rate of 5 per cent per annum on all claims proved in the winding-up in accordance with their priority. The post-liquidation interest is to be calculated on the basis of a "payment of interest first" methodology which, according to the Liquidator, leads to an additional payment to creditors in the aforesaid amount of $17,866,181.

[37] It is not clear to me from the materials whether the foregoing amount includes the payment of post-liquidation interest in respect of what the parties have referred to as the "Stub Period". The Stub Period represents the time between the Liquidation Date and the date on which CDIC satisfied its obligations under the CDIC Act to Depositors in respect of insured deposits. The Insured Depositors retain their claims against Confederation Trust for post-liquidation interest for the Stub Period and should, [page531] in my opinion, be treated in the same fashion as all other claimants against the Confederation Trust estate.

[38] There will therefore be an Order,

(a) declaring that post-liquidation (being interest on valid claims against Confederation Trust Company in respect of the period following the issuance of the Order winding-up the Company) is payable on all Court-approved Guaranteed

Fund and Company Fund claims (as defined in the Liquidator's Report No. 36);

(b) authorizing the Liquidator of Confederation Trust Company to allocate payments to Claimants as between principal and post-liquidation interest in the manner described in paragraph 11 of Report No. 36;

(c) authorizing the Liquidator of Confederation Trust Company to calculate post-liquidation interest in accordance with the provisions of subsection 95(2) of the Winding-up and Restructuring Act and on a "payment of interest first" methodology, as set out in Column 1B of Schedule B to the Liquidator's Report No. 36A.

[39] If costs are an issue I may be spoken to in that regard.

Order accordingly.

Notes

Note 1: In re Fine Industrial Commodities Ltd., [1955] 3 All E.R. 704, [1956] 1 Ch. 256, per Vaisey J. at p. 260 Ch.

Note 2: R.S.O. 1990, c. C.43, as amended.

Note 3: S.C. 1991, as amended.

Note 4: R.S.C. 1985, c. W-11, as amended by S.C. 1966, c. 6, s. 155. The Winding-up Act was renamed the Winding-up and

Note 5: (2002, 33 C.B.R. (4th) 145 (Ont. C.A.), at p. 158, affg 2000 CarswellOnt 4934, 22 C.B.R. (4th) 153 (Ont. S.C.).

Note 6: R.S.C. 1985, c. B-3 as amended.

Note 7: Also appointed by the Superintendent in Bankruptcy. Restructuring Act in 1996.

Note 8: In re Humber Ironworks and Shipbuilding Company (sub. nom Warrant Finance Company's Case), supra, at pp. 645-46 Ch.

App.

KEVIN D'AMORE
APPLICANT

-and-

BANWELL DEVELOPMENT CORPORATION ET AL
RESPONDENTS

Court File No. CV-11-17088

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
WINDSOR

SUBMISSIONS ON INTEREST STOPS RULE OF D'AMORE CONSTRUCTION (2000) LTD.

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File number: 24.116.000

KEVIN D'AMORE Applicant	and	BANWELL DEVELOPMENT CORPORATION, 928579 ONTARIO LIMITED, SCOTT D'AMORE and ROYAL TIMBERS INC. Respondents	Court File No: CV-11-17088

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at WINDSOR

SUPPLEMENTARY MOTION RECORD (RE THIRTEENTH REPORT OF THE RECEIVER) (VOLUME 1 OF 2)

(RETURNABLE ON A DATE TO BE DETERMINED BY REGIONAL SENIOR JUSTICE THOMAS)

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