TAB “J”

COURT FILE NO.: 05-CV-5864CM
DATE: 2008-05-13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
REMO VALENTE REAL ESTATE (1990) LIMITED Plaintiff	Gino Morga, Q.C., for the Plaintiff
- and -	
PORTOFINO RIVERSIDE TOWER INC., WESTVIEW PARK GARDENS (2004) INC., PORTOFINO CORPORATION and DANTE J. CAPALDI Defendants	William V. Sasso and Jacqueline A. Horvat, for the Defendant, Dante J. Capaldi
	HEARD: January 28, 29, 30 and 31, 2008

Brockenshire J.

REASONS FOR DECISION

BACKGROUND

[1] This is an action in which the plaintiff realtor sought, directly or indirectly, payment of real estate commissions, past and future, plus damages, and other relief against the defendants, principally under s. 248 of the *Ontario Business Corporations Act (OBCA)*. Remo Valente, the principal of the plaintiff, Dante Capaldi, now the principal of the defendant corporations, and two others had been partners or principals in a joint venture to develop, build and sell off a large luxury condominium building. The plaintiff had an exclusive listing on the proposed units in the building, and before construction had realtors on site and sold a number of proposed units.

[2] A lengthy trial was held before me, in which evidence was given that Capaldi had exercised his rights under a shotgun clause in the agreement with the other partners to buy them

out. Additionally, it was alleged that once in control of the project, through conveyances and corporate maneuvers, he sought to make the exclusive listing agreement valueless and thus avoid or evade commissions already earned through sales, and future commissions on sales, of condominium units. Allegedly, those manoeuvres would also thwart the plaintiff from earning commissions on leases of units, and sales of the homes of buyers of condominiums.

[3] At the end of the trial, in my written reasons for judgment, I found that the plaintiff was properly entitled to make a claim under s. 248 of the *OBCA* as a creditor, that the defendants had acted in a manner that was oppressive or unfairly prejudicial to the valid interests of the plaintiff, and that on the basis of the evidence before me in addition to entitlement to commissions re the condominium units, there would have been a 20% chance of the plaintiff earning commissions on the sale of homes owned by buyers of the condo units. I granted an immediate judgment of $1,000,000 against the defendants in favour of the plaintiff, ordered security of an additional $2,000,000 be posted by the defendant, and then, under the authority of s. 248(3) of the *OBCA*, made a further order that an accounting be held to determine the details needed to complete the assessment of damages against the defendants.

[4] The particular issues listed in my decision were the subject of the now completed three day trial of issues, and will be the subject of this decision.

THE SELLING PRICE OF ALL CONDOS SOLD TO THE DATE OF THE ACCOUNTING

[5] During the original trial, this topic was the subject of some conjecture. Between that trial and this accounting, disclosures were made, documents exchanged, there were discussions between lawyers, and on January 29, 2008 this court was provided with what is now marked as Exhibit 2, a comprehensive accounting of all units including the closing date for the sales of various units, the name or names of the purchasers, the "purchase price" and the commissions paid or to be paid (less GST) to Valente. The table, backed up by the evidence of Capaldi, also indicated that a number of the units not yet closed would close very shortly, but further that there were a number of "troubled transactions", and another group, apparently past the "troubled stage", which were simply described as not expected to close. The information available at the start of this accounting was that sales of 61 units had actually closed, and a further 11 were expected to close in the very near future, leaving a further 51 units of the total of 123 with either no offers on them, or "troubled transactions" where an offer had been made but was not now expected to close.

[6] It was argued that the exclusive listing agreement spoke of an expiry date in 2006, but it was clear that this exclusive listing agreement was entered into by what was then the four principals in this project, dealing with the real estate company of one of the principals, and the joint intent was obviously, as testified to by Valente, that in return for his bringing the other three into a potentially very profitable development project on land which he had acquired, his real estate company was to have the exclusive right to sell all of the condominium units. I do not

accept the argument that the entitlement of the plaintiff to list the units and receive commissions ended at the end of 2006. I accept the evidence of Valente that the exclusive selling right is to continue until all the units are sold, and read the termination clause in the listing agreement as providing a date only for reasons of certainty, in view of the automatic annual extension provision.

[7] From the table above referred to, Exhibit 2, it would appear to be a simple arithmetic problem to work out the commission amounts due to Valente at any time, except for a new subject introduced on this table – extras.

COMMISSION ON EXTRAS

[8] The position of Valente was that commissions should be paid to the plaintiff on extras included in the final purchase price of a unit. The position of Capaldi was that commissions should be paid only on the basic unit price set out in the original agreement of purchase and sale.

[9] Considerable evidence was heard from both Valente and Capaldi, as well as from Tim O'Neill, an interior decorator and designer.

[10] Valente's evidence was that on certain development projects, the developer will make it clear with the realtors that any extras to the unit are to be something between the buyer and the developer and not subject to commission. However usually, and particularly on the Portofino project, where there were realtors on site, the purchasers would be discussing upgrades and changes to the units with the on site realtors, the cost of these upgrades would be included in the final purchase price, and the commission would be based on that final purchase price. In his view, upgrades and extras are the sort of thing that are discussed and worked out once the building is actually under construction. In fact, in his view, if a pre-construction buyer wished to discuss extras, that buyer would be told to wait until the building was actually under construction. In this case, Capaldi took over the project before construction started, and changed realtors before the construction process progressed very far, if at all.

[11] Capaldi denied that the Valente realtors did anything about selling extras, and indicated that he brought in Tim O'Neill to assist buyers in decorating and improving their units, and to thereby sell them on the idea of extras. He himself would deal with the suppliers in getting prices and quantities for extras for individual unit buyers.

[12] Tim O'Neill, an interior designer with over 30 years experience, testified to being brought in to the Portofino development to deal with the design and decoration of the common areas, and to choose standard colours and finishes, including four different colour schemes for the units. Once the building started going up he would be available on a no obligation basis to talk to buyers about decorating their units and also about buying upgrades. He only dealt with people that had signed purchase agreements. He would take buyers out to the cabinet maker, lighting shops, etc., to look at upgrades, but Capaldi would work out the prices with the suppliers.

[13] The exclusive listing agreement at Tab 3 of Exhibit 1, the document brief of the plaintiff at this hearing, gave the plaintiff the exclusive authority to promote and sell the condominium units at a commission of 4% of the sale price if sold by sales representatives assigned to the project and 5% if sold by other "Valente" sales people or other sales people registered with outside real estate brokers. The term "sale price" is not defined in that document, and no mention is made therein of selling upgrades or extras.

[14] The agreement of purchase and sale form used for each sale of individual units is a multi-page document that, unlike the usual agreement of purchase and sale of an individual home, does not contain at the end thereof a separate commission agreement stating the dollar amount of the commission payable to the realtor for the sale. On the face of the document there is a place to insert a purchase price. Immediately below this there is a provision that there would be a $2,500 deposit and that the balance of the purchase price would be payable on closing, "subject to adjustments for extras and as hereinafter provided." Paragraphs 24 to 30 of this document deal with finishes, appliances and extras. Paragraph 24 indicates that the purchase price shall include the standard finishes and appliances described in a schedule. Paragraph 28 provides that if the vendor chooses to make changes to the standard materials and specifications, and the vendor agrees to make such changes, then the vendor is not liable for any delays in closing arising therefrom. Paragraph 29 provides that if the buyer wants extras that the vendor is not prepared to supply or construct, then the buyer shall not arrange for any work services and/or materials to be undertaken, etc., before the buyer's possession date.

[15] I was told at the hearing before me that if a buyer arranged for extras through Portofino, then the cost of those extras would be added on a statement of adjustments to the purchase price payable on closing. If the buyer arranged for upgrades or extras direct with a supplier, then the price thereof would not appear on the adjustments and it was up to the buyer to pay and deal with the supplier

[16] From the foregoing I conclude that if the contract with Valente had not been terminated by Capaldi, the Lunaus (the on-site sales representatives of Valente) would have continued, and have been the people the buyers would normally have contacted in relation to upgrades and extras, and that the Lunaus would have been the persons dealing with Capaldi, at least in the initial stages, in relation to such upgrades and extras.

[17] I accept the evidence of Valente, that unless a specific agreement has been reached between the realtor and the developer in relation to a particular condominium project, providing that the realtor is not to get any commissions on extras, the standard and accepted practice is that upgrades or extras which are done through the developer (as opposed to ones where a buyer brings in an independent third party contractor) are treated as increasing the purchase price, and the commission is calculated on that increased price. In this development, this approach is clearly supported by the special agreement of sale form, which specifically contemplates adding the cost of upgrades and extras to the sale price through a statement of adjustments.

[18] Capaldi did not directly contradict that evidence. Instead, in his testimony he stated the Lunaus had not been involved in actively selling upgrades and extras, and would not have been

because, as it developed, he dealt with the buyers and the suppliers in relation to upgrades and extras.

[19] According to my notes, this topic was not raised with Gary Lunau when he testified at the earlier trial. However Capaldi's evidence was to some extent contradicted by his own witness, Tim O'Neill, who testified that part of his duties involved actively encouraging buyers to upgrade the finishes, cabinets, lighting, etc., in the units they were buying, and to acquire extras, and in so doing he would take them to the showrooms of suppliers and assist them in making choices. It may be that Capaldi took care of the final bargaining on contract prices, but clearly his own employee did a lot of the sales work.

[20] Further, and most importantly, the evidence at the earlier trial and at this hearing was that the time to sell upgrades and extras was not while the building remained a concept, but when the building was going up or, except for structural changes like moving walls, when the basic construction was completed and finishing work was being started. In my view, the complete answer to Capaldi's argument that the Valente forces did not sell any upgrades or extras, and so should not earn commission on them is, as I found in my previous judgment, particularly in paragraphs 76, 77 and 78 thereof, that the Lunaus never had the expected opportunity to deal with buyers and prospective buyers of the condo units, through to the completion of their purchases, because they were locked out by Capaldi and his companies to "get rid of the commissions" in breach of s. 248 of the *OBCA*.

[21] I find that all of the upgrades and extras to any of the units, (except such as may be or have been arranged directly by unit purchasers with independent contractors, who were or will be paid direct by such purchasers), which would include all of the extras shown in two separate lists on Exhibit 2, as well as all future costs of upgrades and extras except those specifically excluded as above, would be included in the statement of adjustments per the agreement of purchase and sale and become part of the purchase price of the unit, and thus are subject to commission thereon per the terms of the exclusive listing agreement.

THE COMMISSION RATES

[22] The exclusive listing agreement provided for two different commission rates – 4% if sold by "sales representatives assigned to the project", which here would mean Mr. and Mrs. Lunau, and 5% if sold by other "Valente" sales people or other sales people registered with outside real estate brokers. It was clear from the evidence at trial that Mr. and Mrs. Lunau had dedicated themselves to this project, and did excellent work both in selling units, and in doing their best to hold together the sales they made, despite the long and unexplained delays in getting the project started. If there had not been a falling out between Capaldi and his partners, the most reasonable expectation would be that the Lunaus would have carried on until all of the units had been sold. Indeed, after the break up, and despite the antipathy between Capaldi and particularly Remo Valente, Capaldi wanted to keep the Lunaus on the job, and was trying to persuade Mr. Lunau to change to another real estate agency but continue to work on the Portofino project. Therefore, in

my view, the rate of commission for sales in the normal course of business after the exclusive listing agreement was unilaterally cancelled by Capaldi would be 4%.

[23] However, there was a class of sales that were not made in the ordinary course of business. I discovered that there was a well known and often followed practice in the condominium development trade of the developers looking to prospective contractors and sub-trades to "support the project" by purchasing condominiums in the proposed building. It was not clear from the evidence whether such expectations were expected to be crystallized by signed offers before or after construction contracts were entered into with these contractors, but it was clear that dealings of this type had occurred in previous projects involving Valente and Capaldi, and it was also perfectly clear that the negotiating of such agreements to purchase units would not be handled by the regular sales staff but would have been taken care of by Remo Valente, the partner with abundant experience in such matters. In that case, the agreed commission rate of 5% would apply. I accept the evidence of Mr. Valente, and the argument of his counsel, that Mr. Valente's driving motivation for turning over land he had acquired at, in effect, cost price to the partnership in which he had entered, was a desire to generate commissions for his real estate business. The sales to suppliers and contractors, although perhaps entered into by the buyers for different motivations from other buyers, nevertheless involved all of the complexities and all of the steps required in conventional sales and certainly would command the commission called for under the exclusive listing agreement.

THE DATE UPON WHICH ONE HALF OF PRE-SALE COMMISSIONS WOULD BE PAYABLE

[24] The exclusive listing agreement contained an agreement that with pre-sales, 50% of the commission plus applicable taxes would be due and payable 45 days from the day "in which the necessary pre-sales had been achieved to satisfy the condition in the Project Financing commitment." There is a further proviso that after the minimum pre-sales had been attained then 50% of commissions comes due and payable within 30 days of the offer becoming unconditional, and the remaining 50% (in all cases) upon the completion of each sale. In the evidence at trial and on this reference it was made clear that on a project like this, a developer starts by selling a "concept" with glowing words and lovely plans and pictures, but little else, until enough prospective buyers had been signed up, at low initial deposit amounts, to show prospective lenders that the project is financially viable. These pre-sale contracts are conditional, so if the developer cannot put together a sufficient number to satisfy prospective lenders, a developer can call off the various deals. However if the developer gets a sufficient number of these offers then the developer can declare the agreements to be unconditional, in which case the buyers are required under their agreements to put up an additional and much larger deposit. Here, there was no specific condition in any project financing commitment about the number of pre-sales required. However, it is clear that by November 12, 2004 bank financing was available for this project. On that date BMO Bank of Montreal forwarded a detailed 15-page long proposal addressed to the developers for a loan for $26,500,000 for construction of the building. While

that proposal called for the guarantees of all four of the original partners, it is clear that after Capaldi bought out the others, he was able to arrange the needed financing.

[25] In my view, the essence of the condition in the exclusive listing agreement re payment of 50% of commissions on pre-sales was that the project was in fact going ahead. The best evidence of that, in my view, is the formal notice of removal of conditions by Portofino Riverside Tower Inc. dated January 11, 2005 and signed by Capaldi as president. That was backed up by letters sent out by Capaldi on January 11, 2005 to Gary Lunau, Rosemary Lunau, (Tabs 33 and 34 of the plaintiff's document book) and to presumably all other pre-sale purchasers, such as the Colavitas, (Tab 35) in each case advising that construction of Portofino would commence in the spring of 2005 or earlier, enclosing the formal notice of removal of conditions, requesting an additional $17,500 deposit and inviting the recipient to a reception for all of the purchasers to be held January 20, when the construction timetable would be provided. At that time, Valente Real Estate certainly felt the condition had been met because on January 25 they sent out an invoice detailing all of the 50% of commissions, saying they were due and payable by February 25, 2005. The total, including GST was $466,733.86.

[26] I accept the January 11, 2005 date as the appropriate triggering date under the exclusive listing agreement, so 50% of the commissions would be due and payable 45 days from that date.

[27] To clarify, in relation to these one-half commission payments, and to later one-half commission payments becoming due and payable within 30 days of the offer becoming unconditional, this one-half would apply to the base selling price only. The scheme re upgrades and extras, as above explained, was to add these to the purchase price on the statement of adjustment on closing, so the totality of commissions on such upgrades and improvements would be added to the other one-half of commission due when the sale closed.

[28] Capaldi raised in argument that the contract provision for payment of one-half of commissions before the deal closed should in effect be struck as legally impossible. The argument was that bank financing was specifically for the purpose of construction of the condominium building, and diverting money from that purpose to the unconnected purpose of paying real estate agents in advance would be a breach of the trust provisions under the *Construction Lien Act*. As Portofino had only a few hundred dollars cash, there would therefore be no way to pay the commissions until the purchase monies were paid on closing. The practical answer to that was provided by Mr. Valente, who testified that in previous deals including Capaldi, advanced commissions had in fact been paid, and the idea of using such a clause was picked up from a large home builder from Toronto who regularly made such advances. A hint of how prepaid commissions could be accomplished is found in note C at page 8 of the financing proposal which speaks of third party financing provided by Tarion or a bonding company, secured by a collateral second mortgage fully postponed and subordinated to the banks first mortgage. I reject the suggestion that financing for commission advances could not, in a practical or legal sense, be obtained.

INTEREST ON UNPAID COMMISSIONS

[29] The initial billing by Valente Real Estate made no mention of interest. On March 23, 2005 a reminder was sent out. It contained advice that "interest is now accruing at a rate of 18% per annum." Capaldi never agreed to that rate nor in fact did he ever apparently acknowledge that these partial commissions were due or that interest had been claimed.

[30] It is clear that there is no contractual basis supporting a claim for interest on the overdue partial commissions, or indeed on other monies found due by Capaldi in this litigation. It is also clear that the broad powers of the court under s. 248 of the *Ontario Business Corporations Act*, R.S.O. c. B.16, to "make an order to rectify the matters complained of" which forms the basis of the judgments and orders herein, is essentially an equitable jurisdiction. While the pre-judgment interest provisions under the rules of practice is authority to add interest, at a rate set by regulation, to a money judgment despite a lack of agreement between the parties on such interest, the courts have long recognized that in relation to equitable claims, the court can go further. See *Brock v. Cole et al.* (1983), 40 O.R. (2d) 97 (Ont. C.A.); *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (S.C.C.); and many others at the trial level.

[31] Here, I had found that the driving force behind Capaldi's "reorganization" of Portofino was to "get rid of the commissions". This oppressiveness, and in fact *male fides*, opens the door to the full range of equitable remedies. However, as is pointed out in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 440, while plaintiffs are entitled to be placed in as good a position as they would have been in had the breach not occurred, they are not entitled to be placed in a better position.

THE INTEREST RATE

[32] Valente Real Estate Limited purported to add 18% per annum interest to its invoices. Valente, in his evidence, attempted to support rates of this kind by indicating they were common in dealings with real estate agents. Particularly, he indicated that his company would charge rates like that on advances of commissions to sales people and told us the Lunaus were charged only 12% interest, as a special favour to them, on expense they owed the real estate firm for rental on their office, etcetera, while waiting for commissions from Portofino to come in. He admitted to having a line of credit with the Toronto-Dominion Bank, on which his firm would be charged prime plus one-quarter of one percent, but said the line of credit was not used, because if it was, there would have to be monthly reporting documents filed as to receivables, etcetera, and he had found it preferable to simply use a credit card to pay bills even though on a couple of occasions the balance was not paid off before the high credit card interest rate started.

[33] Capaldi denied ever paying high interest rates. He admitted to receiving invoices showing interest at one and a half or two per cent per month chargeable, but denied every paying those high interest rates to creditors. The interest rate set out in the proposal of the Bank of Montreal to Portofino was prime rate plus 0.85% per annum floating, calculated and payable

monthly in arrears. It was hinted in evidence that the final financing agreement was at a somewhat lower interest rate.

[34] I conclude that the 18% per annum set out in the Valente invoices was an "*in terrorem*" rate, set out for the purpose of frightening a debtor, or at least encouraging a debtor to pay up promptly. Here, prompt payment was not forthcoming, but we heard no evidence of Valente Realty having to go out and borrow to cover the delay in receiving these commissions. However, applying *Hodgkinson v. Simms*, supra, if Valente Realty was to be put in as good a position as it would have been had the failure to pay the commission not occurred, it could have simply covered the shortfall by borrowing on its line of credit with the Toronto-Dominion Bank.

[35] I find the appropriate rate of interest to apply to all monies due to Valente Realty from Capaldi to be the Toronto-Dominion Bank prime rate from time to time plus one half of one per cent, to be calculated at the time of each change in the prime rate, and at the time of any payment on the debt, with annual rests when all accruing and unpaid interest would be added to the principle, with interest thereafter to be calculated on the new principle amount. Such interest shall commence 45 days after January 11, 2005 on the initial one half of the commissions on the original pre-sales, and from the due dates of all other commissions, whether initial or final.

THE FUTURE SELLING PRICE OF UNSOLD CONDOS

[36] My information was that the condominium building contained 123 units, and as of January 29, 2008 there were some 50 units still unsold. The best evidence of the state of things on January 29, 2008 is Exhibit Two on the reference, a comprehensive accounting of all the units showing those that are available for sale, some that were leased by Portofino, the ones that had closed, and also five units listed for sale on the MLS, 25 more available for sale but not listed on MLS, 12 units expected to close by the end of February, and a further 19 units described as either "troubled transactions" or as "not expected to close."

[37] The exercise of attempting to determine potential selling prices in the future is not to come up with individual prices for each unit, but rather to arrive at one bulk figure upon which a single total commission figure could be calculated.

[38] On my understanding, the majority of the floors in this building have ten units on each floor. The first and second floor have considerably fewer units, to allow for amenities for the building. The ninth, tenth and eleventh floor have eight, presumably larger, units each. The twelfth, thirteenth and fourteenth floor have six units each, and the fifteenth and sixteenth floor have five units each. I further presume that while for example unit 1604 would have a similar square footage and layout to unit 1504, and that the same would likely apply to say unit 310 as compared with unit 810, nevertheless, all other things being equal, the higher units would command a better price than the lower units, simply because a large attraction of the building is the panoramic views of the Detroit River and of the City of Detroit. I further understand, that while the developer would attempt to maintain a price structure, nevertheless there would be some individual bargaining that would enter into the prices of at least some of the units, and

further that Capaldi introduced a ten per cent price increase in 2005 and another ten per cent in 2006. Further, most of the sold units included extras. These range anywhere from $1,000.00 or so to several of $90,000.00 or more.

[39] I heard evidence from Margot Stevenson who is a market analyst for C.M.H.C., with some 20 years experience, particularly in the Windsor area market. She recognizes that in the Windsor area there is a very definite slow down in the local economy, acerbated as far as this development is concerned by the rise in the Canadian dollar as against the U.S. dollar and security induced backups at the Tunnel and Bridge, because originally a number of buyers in this development were Americans. However, in her view, because these are high end units, of which only a limited number are available in the Windsor area, mainly in the Portofino development, she does not expect the economic and other problems to press the price of the units down by more than say one per cent. For that reason, I feel the past history could provide a generally accurate guide for the future, and so for units that had been sold but now are not expected to close, I would use the old price as the best indicator of the expected new price on a resale of the unit. On the 30 units shown as listed for sale or available for sale but not listed, in my view the asking price would be the best guide. These would be figures which Capaldi testified would be reasonable prices, and would be amounts arrived at on the basis of a general pricing scheme for all of the units in the building. In view of Ms. Stevenson's evidence of the prices of these high end units holding up, I see no reason for reducing those figures.

[40] In addition to the base price, as I have noted, most of the sold units included extras. The number for extras on units sold, according to Exhibit Number Two, was $1,313,607.73. My view is that that figure should be divided by the number of units sold to give an average cost for extras per unit, and then that average figure be multiplied by the number of unsold units and the result added to the lump sum selling price.

[41] The commission to be applied to that lump sum figure would be 4%. If Valente Realty had not been put out of the project, all of these future sales would have been handled by the Valente sales people assigned to the project at the 4% rate under the exclusive listing agreement. I understand that all of the special supplier deals have now been formalized by written offers so would not form part of the future sales.

[42] I appreciate that in some, if not most, of the "troubled transactions" or "deals not expected to close" a 50% of commission figure has already been calculated as payable to the Plaintiff that was earned and due for attracting the original sale and services in trying to hold it together. That portion of commission would presumably be payable out of forfeited deposits if the deal did not close. A resale would of course be a completely new transaction, and per the exclusive listing agreement would be a new transaction handled by the Valente agents on site.

[43] In addition to sales, I was advised that some four of these units were leased out. The evidence I heard was it was likely in the remaining sales another four or so would result later in leases and the evidence was that the realtors on site would be the persons most likely to handle finding and negotiating with prospective tenants. The evidence was that on a one year lease the commission would be a month's rent which would be in the neighborhood of $2,000.00. I

appreciate that this evidence is pretty vague and not backed up with any solid documentation, but on the other hand there is no evidence to the contrary. I accordingly accept that evidence especially since I see on Exhibit Number Two reference in at least two places to units being leased. I would award $16,000.00 as commissions on the leasing of eight units.

THE APPROPRIATE DATE OR DATES OF ANTICIPATED SALES

[44] There was a divergency of views on how long it would take to sell off the remaining units in this development. Valente was quite sure that if the project was marketed aggressively all the remaining units could be sold within two years. Capaldi, looking to current local conditions and the withering away of sales over the last three years, felt it would take a further five or six years to completely sell out the development. In view of that divergence, I much prefer the evidence of Ms. Stevenson, the market analyst for C.M.H.C. who has had many years of experience in forecasting such things. Her evidence was that in 2005, in her view it would have taken 12 to 18 months to sell out the units in the project. In 2006 she had stretched out that estimate to 18 to 24 months. In January of 2008, in her view, six to 12 months should be added to that because of the slowdown in the economy. The midpoint in her original estimate would have been 21 months, and the midpoint in her later adjustment would be nine months, totaling 30 months or two and a half years. I have no evidence before me to indicate that there would be more sales at the beginning or towards the end of that two and a half year period, so I have to assume that the sales process would continue evenly over that time. If so, a convenient way to get an average for the purpose of doing a present value calculation on the lump sum would be to take the midpoint of the two and a half years or one and three-quarter years, then arithmetically treating all sales as occurring at that point.

PRESENT VALUE CALCULATIONS

[45] Mr. Morga filed, at Tab 13 in his Exhibit Brief on the Reference, an opinion letter dated January 25, 2008, from Dilks Jeffrey & Associates Inc., consulting actuaries. This firm, located in London, Ontario, is well known in the Southwest Region. As indicated in the C.V. of Mr. Jeffrey annexed, he and the reports of his firm have been accepted as expert evidence in numerous trials. There was no objection raised to his report or to the conclusions he set forth in it.

[46] Mr. Jeffrey did present value calculations based upon sales as of January 23, 2008 on government treasury bills and bonds, came up with an interest discount rate of 3.37%, and calculated the present value of $1,000.00 payable one year from January 28, 2008 at $967.00, at two years out at $936.00 and at three years at $905.00. Extrapolating to produce a number for one and three quarter years in the future, I arrive at $943.75 as the present value of the $1,000.00 payable one and three-quarter years after January 28, 2008. Subject to my arithmetic being corrected, I find that the commission figure calculated against the lump sum of the future sales be discounted by the figure of .94375.

ANCILLARY SALES

[47] At the trial in this matter, there was some evidence from Valente and Gary Lunau that Valente Realty could anticipate, in connection with the sale of condo units, being asked to sell the homes of these buyers. From the evidence I then had, I made a finding in paragraph 94 of my decision, that the chance of Valente Realty getting to handle sales for buyers of Portofino condos would be 20%. For purposes of this reference, detailed information has been gathered and was presented in Tab 9 of Exhibit One on the reference, an exhibit brief of the plaintiff. This shows the resales of buyers homes, both of Portofino units that closed as of September 12, 2007 and of further units that had been sold but not closed as of that date. These lists, on my count, show of the 63 units sold, 16 of the buyers were selling their previous homes. Interesting, five of them listed with Valente Realty. There is an additional list of troubled deals, showing 12 buyers, two of whom listed previous homes and one of those actually sold. I find Tabs 10 and 11 in that same exhibit book supportive of the argument that the on-site realtors would get ancillary deals, as out of 14 unit holders that wanted to lease their condos, all but one listed with Pedlar and out of 15 unit holders trying to re-sell units, no one listed with anyone but Pedlar.

[48] Of the 63 condo sales listed at Tab 9, I would conclude that, as Valente Realty already had six of the 16 resales, it should be credited with seven more to bring their share of the resales up to the 20% I had anticipated if Valente Realty had not been removed from the scene. I see, from that list, there are at least two of what I assume are small condos (listings under $100,000.00) and perhaps two others (listed under $200,000.00) two of which had not sold, with the other two bringing down the average sale price. For the seven sales I would attribute to Valente Realty, I would use a rough average selling price of $250,000.00 and a commission of 5%, yielding a commission figure of $87,500.00. In connection with the remaining unsold condo units, I would continue my finding that 20% of future buyers would list existing homes for resale with Valente Realty and again use an average price of $250,000.00 and a commission of 5%, with again all of the sales being treated as lumped 1 3/4 years after January 28, 2008 so that the commissions would be discounted by .94375.

CONDO RESALES

[49] Tab 12 of the exhibit brief shows 15 condo units being listed for resale by the buyers, all of whom listed with Pedlar. A number of these listings have expired, and apparently none of them resulted in a sale. The issue of commissions on resales was not specifically raised before me, and I do not recall any evidence on that subject, except for some concern being expressed by Capaldi of resales conflicting with, and limiting the prices, on original sales in the project. I am therefore not making any findings on that subject.

CONCLUSIONS

[50] I leave it to counsel to do the arithmetic and put dollar amounts on the conclusions I have reached. If there is any difficulty between counsel in settling on the numbers, I may be spoken to. I expect that even without difficulties, I will be called upon to approve or sign the draft judgment.

[51] I have not dealt with the form and terms of the $2,000,000.00 security ordered in my previous judgment, because that was not raised on the reference, leading me to assume that in some way it had been dealt with.

[52] If counsel cannot agree on costs, written submissions can be made to me, within 30 days.

[53] If there are remaining issues, on which I have not made a finding, or difficulties with the calculations or wordings contained in this decision, I would ask counsel to contact me.

John H. Brockenshire
Justice

Released: May 13th, 2008

COURT FILE NO.: 05-CV-5864CM
DATE: 2008-05-13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

REMO VALENTE REAL ESTATE (1990) LIMITED

Plaintiff

- and -

PORTOFINO RIVERSIDE TOWER INC., WESTVIEW PARK GARDENS (2004) INC., PORTOFINO CORPORATION and DANTE J. CAPALDI

Defendants

REASONS FOR JUDGMENT

Brockenshire J.

Released: May 13th, 2008

TAB “K”

CITATION: Remo Valente Real Estate v. Portofino Riverside Tower et al., 2010 ONSC 280
DIVISIONAL COURT FILE NO.: 1661-1707
DATE: 2010-02-03

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

P. B. Hambly, J.C. Murray and T.D. Ray J.J.

B E T W E E N:

Remo Valente Real Estate (1990) Limited Plaintiff (Respondent)	)	Gina Morga for the Plaintiff (Respondent)
- and -	)	
Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc. Portofino Corporation and Dante J. Capaldi Defendants (Appellants)	)	William V. Sasso and Jacqueline A. Horvat, for the Defendants (Appellants)
	)	**HEARD:** November 24, 2009

Hambly & Ray JJ.

[1] This is an appeal from judgments of Justice Brockenshire dated August 31, 2007 and May 13, 2008.

Background

[2] Remo Valente Real Estate (1990) Ltd. (Valente) is owned and controlled by Remo Valente. In 1990 Valente acquired vacant land (the Land) on Riverside Drive in Windsor

Ontario facing the Detroit River. Valente and holding companies owned and controlled by Frank Mancini, Melvin Muroff and Dante Capaldi (the partners) incorporated a numbered company, which became Portofino Riverside Tower Inc. (Portofino 1), for the purpose of constructing a condominium apartment building on the vacant land owned by Valente (the project). They planned to construct a building with about 123 units. In consideration of Portofino 1 entering into a listing agreement with Valente, dated November 22, 2002, for the sale of condominium apartment units in a building to be constructed on the vacant land owned by Portofino 1, Valente conveyed the land to Portofino 1. That agreement is attached hereto as schedule A. Important terms are the following:

> GRANT OF EXCLUSIVE AUTHORITY TO PROMOTE AND SELL
>
> THE BUILDER HEREBY GRANTS VALENTE THE EXCLUSIVE AUTHORITY TO PROMOTE AND SELL the above listed condominium units constructed or to be constructed thereon or the lands if condominiums units are not built until DECEMBER 30, 2006 and unless terminated by written notice THIRTY (30) days prior to the expiration of said term, shall be renewed for a further period of (1) year.
>
> COMMISSION
>
> The Builder agrees to pay Valente a commission of Four PER CENT (4%) of the sale price if sold by sales representatives assigned to the project and FIVE PER CENT (5%) if sold by other "Valente" salespeople or other salespeople registered with outside real estate brokers, of each condominium unit or lands sold under an Agreement of Purchase and Sale entered into during the currency of this agreement, plus any applicable Goods and Services Tax or other service taxes that may be in effect from time to time, which commission together with applicable taxes shall be due and payable 50% of each commission 45 days from the day in which the necessary pre-sales have been achieved to satisfy the condition in the Project Financing commitment provided that said sales are unconditional and the remaining 50% payable upon the completion of each sale. Provided that if a sale occurs after said time that the minimum pre-sales have been attained the 50% of the commission shall become due and payable within 30 days of the offer becoming unconditional, and the remaining 50% payable upon the completion of each sale

[3] The agreement was amended by an agreement signed by all of the partners, dated October 29, 2004. The essential terms are as follows:

> 1. The Owner agrees to pay to the Broker a commission of Five per cent (5%) of the sale price of the property or project or any interest therein during the currency of the aforesaid agreement, plus any applicable Goods and Services tax or other service taxes that may be in effect from time to time, which commission together with any applicable taxes shall be due and payable upon completion of any such sale.
>
> 2. The undersigned being all of the Shareholders of the Owner, hereby agree that the Broker shall be paid a commission if in the event of a sale of part or all of the shares to the owner to any third party, at the same rate and on the same basis as if the as if the Owner had sold the said property to project or any interest therein, each Shareholder being responsible for the portion of such commission attributable to such Shareholder's shares in the Owner being so sold.

[4] The partners entered into a shareholders' agreement which contained a shotgun clause that permitted each to make an offer to the other to purchase his shares in Portofino 1, which would entitle the offeree to purchase the offeror's shares at the price that was offered to the offeree.

[5] In December, 2004 Valente and Mancini offered to purchase Capaldi's shares. Capaldi exercised his right under the shotgun clause to purchase the shares of Valente and Mancini. In January 2005 Capaldi purchased Muroff's shares, which left Capaldi as the sole owner of Portofino 1.

[6] Gary and Rosemary Lunau are husband and wife, who were real estate agents employed by Valente. Remo Valente assigned them to sell units in the project. They worked out of a sales office on the land from June, 2003. By January 2005 they had presold about 71 units. The prospective purchasers pursuant to the agreements that they signed, made deposits of $2,500

There was a clause in the agreements which permitted Portofino 1 to cancel the agreement if it did not think that the project was economically viable. In a notice to the prospective purchasers dated January 11, 2005 Capaldi waived this clause. The agreements required that upon the vendor waving this clause the purchaser was required to make a further deposit at $17,500. The Lunaus continued to work on the project. They obtained the further deposits from about 67 purchasers.

[7] The Bank of Montréal made a proposal to finance the project in a letter to Portofino 1 dated November 12, 2004. The appellants in their factum at paragraph 37 summarize the conditions of the proposal as follows:

> 37. The trial judge did not examine the BMO Proposal or make any findings in the Reasons on the pre-sales requirements in the BMO Proposal. Those pre-sale requirements include the following:
>
> (a) no sales commissions—treated as Deferred Costs—are payable before closing;
>
> (b) pre-sales must be at arm's length and at *pro forma* prices;
>
> (c) pre-sales must generate aggregate estimated cash on closing for repayment of 90% of the authorized non-revolver loan amount of $26,500,000 (90% of $26,500,000=23,850,000);
>
> (d) deposits of a minimum of $20,000 or 10% of the purchase price of the units and 100% of upgrades are required;
>
> (e) non-Canadian (offshore) investors are required to provide a 25% deposit and are limited to 10 units in total; and
>
> (f) it is anticipated by BMO that the pre-sale requirement would be satisfied upon the firm (unconditional) sale of 80 units.

[8] The bank of Montréal renewed its proposal in a letter to Portofino dated July 8, 2005. The conditions were similar. Neither Portofino 1 or Portofino 2 obtained financing from the Bank of Montréal. After Capaldi obtained control, the project did go ahead. He obtained financing from private lenders.

[9] Capaldi reorganized the corporate structure of Portofino 1. He was the owner of a corporation named Westview Park Gardens (2004) Inc. He created a partnership consisting of 1 Capaldi General Partner Corporation (The General Partner) and Portofino 1, which he named Portofino (2005) Limited Partnership (The Limited Partnership). In due course he renamed Westview Park Gardens (2004) Inc. Portofino Corporation (Portofino 2). He caused Portofino 1 to convey the legal title in the land to Portofino 2 and the beneficial interest in the land to The Limited Partnership. In return Portofino 1 acquired partnership units in The Limited Partnership and an interest in the capital account of The Limited Partnership of $2 million. Capaldi, on behalf of Portofino 2, signed a declaration of trust which stated that at the request of Portofino 1 it would convey the beneficial interest in the land to Portofino 1. These transactions were put in place by documents dated May 3, 2005. On May 9, 2005 Capaldi locked the Lunaus out of the sales office located on the land. Capaldi's lawyer, Jerry Goldberg, sent Valente a letter dated July 13, 2005 in which he stated that Westview (Portofino 2) had listed the project with another realtor. The letter stated the following:

> Attention: Remo Valente
>
> Re: File No. 122303.00007
> Portofino Riverside Tower Inc.

Dear Sir:

We are the solicitor's for Westview Park Garden, (2004) Inc. You are the Listing Broker shown on a multiple listing of property identifying Portofino Riverside Tower Inc. as the Vendor. Portofino Riverside Tower Inc. no longer owns the property. We are given to understand that under the specific terms of your firm's Agreement with Portofino Riverside Tower Inc., unlike the conventional form of listing agreement, your firm was not entitled to participate in any transaction that was either a lease or an exchange. The property was acquired through an exchange.

In the meantime, Westview Park Gardens (2004) Inc. listed the property with another realtor.

Please ensure that your listing of the property is promptly removed from the multiple listing agreement.

Yours truly,

MILLER, CANFIELD, PADDOCK AND STONE, LLP

Jerry L. Goldberg

[10] Capaldi signed a declaration dated January 17, 2006, which is described as an "agreement" on behalf of The General Partner and Portofino 2, in which the limited partnership agrees to keep Portofino 1 indemnified against all amounts that it may be legally obligated to pay Valente pursuant to the exclusive listing agreement dated November 22, 2002. It stated the following:

AGREEMENT

FROM: Portofino Riverside Tower Inc.

TO: Remo Valente Real Estate (1990) Limited

Portofino (2005) Limited Partnership agrees to keep Portofino Riverside Tower Inc. fully protected, defended and indemnified against all amounts that Portofino Riverside Tower Inc. may be legally obligated to pay Remo Valente Real Estate (1990) limited, if any, in respect of real estate commissions payable pursuant to the Exclusive Agreement dated

Portofino (2005) Limited partnership further agrees to irrevocably direct its trustee, Portofino Corporation, to pay such amounts from the proceeds of the sale of the condominium units at issue in priority to any payment to Portofino (2005) Limited Partnership.

DATED at Windsor, Ontario this 17 day of January, 2006.

PORTOFINO (2005) LIMITED PARNERSHIP

Per:

J. CAPALDI GENERAL PARTNER CORPORATION

Dante J. Capaldi, President
I have authority to bind the Corporation

ACKNOWLEDGMENT

PORTOFINO CORPORATION hereby acknowledges the foregoing irrevocable direction.

PORTOFINO CORPORATION

Per:

Dante J. Capaldi, President
I have authority to bind the Corporation

[11] On November 15, 2005 Valente commenced an action against Portofino 1, Portofino 2 and Capaldi. It sought, amongst other relief, reversal of the corporate reorganization, damages for breach of contract in relation to the listing agreement and in the amendment to the statement of claim given at the outset of the trial a remedy pursuant to section 248 of the *Ontario Business Corporations Act* (*OBCA*).

Judgment

[12] The trial took place between May 7 and 22, 2007 in Windsor. In a judgment dated August 31, 2007 (86 O.R. (3d) 667) the trial judge granted the plaintiff a remedy under section 248 of the OBCA. He did not deal with the other claims. He awarded a judgment to the plaintiff against all the defendants of $1 million and ordered that they provide security of $2 million against their assets for further damages and directed that an accounting be held. A further hearing took place between January 28 and January 31, 2008. The trial judge in a judgment dated May 13, 2008 (2008 O.J. No.1887) awarded the plaintiff, inclusive of the previous judgment and of prejudgment interest, $2,508,628.61. He awarded the plaintiff commissions on the selling price of 49 closed condominium sales made by the plaintiff, extras on those sales, on the sale price of 13 sales which Valente did not make, on the sale price of 13 transactions expected to close and one half of the commissions on the sale price of 19 transactions not expected to close, the present value of commission on unsold units and commissions on ancillary sales which were projected sales of homes of purchasers of condominium units and resales of condominium units of purchasers and on leased condominium units.

[13] Neither Portofino 1 nor Portofino 2 obtained financing from the Bank of Montréal. It seems that Capaldi was able to arrange private financing. The trial judge seems to have found, by a combination of the Bank of Montréal's proposal for financing, the program going ahead with private financing and Capaldi waving the term on January 11, 2005 in the agreements of purchase and sale which permitted Portofino 1 to cancel the agreements that the defendants owed Valente 50% of the commissions on the pre-sales from January 11, 2005. This gave Valente the

status of creditor and made it a potential complainant under section 248 of the *Ontario Business Corporations Act*. The trial judge stated the following:

[14] In the judgment dated August 31, 2007:

> **74** I agree with the point raised by Mr. Ball, that the exclusive listing agreement clearly provides that 50% of each commission, plus taxes, shall be due and payable 45 days from the day "in (sic.) which the necessary pre-sales have been achieved to satisfy the condition in the project financing commitment". I accept that when Capaldi waived the right of the developer to back out of the sales, there was no formal project financing commitment in place. However, the evidence was that financing arrangements had been worked out in principle with the Bank of Montreal and had simply not been formalized. As I understand it, Capaldi waived the condition as a sign of good faith in the project, as an encouragement to existing and prospective buyers that in fact the project was going ahead, and incidentally as a means of triggering the obligation of prospective buyers to substantially increase their deposits. No doubt, with $20,000 instead of $2,500 on hand from each prospective buyer in a trust account, the needed financing would be easier to obtain. In any event, financing clearly did issue and the project in fact is substantially completed. Therefore, the argument would relate only to the date of commencement of prejudgment interest.
>
> **75** I find on all of the evidence, including of course, the listing agreement signed by the four individual investors, together with the amendment thereto signed by the corporations of the four investors, that the plaintiff realtor, is a creditor of Portofino I and thus an appropriate complainant under s. 248 of the *Ontario Business Corporations Act*.

[15] In the judgment dated May 13, 2008:

> **25** In my view, the essence of the condition in the exclusive listing agreement re payment of 50% of commissions on pre-sales was that the project was in fact going ahead. The best evidence of that, in my view, is the formal notice of removal of conditions by Portofino Riverside Tower Inc. dated January 11, 2005 and signed by Capaldi as president. That was backed up by letters sent out by Capaldi on January 11, 2005 to Gary Lunau, Rosemary Lunau, (Tabs 33 and 34 of the plaintiff's document book) and to presumably all other pre-sale purchasers, such as the Colavitas, (Tab 35) in each case advising that construction of Portofino would commence in the spring of 2005 or earlier, enclosing the formal notice of removal of conditions, requesting an additional $17,500 deposit and inviting the recipient to a reception for all of the purchasers to be held January 20, when the construction timetable would be provided. At that time, Valente Real Estate certainly felt the condition had been met because on January 25 they sent out an invoice detailing all of the 50% of commissions, saying they were due and payable by February 25, 2005. The total, including GST was $400,733.86.

[16] Although the trial judge does not say so in clear terms implicit in the trial judges reasoning, is a finding that the corporate reorganization constituted oppression by rendering Portofino I judgment proof from the claims of Valente. He stated the following:

> **70** ... I conclude, the real reason for the very odd process of dividing the legal and equitable interest held by Portofino I, putting the legal interest in a bare trust, and exchanging the equitable interests for units in a limited partnership, with Capaldi's personal corporation as the general partner, so that those interests, including the power to reconstitute Portofino I, could not be reached by execution creditors without the aid of very special and unusual court orders.
> **71** What to my mind speaks the loudest is point #1 in Mr. Goldberg's notes of his discussions with Capaldi about restructuring, the goal was simply stated to be, "to get rid of commissions". (judgment August 31,2007)

[17] He also seems to have held that the reasonable expectations of Valente as a victim of oppression under section 248 included the following:

> **82** It was clear from the beginning that the plaintiff's claim was essentially for three things:
>
> 1. Commissions payable and to become payable on the sale of the 75 or so units sold through the Lunaus before they were locked out of the premises and Capaldi unilaterally declared the exclusive listing agreement with the plaintiff was no longer in effect;
> 2. The future commissions expected to be earned on the sale of the remaining 50-odd units if the exclusive listing agreement had remained in effect; and
> 3. Ancillary commissions anticipated to have been earned, if the exclusive listing agreement had continued in effect, by the Lunaus being retained by at least some of the purchasers of units, to sell their existing homes on moving into Portofino. (judgment August 31, 2007)

Discussion

[18] The relevant sections of the *Ontario Business Corporations Act* are the following:

Definitions

245. In the Part,

"action" means an action under this Act; ("action")

"complainant" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver- manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(o) any other person who, in the discretion of the court, is a proper person to make an application under this Part. ("plaignant")

[19] Before a creditor can be granted a remedy for oppression under section 248 it must be found to be a proper person to be a complainant under section 245. In *Royal trust Corp. V. Hordo* (1993), 10 B.L.R. (2d) 86, Justice Farley stated the following:

> Who May Be A Complainant Under The Oppression Provision Of The CBCA
>
> **10** Section 241(1) CBCA states that "a complainant" may apply to a court for an order under the oppression section. The definition of "complainant" for the purpose of both an oppression proceeding under s. 241 and a derivative proceeding under s. 239 is set out as follows in s. 238:
>
> 11 "Complainant" means
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

The person who qualifies as a "complainant" must be in that capacity at the time of the acts complained of: see Trillium Computer Resources Inc. v. Taiwan Connection Inc. (1992), 10 O.R. (3d) 249 (Gen.Div.) at p. 253; First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.L.R. 28 (Alta.Q.b.) at 60, rev'd on other grounds (1989), 45 B.L.R. 110 (Alta.C.A.).

12 A creditor is not specifically defined as a "complainant" under the CBCA and therefore creditors generally are not "complainants" as of right. The court may use its discretion to grant or deny a creditor status as a complainant under s. 238(d). It does not seem to me that debt actions should be routinely turned into oppression actions: see R. v. Sands Motor Hotel Ltd. (1984), 28 B.L.R. 122 (Sask.Q.B.); Canadian Opera Co. v. 670800 Ontario Inc. (1989), 69 O.R. (2d) 532 at 536 (H.C.J.) aff'd (1989), 75 O.R. (2d) 720 (Div.Ct.); Jacobs Farms Ltd. v. Jacobs, [1992] O.J. No. 813 (Gen.Div.); First Edmonton, supra. I do not think that the court's discretion should be used to give a "complainant" status to a creditor where the creditor's interest in the affairs of a corporation is too remote or where the complainants of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith. Status as a complainant should also be refused where the creditor is not in a position analogous to that of the minority shareholder and has "no particular legitimate interest in the manner in which the affairs of the company are managed": Jacobs, supra, at pp. 12-14. See also Lee v. International Consort Industries Inc. (1992), 63 B.C.L.R. (2d) 119 (C.A.) at pp. 127-9 and Canadian Opera, supra, at p. 536 (H.C.J.).

13 As well it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person really holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained: see Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd. [1969] 2 O.R. 349 at pp. 351-5 and 358; First Edmonton, supra, at pp. 111-2; Mohan v. Philmar Lumber (Markham) ltd. (1991), 50 C.P.C. (2d) 164 (Ont.Gen.Div.) at pp. 165-6.

[20] Cases in which a creditor has been given status as a complainant against a corporation, found to be oppressed within the meaning of section 248 and given a remedy by way of piercing the corporate veil in the form of a judgment against those in control of the corporation have been

cases where those in control of the corporation have stripped the corporation of assets or dissipated assets rendering it immune from a judgment in favour of the creditor. (See *Gignac, Sutts, and Woodall Construction Co v Harris* [1997] O.J. No. 3084 (Gen. Div.); *S.C.I. Systems inc. v Gornitzki Thompson & Little Co. Ltd.* (1997), 147 D.L.R. (4th) 300 (Gen. Div.) var'd on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v Ontario (2001)*, 54 O.R. (3d) 161 (C.A.) *Sidaplex-Plastic Suppliers Inc. v Elta Group Inc.* (1998), 40 O.R. (3d) 563, [1998] (C.A.).

[21] Here the trial judge ignored the declaration made by the limited partnership, dated January 17, 2006, in which it agreed to indemnify Portofino 1 against all amounts that Portofino 1 may be legally obligated to pay to Valente in respect of real estate commissions payable pursuant to the exclusive listing agreement.

[22] Also the trial judge disregarded the clear wording of the listing agreement that 50% of commissions owing on presales were only owing to Valente by Portofino 1 when sufficient presales have been made "to satisfy the condition in the Project Financing commitment". The only project financing proposal that was introduced into evidence was the Bank of Montréal proposal. The conditions in this proposal were never satisfied. On the evidence, neither Portofino 1 or Portofino 2 were creditors when the action was commenced or when it was tried.

[23] In *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.* [2008] O.J. No. 958 the landlord sued a tenant for rent arrears. There have been a number of assignments of the lease by the original tenant to related companies. The trial judge granted the landlord an oppression

remedy under section 248. The Court of Appeal in the judgment of Justice Doherty held that he erred in so doing and should have filed the tenant in breach of a contract that existed between it and the landlord notwithstanding the assignments of the lease and assessed the damages for breach of contract. The result was the same. Justice Doherty stated the following:

> **60** The oppression remedy is not, however, a means by which commercial agreements negotiated at arms length by sophisticated parties can be rewritten to accord with a court's after-the-fact assessment of what is "just and equitable" in the circumstances. It is not the function of the court to rewrite contracts or to relieve a party to a contract of the consequences of an improvident agreement. See *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] S.C.J. No. 55 at para. 34.
>
> **61** J.S.M. and the Brick enterprise entered into a business arrangement in 1986 when they negotiated the head lease. There is no suggestion of any relationship between them other than commercial landlord and commercial tenant. Nor is it contended that there was any imbalance of power between the two such that it might be said that the terms of the lease were not the product of legitimate arms length negotiation. Subsequent agreements between J.S.M. and the various Brick companies were negotiated in the same way.
>
> **62** The reasonable expectations of parties to commercial agreements negotiated at arms length must be those reasonable expectations that find expression in the agreements negotiated by the parties. For example, when J.S.M. initially negotiated the head lease, it did not negotiate any provision in that lease that would allow it to look to any party other than the tenant, Brick Ltd., for payment of the rent upon a breach of the lease. Having negotiated a detailed lease which did not bind any other entity, J.S.M. could not be heard to argue that it reasonably expected that some other corporate entity would be liable if Brick Ltd. breached the original lease. The fact that Brick Ltd. had no assets certainly suggests that J.S.M. may have acted improvidently in agreeing to look only to Brick Ltd. for recovery. A bad bargain cannot, however, alter J.S.M.'s reasonable expectations or render the breach of the lease oppressive conduct.
>
> **63** Similarly, if, contrary to my holding on the contract claim, the "Consent and Acknowledgement" did not give J.S.M. recourse against Brick Corp. for unpaid rent, then J.S.M. could not argue that it reasonably expected to have rights it had not negotiated in its agreement.
>
> **64** If, again, contrary to my holding above, J.S.M. had negotiated to recover unpaid rent as against only Brick Windsor and Brick Ltd., the two shell companies, J.S.M.'s subsequent inability to make any real recovery when the lease was breached would have nothing to do with the Brick enterprise's subsequent unilateral and devious rewriting of the sublease. If J.S.M. did not have a contractual claim against Brick Corp., it would not [illegible] that frustrated J.S.M.'s ability to make any real

recovery. J.S.M.'s inability to reach a corporate entity with assets, had I come to a different conclusion on the contractual claim, would have been the product of J.S.M.'s own failure to adequately protect its position in its negotiations with the Brick enterprise, and not the product of any oppressive conduct on the part of any corporate entity within the Brick enterprise.

65 I would adopt, as applicable to the facts of this case, the observations of Kevin P. McGuiness, The Law and Practice of Canadian Business Corporations (Toronto: Buttersworth, 1999) at para. 9.247:

> In most cases it would seem reasonable to hold the creditors of the corporation are limited to the normal remedies for a breach of contract (including any available security or personal guarantee) should the corporation default in performance, for it cannot have been intended that the oppression remedy would be available where a creditor failed to protect himself or herself adequately against the inherent risks of doing business with a corporation. While acts of oppression may entail a breach of contract, or the commission of some tortious or similar wrong, against the complainant, it is doubtful that the oppression remedy was intended to be a substitute for an ordinary right of action in contract - or tort for that matter. Where the sole complaint is that of a breach of contract, then a contract action should be pursued. Insofar as the contract deals with a specific matter, it seems only natural to conclude that it sets out exhaustively the underlying intentions, understandings and expectations of the parties. While many - perhaps all - breaches of a contract can be characterized as oppressive to the injured party, and while many - perhaps all - forms of tortious injury may be said to be unfairly prejudicial, the legislature clearly cannot have intended for the oppression provisions to serve as a panacea for all manner of legal wrongs, or to make the remedies created under the statute for genuine cases of oppression or unfair prejudice a substitute for the normal legal and equitable remedies that are available to aggrieved parties. Where a simple breach of contract, or comparable legal wrong has occurred, it is not appropriate for the court to invoke the oppression provisions of the Act merely because the party in breach is a corporation. [Emphasis added.]

66 I stress Mr. McGuiness' observation that the oppression remedy is not intended to give a creditor after-the-fact protection against risks that the creditor assumed when he entered into an agreement with a corporation. The position of a creditor who can, but does not, protect itself against an eventuality from which he later seeks relief under the oppression remedy, is much different than the position of a creditor who finds his interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself. In the latter case, there is much more room for relief under the oppression provisions than in the former case. See *S.C.I. Systems, Inc. v. Gornitzki Thompson & Little Co. Ltd.* (1997), 147 D.L.R. (4th) 300 (Gen. Div.) var'd on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); see also M. Koehnen, Oppression and Related Remedies (Toronto: Carswell, 2006) at pp. 88-93.

Conclusion

[24] Valente entered into the shareholders agreement with his partners. He accepted the risk that his interest and that of Mancini and Muroff could be purchased by Capaldi. Valente's reasonable expectations were limited to Portofino I and its successors complying with the terms of the listing agreement. It was not a creditor and could not be a complainant under section 248 when the action was commenced nor when it was tried. Valente pursued only a remedy under section 248 at the trial. The trial judge made no finding of breach of contract. The appeal is allowed.

Costs

[25] The appellants are entitled to their cost below and on this appeal.

[26] The court will entertain written submissions with respect to scale and quantum. The appellants' submissions shall be filed within 30 days of the release of this decision and the respondent shall have 30 days from receipt of the defendants cost submissions within which to file its written submissions in response.

P.B. Hambly J.

F. D. Ray J.

J.C. MURRAY J. (Concurring)

[27] I agree with the result reached by the majority of the panel to allow the appeal, to set aside the judgments of Justice Brockenshire and to grant judgment dismissing the action of the plaintiff, Remo Valente Real Estate (1990) Limited in its entirety.

[28] The following are my concurring reasons.

The Exclusive Listing Agreement

[29] On the 22nd day of November, 2002, the plaintiff Remo Valente Real Estate (1990) Limited (hereinafter referred to as "Valente") entered into an exclusive listing agreement with 1318941 Ontario Limited (later renamed Portofino Riverside Tower Inc. and referred to in these proceedings as "Portofino 1"), a builder/owner which was intending to build a condominium project on Riverside Drive West in the City of Windsor, in the County of Essex. The listing agreement granted to the broker exclusive authority to promote and sell condominium units to be constructed.

[30] The term of the listing agreement was from the date of execution until December 30, 2006, subject to automatic renewal for a further period of one year unless terminated by written notice 30 days prior to December 30, 2006. The commission clause provided in part that:

> ... the builder agrees to pay Valente a commission of 4% of the sale price if sold by sales representatives assigned to the project and 5% if sold by other "Valente "salespeople or other salespeople registered with outside real estate brokers, of each condominium unit or lands sold under an Agreement of Purchase and Sale entered into during the currency of this Agreement ... which commission shall be due and able 50% of each commission 45 days from the day in which the necessary pre-sales have been achieved to satisfy the condition in the Project Financing commitment provided that said sales are unconditional and the remaining 50% payable upon the completion of each sale

[31] The listing agreement was amended by the parties by subsequent agreement dated September 29, 2004. By the amendment, the owner builder and the broker agreed that should the property be sold during the currency of the listing agreement, the owner builder would pay to the broker a commission of 5% of the sale price of the property on the completion of such sale.

The Re-Organization

[32] As of January 2005, Dante J. Capaldi owned Capaldi Investment Holdings Inc. and through that holding company was the sole shareholder of Portofino 1.

[33] After Capaldi became the sole shareholder of Portofino 1, Portofino 1 was re-organized. The re-organization involved the transfer by Portofino 1 of the legal title to the lands to a trustee while retaining beneficial ownership of the land. To achieve this, legal title of the lands was transferred to Westview Park Gardens (2004) Inc. on May 3, 2005. The legal title was transferred for nominal consideration with no change in beneficial ownership or value of Portofino 1's assets. Westview Park Gardens (2004) was subsequently renamed Portofino Corporation.

[34] The second aspect of the re-organization involved the transfer by Portofino 1 of the beneficial ownership of the lands and all other Portofino 1 assets to the Portofino (2005) Limited Partnership in satisfaction of the capital contribution of a limited partner. The general partner was "1 Capaldi General Partner Corporation" (owned by Dante Capaldi). The capital contribution was stated as the value of Portofino 1's beneficial interest in the land and other assets, being $2 million. Therefore, the defendants submitted that the value of Portofino 1's

interest in the limited partnership was the same as the value of the property and other assets of Portofino I before the re-organization.

[35] Capaldi described the re-organization, as follows. The legal ownership of the land held by Portofino I was transferred to Westview Park Gardens (2004) Inc. to hold as a trustee, subject to a proviso that on request the legal title would be transferred back to Portofino I. Then the beneficial or equitable interest of Portofino I, which would include the right to recall the legal title, was transferred from Portofino I to 1 Capaldi General Partner Corporation in exchange for a credit to its capital account in the limited partnership known as the Portofino 2005 Limited Partnership, in the amount of $2,000,000.

[36] Capaldi stated that the re-organization was undertaken for a number of business purposes described by him in his evidence as follows:

1. To attract new investors to assist in financing the project;
2. To permit unequivocal interest to be provided to those investors without attracting obligation to pay commission to Valente pursuant to the Listing Agreement as amended in September, 2004;
3. To permit the retainer of real estate agents other than Valente;
4. To preserve the underlying value of Portofino I to meet its existing obligations to Valente; and
5. To avoid paying double commissions on future sales both to the real estate agents who sold the remaining condominium units and to Valente.

[37] One of the reasons for the re-organization orchestrated by Capaldi was to permit the engagement of real estate agents other than Remo Valente Real Estate (1990) Limited. Capaldi's intention to cease using the plaintiff real estate agency was manifest immediately after the transfer of the legal title of the property by Portofino 1 to Westview Park Gardens (2004) Inc. as "trustee". On May 3, 2005, Capaldi ordered the agents of the plaintiff to vacate the sales office located on the premises, to turn in all keys and remove any signage related to the plaintiff real estate broker. Valente was replaced as agent for the project when a formal listing agreement was entered into between Portofino Corporation and Bob Pedler Real Estate.

The Statement of Claim

[38] By statement of claim, dated and issued on November 15, 2005, Valente sued the corporate defendants Portofino Riverside Tower Inc. (previously named 1318941 Ontario Limited and referred to in these proceedings as "Portofino 1"), Westview Park Gardens (2004) Inc. and Portofino Corporation (Portofino Corporation is the successor corporation to Westview Park (2004) Gardens Inc.). The statement of claim also named as a defendant, Dante J. Capaldi, as an officer, director and the controlling mind of both corporate defendants.

[39] The plaintiff alleged that pursuant to the listing agreement, the plaintiff's agents procured 75 offers to purchase condominium units which were accepted by the defendant Portofino 1. The claim alleges that pursuant to the terms of the Exclusive Listing Agreement, 50% of the commissions generated as a result of these sales were due and owing to the plaintiff 45 days after the date on which Portofino waived certain financing conditions which were set out in the said

agreements of purchase and sale. The plaintiff alleged that the waiver of conditions occurred on January 5, 2005 and as a result, commissions in the amount of $510,000 became due and owing on the 25th day of February, 2005. No commissions were paid.

[40] The plaintiff real estate broker alleged that the sole purpose of the conveyance of the legal title of the property was to defeat the legitimate claims of the plaintiff as a creditor of Portofino and the plaintiff therefore sought relief pursuant to the provisions of the *Ontario Business Corporations Act* and the *Fraudulent Conveyances Act* seeking to set aside and/or reverse the transfer of the legal title of the property from Portofino 1 to Westview Park Gardens (2004) Inc., subsequently named Portofino Corporation and referred to in these proceedings as "Portofino 11".

[41] The plaintiff also pleaded that as a result of the defendants preventing the plaintiff from continuing its efforts to sell condominium units and by listing the property with another real estate broker, the defendants were in breach of the listing agreement and deprived the plaintiff of the opportunity to earn commissions under the said agreements in an amount estimated to be $2,500,000.

[42] Lastly, the plaintiffs claimed that because the listing agreement was terminated, the plaintiff was deprived of the opportunity to obtain listing agreements to sell homes, residences or condominiums owned by the various purchasers at the time of their agreement to purchase a Portofino condominium unit. These lost commissions were estimated in the claim to be valued at $1,500,000.

The Indemnification of the Named Corporate Defendants

[43] By written statement, dated January 17, 2006, the Limited Partnership undertook that it would, from the proceeds of condominium unit sales, keep Portofino 1 fully indemnified against any amounts that Portofino 1 might be obligated to pay Valente. In addition, the legal successor in title, Portofino Corporation, provided Valente and the trial court (at the outset of litigation) with irrevocable directions to pay out of the proceeds of condominium unit sales commissions that Portofino 1 might be legally obligated to pay Valente.

The Trial

[44] The trial judge relied on the evidence of Jerry Goldberg, corporate solicitor for Portofino 1 and the Portofino Corporation, whose evidence he accepted without qualification. Justice Brockenshire found as a fact that the real reason for the re-organization was to avoid the payment of any commission to the plaintiff and to place assets beyond the reach of execution creditors.

[45] The trial Judge concluded that the plaintiff was a creditor entitled to the benefit of the oppression provisions of the *O.B.C.A.* The following excerpt from the August 31, 2007 judgment of Justice Brockenshire captures the essence of the reasons for finding liability against the defendants. He stated, in paragraphs 74-77, as follows:

> I agree ...that the exclusive listing agreement clearly provides that 50% of each commission, plus taxes, shall be due and payable 15 days from the day "in (sic.) which the necessary pre-sales have been achieved to satisfy the condition in the project financing commitment." I accept that when Capaldi waived the right of the developer to back out of the sales, there was no formal project financing commitment in place. However, the evidence was that financing arrangements had been worked out in principle with the Bank of Montreal and had simply not been formalized. As I understand it, Capaldi waived the condition as a sign of good faith in the project, as

an encouragement to existing and prospective buyers that in fact the project was going ahead, and incidentally as a means of triggering the obligation of prospective buyers to substantially increase their deposits. No doubt, with $20,000 instead of $2,500 on hand from each prospective buyer in a trust account, the needed financing would be easier to obtain. In any event, financing clearly did issue and the project in fact is substantially completed. Therefore, the argument would relate only to the date of commencement of prejudgment interest.

I find on all of the evidence, including of course, the listing agreement signed by the four individual investors, together with the amendment thereto signed by the corporations of the four investors, that the plaintiff realtor, is a creditor of Portofino I and thus an appropriate complainant under s. 248 of the *Ontario Business Corporations Act*.

I accept the evidence of Valente that when Capaldi bought out he, Mancini and Muroff, he reasonably expected that Capaldi would continue with the project of building and selling the units in Portofino Tower, and that the exclusive listing agreement would continue in full effect. I further accept his evidence that, on the other hand, he never expected that the property would be transferred so that he and the plaintiff realtor would be locked out of it. I conclude that these were reasonable expectations to hold in all of the circumstances, and that they were buttressed by the continuation of the Lunaus as the on-site realtors for months after the buyout, through the time of changeover and the time of meeting with and reassuring the prospective buyers and then further reassuring the buyers and collecting the substantial additional deposits required when Capaldi issued the developers waiver. The case law indicates that the expectations of the claimant form an important part of any claim for relief under s. 248, and I find the expectations of Valente were completely reasonable in the circumstances.

The case law indicates that it is not necessary to prove bad faith or lack of probity to be entitled to relief under s. 248. However, I find here, principally on the oral and documentary evidence provided by Capaldi, that the "corporate restructuring" took place in the way it did primarily in an effort to "get rid of the commissions" which not only disregarded the interest of the plaintiff, but quite apparently was intended to block any efforts by the plaintiff to collect commissions due, and future commissions that should have come due under the exclusive listing agreement. In *Gestion Transtech Inc. v. Shipment Systems Strategies Ltd.* [2001] O.J. No. 4710 C. Campbell J. said at para. 38:

> In this case, at least one major purpose of the transfer of assets was to avoid exposure of those assets to judgment. In my view that is sufficient to attract oppression relief.

Analysis

[46] In *Sidaplex-Plastic Suppliers, Inc. and The Elta Group Inc. et al.* 40 O.R. (3d) 563, [1998] O.J. No. 2910 (OCA), the Court of Appeal described the scope of review on appeal as follows:

> As pointed out by Galligan J.A. in Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481 at pp. 486-87, 23 B.L.R. (2d) 286 (C.A.), s. 248(3) empowers a court upon a finding of oppression to make any order "it thinks fit". This gives the court at first instance a broad discretion and the appellate court a limited power of review. The appellate court is entitled to interfere only where it is established that the court at first instance has erred in principle or its decision is otherwise unjust.

Was Valente a "creditor" entitled to assert an oppression remedy under the O.B.C.A.?

[47] Like my colleagues, I have concluded that Valente was not a creditor within the meaning of the oppression section of the *O.B.C.A.* and therefore not entitled to seek relief pursuant to the oppression provisions.

[48] A review of the transcript indicates that counsel for the defendants agreed before the trial judge that the plaintiff was a creditor within the meaning of the *O.B.C.A.* and therefore had standing to bring the oppression claim (See transcript of closing submissions p. 2).

[49] I am not satisfied that the stipulation by counsel for the defence that Valente was a creditor with standing to bring an oppression claim should have ended or did end the inquiry for the trial judge. The *O.B.C.A.*, in s. 248(2), gives a creditor standing to complain. The jurisdiction to remedy oppression is found in the *O.B.C.A.* It does not exist at common law. A plaintiff who is not a creditor cannot access the remedial jurisdiction of the Court created by s.

248 of the *O.B.C.A.* No agreement by the parties can or should convey jurisdiction on the Court where none otherwise exists.

[50] However, the trial judge appears not to have relied on any concession made by defendants' counsel but rather to have made an independent determination that the plaintiff was a creditor entitled to bring an oppression claim. This is evident from the excerpt from the judgment referred to above in which Justice Brockenshire states: "I find on all of the evidence, including of course, the listing agreement signed by the four individual investors, together with the amendment thereto signed by the corporations of the four investors, that the plaintiff realtor, is a creditor of Portofino I and thus an appropriate complainant under s. 248 of the *Ontario Business Corporations Act*."

[51] In *1413910 Ontario Inc. (c.o.b. as Bulls Eye Steakhouse & Grill)v. McLennan*, [2009] O.J. No. 1828, 309 D.L.R. (4th) 756, a panel of the Divisional Court - Toronto, Ontario (K.E. Swinton, W. Low and A. Karakatsanis JJ.) gave the following interpretation to the term "creditor" as it is used in the O.B.C.A.. Justice Low, speaking on behalf of the Court said at paras. 34 -36:

> The oppression remedy is designed to address, where oppression is found, the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of corporation but no control over its conduct. In my view, a person to whom the corporation owes an obligation affirmed by judgment but as yet unquantified by assessment of damages, is in no less vulnerable position vis à vis the corporation and has no less a legitimate stake or interest in the manner in which the affairs of the corporation are conducted than one to whom a liquidated sum is owed.

> There is no case on point. Neither *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560, nor *Awad v. Dover Investments Inc.*, [2004] O.J. No. 3847 (S.C.J.) referred to by the appellant are of assistance.
>
> In my view, the application judge was correct in concluding that Bulls Eye became a creditor at the time of the liability determination in February 2004 and in informing his decision by reference to the broader and more fundamental construction of the term "creditor". It is that construction which harmonizes with the purpose and intent of the oppression remedy in the statute.

[52] The *Bulls Eye Steakhouse and Grill* case suggests that the term "creditor" should be given a broad enough meaning to include every one having a right to require the performance of any legal obligation, contract or guaranty, or a legal right to damages arising out of contract.

[53] The position of the defendant Portofino 1 throughout is that there was no breach of the exclusive listing agreement and that any commissions earned by Valente were payable after condominium unit sales closed and, since closings had not occurred, no commissions were payable.

[54] Indeed, even the position advanced by the plaintiff at trial seems premised on the fact that Valente had no claim based on breach of contract. The trial judge at para. 68 of the August 31, 2007 judgment comments on the position advanced by the plaintiff:

> Mr. Morga's reply to the argument of Mr. Ball was brief. He said that this was **not a contract case**; it was not a case in which the remedy was limited by *Haldey v. Baxendale*. It was an equity case under s. 248 of the *O.B.C.A.*, seeking a fair remedy, not necessarily based on the strict interpretation of the listing agreement. The case was all about the expectations of the parties. Morga put it that Capaldi had the legal right to do what he did in the "re-organization" but not the equitable right.

[55] The trial judge noted the position of the defendants at para. 67 of his judgment, dated August 31, 2007:

> The position taken by the defence, in its closing statement, is that Portofino Riverside Tower Inc. (Portofino I) remains legally obligated to see the plaintiff paid its proper commissions **as sales closed** under agreements it procured.

[56] A review of the transcript of closing submissions by counsel for the plaintiff makes it clear that the plaintiff was not alleging that its rights under the exclusive listing agreement had been breached by the re-organization. The plaintiff advanced the argument that the oppression resulting from the re-organization was that future commissions would be kept out of the plaintiff's reach. (See transcript of submissions at him pages 6-7 and 16). The plaintiff was not asserting that it had an existing contractual right to require the performance of any contract or any legal right to damages arising out of contract. Furthermore, it is clear from the evidence that there was no breach of contract and no commissions were payable to Valente at the time of the re-organization or at the time the action was commenced. The trial judge made no finding that Valente was entitled by virtue of breach of contract to any damages, quantified or unquantified.

[57] There was no factual or legal basis for a finding that Valente, at the time of the re-organization, was a creditor.

[58] As my colleagues have noted, the clear wording of the listing agreement provided for payment of 50% of commissions only when sufficient pre-sales had been made to satisfy the condition in the project financing agreement. In concluding that the plaintiff had standing, the trial judge seems to have equated actual financing with potential financing. At paragraph 74 of his August 31, 2007 judgment, he states as follows:

> I agree with the point raised by Mr. Ball, that the exclusive listing agreement clearly provides that 50% of client commission, plus taxes, shall be due and payable 45 days from

> the day "in (sic.) which the **necessary pre-sales have been achieved to satisfy the condition in the project financing commitment**." I accept that when Capaldi waived the right of the developer to back out of the sales, there was no formal project financing commitment in place. However, the evidence was that **financing arrangements had been worked out in principle with the Bank of Montreal and had simply not been formalized**. As I understand it, Capaldi waived the condition as a sign of good faith in the project, as an encouragement to existing and prospective buyers that in fact the project was going ahead, and incidentally as a means of triggering the obligation of prospective buyers to substantially increase their deposits. No doubt, with $20,000 instead of $2,500 on hand from each prospective buyer in a trust account, the needed financing would be easier to obtain. In any event, financing clearly did issue and the project in fact is substantially completed. Therefore, the argument would relate only to the date of commencement of prejudgment interest. [Emphasis added]

[59] Financing had not been finalized at the time of the re-organization. No financing commitment was in place. The only financing commitment being discussed was that being proposed by the Bank of Montréal. In the absence of a project financing commitment, when no sales of condominium units had closed, no real estate commissions were payable to Valente. As noted above, in my opinion, the trial judge conflated a proposed financing commitment with a formalized commitment.

[60] However, even if the trial judge properly considered the terms of the proposed BMO financing commitment, those terms prohibited payment of real estate commissions to Valente at the time of the re-organization. The pre-sales requirements contained in the proposed financing agreement required 86 conditional sales of condominium units to arms length purchasers prior to the payment of any commissions to Valente. It was common ground that this number of units had not been sold and therefore no commissions were payable and no commissions owed at the time of the re-organization. To use the terminology of *Bulls Eye Steakhouse and Grill*, there was no evidence on which the trial judge could find that the plaintiff was in a position to enforce any

right to require the performance of any legal obligation, contract or guaranty, or a legal right to damages arising out of contract.

[61] As Justice Farley stated in *Royal Trust Corp. v Hordo* [1993] O.J. No. 1560:

> The person who qualifies as a "complainant" must be in that capacity at the time of the acts complained of: see *Trillium Computer Resources Inc. v. Taiwan Connection Inc.* (1992), 10 O.R. (3d) 249 (Gen.Div.) at p. 253; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta.Q.b.) at 60, rev'd on other grounds (1989), 45 B.L.R. 110 (Alta.C.A.).

[62] I agree with the majority of the Court that Valente was not a creditor when the re-organization occurred. The trial judge made a legal error in so finding.

Was there evidence of oppression within the meaning of s. 248 of the *O.B.C.A.*?

[63] Once a determination is made that Valente was not a creditor within the meaning of s. 248 of the *O.B.C.A.*, then this Court has concluded that the plaintiff had no standing to complain that the re-organization caused a result that was unfairly prejudicial to, or that unfairly disregarded its interests within the meaning of the oppression provisions of the *O.B.C.A.*

[64] However, even if this Court is wrong in its conclusion that Valente was not a creditor, there was no oppression by the defendants.

[65] In *Sidaplex-Plastics*, Blair J. provided a detailed analysis of the principles governing the award of an oppression remedy that was accepted by the Court of Appeal. At p. 403-4 D.L.R., he stated, in the context of a creditor's right to bring an application as a complainant pursuant to s. 245(c), that "while some degree of bad faith or lack of probity in the impugned conduct may

be the norm in such cases, neither is essential to a finding of "oppression" in the sense of conduct that is unfairly prejudicial to or which unfairly disregards the interests of the complainant, under the *O.B.C.A.*. Blair J. at p. 404 D.L.R. continued as follows:

> What the O.B.C.A. proscribes is "any act or omission" on the part of the corporation which "effects" a result that is "unfairly prejudicial to or that unfairly disregards the interests" of a creditor.

[66] At p. 404, Blair J., in considering whether an oppression remedy should be granted, agreed with McDonald J. in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 57 B.L.R.:

> More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

[67] The transfer/sale of the property on which the condominium project was located was foreseeable. Indeed, the plaintiff did endeavour to protect itself against a sale of the property which would create the possibility of being replaced, after the sale of the property, by a different real estate agent to sell unsold condominium units. As noted above, the original exclusive listing agreement was amended to provide for just such a contingency. In that amendment, the parties agreed that should the property be sold during the currency of the listing agreement, the owner builder would pay to the broker a commission of 5% of the sale price of the property on the completion of such sale. In addition, Valente and Portofino I had agreed in the exclusive listing agreement that commissions on pre-sales would not be payable in the absence of a

financing commitment and then only in accordance with the terms of the financing commitment. That no commissions based on condominium unit sales were due and payable at the time of the re-organization was in accordance with the agreement.

[68] The owner/builder was entitled to re-organize its affairs to avoid on-going contractual obligations to the plaintiff. Even if the re-organization was cynical and deliberate, the fact that it enabled Portofino to enter into an agreement with another real estate agent and enabled it to avoid future performance of its contractual obligations to Valente is not sufficient reason to depart from the normal basis on which damages are awarded.

[69] The fact that there may have been no damages for breach of contract is no reason to provide relief pursuant to the oppression provisions of the *O.B.C.A.* As the Ontario Court of Appeal stated in *J.S.M. Corp (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2008] O.J. No. 958, (at para. 60): "It is not the function of the court to rewrite contracts" and "the oppression remedy is not a means by which commercial agreements negotiated at arm's length by sophisticated parties can be rewritten to accord with a trial judge's concept of fairness and equity".

The trial judge made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence.

[70] An appellate court may substitute its own view of the evidence and draw its own inferences of fact where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence. See *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401.

[71] The trial judge relied on the evidence of Jerry Goldberg, corporate solicitor for Portofino 1 and the Portofino Corporation, whose evidence he accepted without qualification or caveat. Justice Brockenshire stated in his reasons, at para 55: "I have no difficulty at all in accepting what he told the court as being both credible and reliable."

[72] Justice Brockenshire found, based on Goldberg's evidence that the real reason for the re-organization was to avoid the payment of any commission to the plaintiff and to place assets beyond the reach of execution creditors by making Portofino 1 an empty shell. These factual conclusions are wrong, unreasonable and unsupported by the evidence of Goldberg or by any other evidence.

[73] Mr. Goldberg's evidence was that one of the objectives of re-organization was to avoid paying future or additional commissions to the plaintiff. His evidence does not support a conclusion that one of the objectives was to avoid paying all commissions including any that might have been earned by Valente prior to the re-organization when Valente was replaced by another real estate agency. Mr. Goldberg's testimony was that existing obligations to Valente were not intended to be adversely affected. Consider the following excerpt from a transcript of the evidence of Mr. Goldberg:

> Q. So the implication that I get out of this, and correct me if I'm wrong, is he's trying to avoid commissions to Valente?
>
> A. Well, not total commissions. He knew that Valente had brought in offers and were entitled, you know, to a payment of commissions for the services and the offers obtained.

> Q ... okay, future commissions to Pedler, the long and short is, what he's trying to do, one of his goals is to get out of paying commissions to Valente. Isn't that the logical implication from this?
>
> A. Certain amounts of commissions. Once Valente is out of the picture, he didn't need two realtors.
>
> Q. So rather than do that, rather than simply have Portofino sell the land, pay Valente $100,000 commission, we decide to go into this limited partnership agreement in an effort, in part, to evade all future commissions to Valente. Right?
>
> A. As I said, there are several goals and objectives with the owner of the partnership.
>
> Q. And one of them is to avoid paying commissions to Valente?
>
> A. Future and additional commissions.

[74] As mentioned above, even the plaintiff's counsel in his final submissions conceded that the objectionable purpose of the re-organization was to avoid paying future commissions.

[75] Neither does Goldberg's testimony - taken on its own or together with the other evidence before the court - reasonably support an inference that the real reason for the re-organization was so that assets of Portofino 1 could not be reached by execution creditors without the help of "special and unusual" court orders. There are two principal reasons why this conclusion is unsupported by the evidence. First, the evidence before the trial judge was that the value of Portofino 1's interest in the limited partnership was the same as the value of the property and other assets of Portofino 1 before the transfer, that is, $2,000,000. Secondly, this conclusion ignored the fact that the Limited Partnership had provided Portofino 1 with an indemnification for all amounts that Portofino 1 might owe Valente. In addition, the trial judge effectively ignored the evidence that the successor in title had provided both Valente and the Court with irrevocable directions to pay commissions that Portofino 1 might be legally obligated to pay Valente out of the

proceeds of condominium unit sales. By virtue of the indemnification and the irrevocable directions, all assets and property that were once held by Portofino 1 were available to satisfy any claim that Valente might have. If Valente was not satisfied that the value of Portofino 1's interest in the limited partnership was the same as the value of the property and assets it once held before the re-organization, any suggestion that the purpose of the diversion of those assets was to insulate them from being available to satisfy any commissions payable to Valente was completely answered by the indemnification and the irrevocable directions.

[76] In summary, the evidence at trial was that the value of Portofino 1 after the re-organization had not diminished. In any event, the indemnification and the irrevocable directions ensured that there would be no unfair prejudice or unfair disregard to the underlying expectations of Valente in its arrangements with Portofino 1.

[77] The re-organization did not render Portofino 1without assets and incapable of responding to a possible claim by Valente. There is no conduct by the defendants that was unfairly prejudicial to or that unfairly disregarded the interests of Valente within the meaning of the oppression provisions of the *O.B.C.A.*

Was Dante Capaldi properly found liable?

[78] The answer is no, for the reasons already given, that is, that Valente had no standing as creditor to bring a complaint and there was no conduct which amounted to oppression within the meaning of section 248 of the O.B.C.A.

[79] In addition, the trial judge did not appear to understand the circumstances in which courts have found a director to be liable where oppression has occurred. In s. 248(2)(c) of the *O.B.C.A.*, the legislature has included the exercise of the powers of a company's directors in targeting the kinds of conduct encompassed by an oppression remedy. In *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.), varied (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367 (C.A.), Blair J. commented on directors' liability under s. 248 of the O.B.C.A. In this regard, Blair J. stated at pp. 405-06 D.L.R.:

> Courts have made orders against directors personally, in oppression remedy cases: see, for example, *Canadian Opera Co. v. Euro-American Motor Cars*, supra; *Prime Computer of Canada Ltd. v. Jeffrey*, supra; *Tropxe Investments Inc. v. Ursus Securities Corp.*, [1993] O.J. No. 1736 (QL) (Gen. Div.) [summarized 41 A.C.W.S. (3d) 1140]. These cases, in particular, have involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person.

[80] Brockenshire J. made no finding that Dante Capaldi, as director and controlling mind of Portofino 1, engaged in conduct of the sort that that would attract liability to him. Dante Capaldi was responsible for the re-organization but there was no finding that he directly benefitted from same and no basis upon which the trial judge could find Dante Capaldi liable for acts of oppression. He made an error in law by so finding.

The reasonable expectations of the Plaintiff.

[81] In the case of *J.S.M. Corp (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2008] O.J. No. 958, the Ontario Court of Appeal (at paras. 60 and 62) stated:

> The oppression remedy is not, however, a means by which commercial agreements negotiated at arms length by sophisticated parties can be rewritten to accord with a court's after-the-fact assessment of what is "just and equitable" in the circumstances. It is not the function of the court to rewrite contracts or to relieve a party to a contract of the consequences of an improvident agreement. See *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] S.C.J. No. 55 at para. 34.
>
> **The reasonable expectations of parties to commercial agreements negotiated at arms length must be those reasonable expectations that find expression in the agreements negotiated by the parties.** ... A bad bargain cannot, however, alter J.S.M.'s reasonable expectations or render the breach of the lease oppressive conduct. (Emphasis added)

[82] In para 76 of the trial judgment of August 31, the trial judge stated:

> I accept the evidence of Valente that when Capaldi bought out he, Mancini and Muroff, he reasonably expected that Capaldi would continue with the project of building and selling the units in Portofino Tower, and that the exclusive listing agreement would continue in full effect. I further accept his evidence that, on the other hand, he never expected that the property would be transferred so that he and the plaintiff realtor would be locked out of it. I conclude that these were reasonable expectations to hold in all of the circumstances, and that they were buttressed by the continuation of the Lunaus as the on-site realtors for months after the buyout, through the time of changeover and the time of meeting with and reassuring the prospective buyers and then further reassuring the buyers and collecting the substantial additional deposits required when Capaldi issued the developers waiver. The case law indicates that the expectations of the claimant form an important part of any claim for relief under s. 248, and I find the expectations of Valente were completely reasonable in the circumstances.

[83] It is clear that the trial judge did not follow the admonition of the O.C.A. in *J.S.M. Corp (Ontario) Ltd.(supra)* that the reasonable expectations of the parties to commercial contracts must find expression in the contracts that they have negotiated and not in the judge's after the fact assessment of what is fair.

[84] Although there are numerous examples in this case of heads of damages not being tied to the commercial bargain struck between the parties in this case, one of the most striking, at least in my view, is a claim by the plaintiff for associated sales commissions unrelated to sales of condominium units in the project. Regarding this claim, the trial judge stated at paragraph 80 - 90

> The issue of associated sales commissions was raised by Mr. Lunau in his evidence. It appears to me to make good common sense that the realtors that have been present at the project from its inception, and in effect holding the hands of the prospective buyers, would quite likely be asked to represent those buyers in sales of their own homes. However, no percentage figure of the number of such buyers was suggested, nor was there any suggestion as to the value of the homes they might own.
>
> I heard no evidence against the suggestion that if the Lunaus had continued with the project, they would have picked up sales from eventual buyers. I am, therefore, prepared to accept that liability has been made out under this heading. However the quantification of it is another matter. In *Webb & Knapp (Can.) Ltd. v. Edmonton (City)* 1970 CanLII 173 (S.C.C.), [1970] S.C.R. 588, the court said that liability being established, it is up to the courts to make the best assessment it can to value the chance. I am prepared to make a finding on the basis of the slim evidence before me, of the number of such sales, bearing in mind that some condo purchasers may well not have a home to sell, and others, such as trades people, may be purchasing as an "investment" with no intention of giving up their existing homes.

[85] What can be seen from the above quote is that the trial judge did not consider the framework of the commercial contract as informing the parameters for remediation under the oppression sections of the O.B.C.A. Notwithstanding that there was no evidence to support a claim for associated sales commissions and no contractual basis for such a claim, the judge decided it was an appropriate head of damages based on the expectations of the plaintiff. The trial judge erred in so doing.

[86] I agree with the appellants that the trial judge made other additional awards of damages based on unrealized commissions which Portofino I would not have been obligated to pay pursuant to the exclusive listing agreement. I do not intend to deal with them in detail but they include damages for unrealized commissions on: a) units unsold during the term of the Exclusive Listing Agreement; b) upgrades and extras not sold by Valente; and, c) leases of unsold condominium units. I agree that such heads of damages could not be found to arise naturally from a

contract breach (if a breach of contract had been found to occur) under the applicable legal principles for assessing damages for breach of contract.

The Judge Erroneously Split the Case into Two Trials

[87] Justice Brockenshire violated the basic right of the defendants to have all issues in the dispute resolved in one trial.

[88] At the conclusion of his first judgment dated August 31, 2007, the trial judge indicated that he was prepared to make a finding of damages on the basis of the evidence at trial but that a more exact quantum of damages could be ascertained in a further proceeding.

[89] The unfairness of the procedure imposed by the trial judge, in my respectful opinion, is obvious. However, one example may serve to underscore the point. As noted above, the plaintiff claimed and was awarded damages based on the loss of sales commissions unrelated to sales of condominium units in the project. Simply put, the theory of this loss was that the real estate agents in the course of selling condominium units would have had the opportunity to act as listing agents for individuals who were purchasing condominium units and had other real estate to sell before they moved in to the condominium unit being purchased.

[90] At paragraphs 89-90 of the trial judgment dated August 31, 2007, which have been reproduced above, the trial judge concluded with respect to this claim for damages that it made "good common sense" that the realtors that have been present at the project and dealing with prospective buyers would likely be asked to represent those buyers in sales of their own homes. The trial judge did state that there was no percentage figure of the number of such buyers who

might provide additional business nor was there any evidence as to the value of any homes they might be selling. In addition, the trial judge said that he heard no evidence "against" the suggestion that if Valente's real estate agents had continued with the project, they would have picked up sales from eventual buyers. Nonetheless, the trial judge found the defendants liable for such damages. It seems there are multiple problems with this approach.

[91] Notwithstanding the complete lack of evidence, the trial judge was prepared to accept that liability had been made out under that heading because the defendants didn't call evidence to rebut "the suggestion" that if Valente's real estate agents had continued they would have picked up sales from eventual buyers. It is not the defendants' burden to disprove damages in the event the plaintiff does not. On this basis alone, the finding of liability is legally flawed.

[92] Secondly, although the trial judge said that he was prepared to assess damages based on the slim evidence before him, the trial judge ordered an "assessment hearing" for which he gave numerous specific directions designed to augment the record with respect to various heads of damage in order to assist in their calculation. These specific directions included instructions related to the claim that ancillary sales were lost. The plaintiffs were directed by the trial judge to provide additional information not produced at trial including:

> (h) The reasonable average sale price of contingent ancillary sales by condo purchasers of their own homes;
>
> (i) The reasonable average future date (if applicable) of such future sales and the present value, if applicable, of commissions on such sales;

[93] I agree with the appellants that this bifurcated trial procedure provided nothing short of a second chance for the plaintiff to fix the problems of proof in the first trial. I agree with the appellants that this was a fundamental error and inconsistent with the Supreme Court of Canada decision in *Webb & Knapp (Canada) Ltd. v Edmonton(City)*, [1970] S.C.R. 588 which requires the trial judge to determine the value of the claim based on the evidence at trial.

[94] In effect, the trial judge completed the trial, determined that no evidence had been provided by the plaintiff either to support a claim for damages or to enable quantification of damages and then gave the plaintiff a second chance to prove not only that damages should be awarded but also in what quantum.

[95] According to the trial judge, section 248(3) of the O.B.C.A. which authorizes the court to make "any interim or final order it thinks fit" was authority to depart from the principle of law established in *Webb & Knapp (Canada) Ltd. v Edmonton(City)*. The trial judge stated at para. 91:

> However, in my view, a fairly exact quantum of damages can be easily ascertained, if necessary, in a further proceeding. In this connection I am pleased to note that s.248(3) of the O.B.C.A. authorizes the court to make "any interim or final order it thinks fit...."

[96] Section 248(3) of the O.B.C.A. is not authority to depart from the principle of law established in *Webb & Knapp (Canada) Ltd. v Edmonton(City)*, [1970] S.C.R. 588. The oppression remedy is designed to address the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of corporation but no control over its conduct. In my view, the purpose of Section 248(3) of the O.B.C.A. is to ensure that the court has authority to make orders which are responsive to the variety of circumstances that

might present themselves in oppression cases. It provides authority to make a broad range of interim or final orders to protect persons found to be in a vulnerable position and to ensure, to the extent possible, that assets property are not placed beyond the reach of bona fide claimants who have been adversely affected by oppressive conduct. Section 248(3) of the O.B.C.A. is not designed to permit, nor does it permit, the court to implement unfair procedures.

[97] The parties did not consent to such a procedure. As far as I can see, a review of the record shows that council did not have any notice of or any opportunity to comment on the procedure prior to the assessment trial being ordered. The second trial in which the plaintiff was allowed to make further proof of damages was not announced until the conclusion of the trial on liability.

[98] It is completely contrary to common sense and to notions of efficiency and fairness to have a trial judge determine, on the basis of the evidence put forward by both parties at trial, that since quantification of damages was difficult or since there was no evidence to support some claims, that a second trial would be conducted to allow the plaintiff to bolster the deficiencies of proof in the first trial.

[99] In *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*, [1986] O.J. No. 578, 55 O.R. (2d) 56, Morden J.A. at paragraphs 10-12 stated:

> The fact that the power to split a trial is not expressly conferred does not, of course, mean that it may not be part of the inherent jurisdiction of the court and we accept that it exists on this basis, to be exercised in the interest of justice. Resort to it has, in fact, been usefully made: see, e.g., Simpsons Ltd. v. Pigott Construction Co. Ltd. (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47, and Lake Ontario Cement Co. v. Golden Eagle Oil Co. Ltd. (1974), 3 O.R. (2d) 739, 46 D.L.R. (3d) 659, ...

> However, since it is a basic right of a litigant to have all issues in dispute resolved in one trial it must be regarded as a narrowly circumscribed power. This approach is supported by the familiar statutory admonition which is continued in s. 148 of the Courts of Justice Act, 1984 (Ont.), c. 11:
>
> > As far as possible, multiplicity of legal proceedings shall be avoided.

[100] I agree with the appellants that the trial judge should not have permitted the plaintiff to litigate in instalments and the judge was in error in so doing.

Conclusion

[101] The trial judge made errors of law and procedure and made unreasonable findings of fact unsupported by the evidence.

[102] The trial judge agreed with and applied the approach recommended by counsel for the plaintiff which was summarized by him as follows:

> "... this was not a contract case; it was not a case in which the remedy was limited by *Haldey v. Baxendale*. It was an equity case under s. 248 of the *O.B.C.A.*, seeking a fair remedy, not necessarily based on the strict interpretation of the listing agreement. The case was all about the expectations of the parties. ... Capaldi had the legal right to do what he did in the "re-organization" but not the equitable right."

[103] The trial judge substituted his assessment of what was just equitable in the circumstances and, in doing so effectively rewrote the commercial contract between the parties. This was not his function.

[104] I agree with the appellants that Valente's rights were to be determined exclusively by the contract between it and Portofino 1, that is, by the terms of the exclusive listing agreement.

The trial judge substituted an oppression analysis for breach of contract analysis as if they were legally interchangeable and this fundamental error informed the entire judgment.

[105] Both the Judgment and the Accounting Judgment shall be set aside.

[106] A judgment shall issue dismissing the plaintiff's action in its entirety.

Costs

[107] I agree with the costs disposition in paragraphs 25 and 26 above.

MURRAY J.

Released: February 3, 2010

93
165

CITATION: Remo Valente Real Estate v. Portofino Riverside Tower et al., 2010 ONSC 280
DIVISIONAL COURT FILE NO.: 1661/1707
DATE: 2010-02-03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Remo Valente Real Estate (1990) Limited

Plaintiff/Respondent

and –

Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc. Portofino Corporation and Dante J. Capaldi

Defendant/Appellants

REASONS FOR JUDGMENT

P. B. Hambly J.
J. C. Murphy J.
T. D. Ray J.

Released: February 3, 2010

TAB “L”

166

CITATION: Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc., 2011 ONCA 784
DATE: 20111214
DOCKET: C53256

COURT OF APPEAL FOR ONTARIO

Doherty, Goudge and Epstein JJ.A.

BETWEEN

Remo Valente Real Estate (1990) Limited

Plaintiff (Appellant)

and

Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante J. Capaldi

Defendants (Respondents)

Gino Morga and Michelle D. Reynolds, for the appellant

William V. Sasso and Jacqueline A. Horvat, for the respondents

Heard: October 24, 2011

On appeal from the order of the Divisional Court (Hambly, Murray and Ray J.J.) dated February 24, 2010, with reasons by Hambly and Ray J.J. reported at 2010 ONSC 280, 68 B.L.R. (4th) 66.

Goudge J.A.:

INTRODUCTION

[1] On November 22, 2002, the appellant, a real estate company, signed a listing agreement with the respondent Portofino Riverside Tower Inc. ("Portofino 1") to sell the condominium units in a building to be constructed by Portofino 1 on land it owned.

[2] On May 3, 2005, Portofino 1 transferred its legal title to the land to Westview Park Gardens (2004) Inc., which then changed its name to Portofino Corporation. Both names appear in the style of cause referring to this respondent, which I will refer to as "Portofino 2". When Portofino 1 transferred the legal title to Portofino 2, it simultaneously transferred the equitable title in the land to a limited partnership, Portofino (2005) Limited Partnership (the "Limited Partnership"). The respondent Dante Capaldi owned Portofino 1, Portofino 2 and the corporate general partner of the Limited Partnership.

[3] On May 9, 2005, Portofino 2 locked the appellant's agents out of the project and at about the same time retained another real estate agent.

[4] The appellant subsequently sued the respondents for oppression under the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16 (the "*OBCA*") and for breach of contract. At trial, the trial judge found that the claim for oppression succeeded, and awarded the appellant $1,883,097.26 together with costs. The trial judge did not address the breach of contract claim.

[5] On appeal to the Divisional Court, the finding of oppression was reversed. The Divisional Court allowed the appeal and dismissed the appellant's action in its entirety. Like the trial judge, it did not address the contract claim.

[6] The appellant comes to this court with leave. For the reasons that follow, I conclude that the Divisional Court was correct to dismiss the oppression claim, but incorrect to dismiss the breach of contract claim without addressing it. That claim has never been tried. In the circumstances of this case, I think it should be. I would therefore allow the appeal and remit the contract claim for trial.

THE FACTS

[7] Remo Valente is the principal of the appellant. He and three other individuals, including the respondent Capaldi, were the owners of Portofino 1 through their personal corporations. Portofino 1 owned land in Windsor on which it planned to build a condominium development. The appellant had an exclusive listing agreement with Portofino 1 pursuant to which its real estate agents began marketing and selling the condominiums in the project in 2003.

[8] Problems among the four owners resulted in Capaldi buying out the others and becoming the owner of Portofino 1 in January 2005. He then undertook a corporate restructuring. On May 3, 2005, Portofino 1 transferred the legal title to the lands to Portofino 2 and the equitable title to the Limited Partnership. Shortly thereafter, on May

9, 2005, the appellant's real estate agents were locked out of the project and their role in marketing the project ended. Portofino 2 subsequently listed the property with another realtor.

[9] The appellant commenced this action on November 15, 2005. It claimed relief against oppression under s. 248 of the *OBCA* and damages for breach of contract.

THE TRIAL DECISION

[10] In his reasons for judgment, the trial judge dealt extensively with the appellant's oppression claim. Indeed, the oppression claim appears to have been the focus, perhaps the only focus, of the case advanced by the appellant at trial. The trial judge did not address the breach of contract claim and made no finding of breach of contract.

[11] In disposing of the oppression claim, the trial judge first concluded that the appellant was a creditor of Portofino 1 and therefore an appropriate complainant under s. 248 of the *OBCA*. He based this finding on his interpretation of the provision of the exclusive listing agreement entitling the appellant to payment before closing of fifty percent of the commissions on the sales it had made, if the necessary condition was met. That condition provided that the appellant was entitled to receive fifty percent of those commissions "45 days from the day in which the necessary pre-sales have been achieved to satisfy the condition in the Project Financing commitment".

[12] The trial judge found that the essence of this condition was a clear determination that the project was in fact going ahead, and that this was evidenced in this case by Portofino 1 giving formal notice to purchasers on January 11, 2005 waiving its right to cancel the project if it did not look to be financially viable. In his view, this met the condition. In addition, while the trial judge acknowledged that there was at that point no formal project financing commitment in place, he found at para. 74 of his reasons that "financing arrangements had been worked out in principle with the Bank of Montreal and had simply not been formalized": *Remo Valente Real Estate (1990) Ltd. v. Portofino Riverside Tower Inc.* (2007), 86 O.R. (3d) 667 (S.C.).

[13] Having thus found the appellant to be a creditor, and therefore entitled to be a complainant under s. 248 of the *OBCA*, the trial judge went on to find that the respondents had conducted the affairs of Portofino 1 and Portofino 2 in a manner oppressive or unfairly prejudicial to the appellant's interests. In particular, he found that the real reason that the corporate restructuring was undertaken was to block the appellant's ability to collect the commissions owed to it by rendering Portofino 1 "an empty shell", as the minority judgment in the Divisional Court put it: *Remo Valente Real Estate (1990) Ltd. v. Portofino Riverside Tower Inc.* (2010), 68 B.L.R. (4th) 66, at para. 72.

[14] Following a subsequent accounting conducted by the trial judge to determine the appropriate remedy under s. 248, he found the respondents jointly and severally liable to

the appellant for $1,883,097.26. Finally, he awarded the appellant costs in the amount of $253,817.98.

THE DIVISIONAL COURT DECISION

[15] Under s. 255 of the *OBCA*, an appeal from an order pursuant to s. 248 is to the Divisional Court. In this case, the Divisional Court rendered two sets of reasons.

[16] The majority dealt only with the conclusion of the trial judge that the appellant was a creditor and therefore a proper complainant under s. 248. They held that the trial judge erred in this finding because, in their view, no financing was ever obtained from the Bank of Montreal, and the trial judge was therefore wrong to find that the condition in Bank of Montreal financing had been satisfied, therefore entitling the appellant to payment of fifty percent of the commissions. The majority concluded that since the condition in the exclusive listing was not shown to be satisfied, neither Portofino 1 nor Portofino 2 owed anything to the appellant when the action was commenced or when it was tried. Hence the appellant was not a creditor and therefore could not be a complainant under s. 248.

[17] The majority concluded their reasons by saying about the breach of contract issue only that the trial judge made no finding of breach of contract. They then allowed the appeal, and dismissed the action in its entirety, including the breach of contract claim.

[18] In his minority reasons, Murray J. agreed with the result reached by his colleagues, and, like the majority, he did not deal directly with the contract claim. He focused on the oppression claim and concluded that at the time of the corporate restructuring, the proposed Bank of Montreal financing had not been finalized. The condition in that financing for payment of fifty percent of the commissions could therefore not be met. He found that the trial judge made a legal error in holding that it had been met, and that therefore the appellant was a creditor of Portofino 1.

[19] Murray J. went on to find that in any event the corporate restructuring could not constitute oppression of the appellant for two reasons. First, the appellant's exclusive listing agreement did not protect it from the refinancing, which in turn opened the possibility of replacement of the appellant as project realtor. As he put it, it is not the function of the oppression remedy to rewrite commercial agreements.

[20] Second, Murray J. looked to an indemnity provided by the Limited Partnership to the appellant, which the trial judge had before him, but had ignored. Murray J. found that the Limited Partnership had provided the appellant with an irrevocable direction to indemnify the appellant for any commissions that Portofino 1 might be legally obligated to pay, so that all the assets once held by Portofino 1 were still available to satisfy any claim that the appellant might have. Thus, contrary to the trial judge's finding, the corporate restructuring did not render Portofino 1 without assets. Murray J. concluded

that the restructuring was not unfairly prejudicial to the appellant's interests and therefore could not constitute oppression under s. 248 of the *OBCA*.

[21] Murray J. went on to deal with the trial judge's finding against the respondent Capaldi personally (assuming there was oppression), his evaluation of the appellant's reasonable expectations for the purposes of the oppression remedy, and his splitting of the case into two parts, the first about oppression and the second about accounting. For the purposes of this appeal, it is not necessary to deal with these issues.

[22] In the end, Murray J. agreed that the entire action, including the breach of contract claim should be dismissed.

[23] After the Divisional Court issued its decision, the appellant moved to vary the judgment. The appellant sought an order that the breach of contract issue be referred to this court as being beyond the monetary jurisdiction of the Divisional Court or alternatively, that the contract issue be referred back to the trial court for adjudication. The Divisional Court issued supplementary reasons, finding that it did have jurisdiction to deal with the contract issue as part of the appeal of the oppression order. It declined, however, to make any further order in response to this motion.

ANALYSIS

[24] The appellant raises two issues in this court. The first is the oppression issue. The appellant argues that the Divisional Court erred in reversing the trial judge's finding of

oppression. The second is the breach of contract issue. The appellant says that the Divisional Court had no jurisdiction to dismiss its breach of contract claim, and further, that it erred in dismissing that claim since it has never been adjudicated. The Divisional Court should at the least have referred the issue back to the trial court. I will deal with each of these issues in turn.

THE OPPRESSION ISSUE

[25] The respondents concede that the majority in the Divisional Court was in error in finding that no financing was ever obtained from the Bank of Montreal and in basing its decision on that. However, I agree with Murray J. that the trial judge erred in interpreting the condition in the exclusive listing agreement that had to be met before the appellant was owed fifty percent of the commissions. To reiterate, that condition required that "the necessary pre-sales have been achieved to satisfy the condition in the Project Financing commitment". This condition in the exclusive listing agreement required a formal project financing commitment to be in place. The trial judge found that formal project financing had not been obtained at the relevant time. He could not find that the condition was met without this. He did so by finding the essence of the condition to be Portofino 1's decision that the project was going ahead. That interpretation of the exclusive listing agreement constitutes an error of law.

[26] I agree therefore that the trial judge was in error in concluding that the appellant was a creditor and therefore entitled to be a complainant under s. 248 of the *OBCA*.

[27] More importantly, I agree with Murray J. that regardless of whether the appellant can properly be found a complainant entitled to seek relief under s. 248, the corporate restructuring that took place could not constitute oppression because of the indemnification of Portofino 1 provided to the appellant for any amounts owed to it.

[28] I am significantly fortified in this conclusion by the exchanges in this court between counsel and the bench. It is true that the written indemnification given to the appellant in 2006 by the Limited Partnership arguably fell short of providing the appellant with assurance that either the Limited Partnership or Portofino 2 were legally bound to indemnify Portofino 1 for its obligations to the appellant under the exclusive listing agreement. For example, the written indemnification is unclear whether it constitutes a contract between the Limited Partnership and the appellant, or whether it is simply a gratuitous promise to the appellant. Nor is it clear that the proposed indemnification covers all the obligations of Portofino 1 arising under the exclusive listing agreement.

[29] However, any lack of clarity was dispelled by the admissions of respondents' counsel in this court. They could not have been clearer. Counsel agreed that all three entities involved in the corporate restructuring – Portofino 1, Portofino 2 and the Limited Partnership – are bound by the exclusive listing agreement.

[30] The consequence of these admissions is clear for the appellant's claim of oppression due to the corporate restructuring. The appellant can enforce any claim it

properly has under the exclusive listing agreement against the same assets after the restructuring as before. It was not left by the restructuring to look only to an empty shell. In these circumstances, its oppression claim cannot succeed.

THE BREACH OF CONTRACT ISSUE

[31] In this court, the appellant argues that the Divisional Court erred in dismissing its claim for breach of the exclusive listing agreement because the amount sought in that claim exceeded that court's monetary jurisdiction. Secondly, the appellant says that its breach of contract claim has never been adjudicated and, at the very least, the Divisional Court should have referred the issue back for trial.

[32] The respondents answer by saying that the appellant did not pursue its contract claim at trial and should not be permitted to do so now. In any event, they say there has been no breach of the exclusive listing agreement.

[33] There is no doubt that the trial and the proceedings in the Divisional Court both focused on the appellant's oppression claim. The proper interpretation of the exclusive listing agreement was raised, but only as relevant to whether the appellant was a creditor of Portofino 1 and therefore a proper claimant under s. 248 of the *OBCA*. The appellant took this tack at trial in order to seek equitable relief under s. 248 that went beyond any damages that might be available for breach of contract. As well, as its counsel told us, this was in part because, at that stage, the uncertainty of the indemnification left grave

doubts that any contract damages award could be collected, since Portofino I was an empty shell.

[34] Nonetheless, it is clear that at every stage of this litigation the appellant has raised its breach of contract claim – in its statement of claim, in the Divisional Court, and in its notice of appeal to this court. It is equally clear that throughout, the respondents have treated this as a contract case to be argued on its merits, and have submitted that there has been no breach of the exclusive listing agreement. In fact, a ground of appeal in their notice of appeal to the Divisional Court was that the trial judge failed to determine if a breach of contract had occurred. Moreover, the appellant agrees with the respondents that the trial judge did not adjudicate the breach of contract claim. While the trial judge recognized that this was not put forward as a contract case, in the sense that the appellant sought a remedy that extended beyond contract, I agree with the parties that he did not decide the contract claim. Nor, however, did he find that the appellant had abandoned it.

[35] In these circumstances, particularly when supplemented by the clarification of the extent of the indemnification given by the respondents in this court, I do not think the appellant can fairly be said to have at any stage relinquished its breach of contract claim.

[36] The Divisional Court found it had jurisdiction to deal with that claim. I agree. Because of s. 255 of the *OBCA*, the respondents' appeal of the oppression finding was to the Divisional Court. That obviously encompassed the appeal from the resulting compensation order, although the amount of that order exceeded the $25,000 monetary

limit for the court found in s. 19(1.1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The breach of contract claim was factually intertwined with the oppression claim, but even it were viewed discretely, the monetary limit of the Divisional Court would not be triggered, since the trial judge made no order dismissing that claim. Moreover, since the oppression claim and the contract claim were intertwined, to send the appeal of one to the Divisional Court and the appeal of the other to this court would be impractical and unwarranted.

[37] In my view, while the Divisional Court had the jurisdiction to deal with the breach of contract claim, it erred in these circumstances in dismissing it. The claim was not adjudicated by the trial judge. He did not address the findings of fact or the legal arguments that might be relevant to adjudicating the contract claim. It is an inadequate second best to adapt to that purpose the findings relevant to the oppression claim.

[38] I conclude that the order that is just in the circumstances is to allow the appeal, but only to the extent of remitting the breach of contract issue for trial. Since the trial judge is now retired, that trial must be before a different judge, unfettered by any previous findings of fact. In light of the clarity that the respondents have now given to the indemnity, it may be appropriate that the Limited Partnership be joined with Portofino 1 and Portofino 2 as defendants, but that will be for the new trial judge to determine, if asked.

[39] In summary, the appeal is allowed to this extent, but is otherwise dismissed. In light of this disposition, the court will entertain written submissions for costs of the appeal, for the proceedings in the Divisional Court and for the trial. Submissions are not to exceed ten pages, and must be filed within 30 days of the release of these reasons.

RELEASED: DEC 14 2011

M. Rouleau J.A.

I agree Doherty J.A.

I agree P.J. Fedak J.A.

TAB “M”

127

180

COURT OF APPEAL FOR ONTARIO

CITATION: Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc., 2012 ONCA 160
DATE: 20120315
DOCKET: C53256

Doherty, Goudge and Epstein JJ.A.

BETWEEN

Remo Valente Real Estate (1990) Limited

Plaintiff (Appellant)

and

Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante J. Capaldi

Defendants (Respondents)

Gino Morga and Michelle D. Reynolds, for the appellant

William V. Sasso and Jacqueline A. Horvat, for the respondents

Heard: October 24, 2011

On appeal from the order of the Divisional Court (Hambly, Murray and Ray J.J.) dated February 24, 2010, with reasons by Hambly and Ray J.J. reported at 2010 ONSC 280, 68 B.L.R. (4th) 66.

ENDORSEMENT

[1] On December 14, 2011, this court dismissed the appellant's appeal from the Divisional Court, save for the issue of breach of contract, which was ordered to be remitted for trial.

[2] In the order appealed from, the Divisional Court set aside the security that had been ordered by the trial judge.

[3] Pending appeal to this court Doherty J.A. required that this security remain in place pending the outcome of the appeal.

[4] This court has now received written submissions from the parties regarding whether, in light of this court's decision, that security should remain in place pending the outcome of the trial of the contract issue.

[5] In our view, that is an issue properly to be decided by the trial court in which the breach of contract issue will be heard. We would therefore not alter our decision.

[6] Nonetheless, in our view it is in the interest of justice, assuming the security has remained in place following the decision of this court, that it remain in place for a further 60 days to permit the appellant to move for security in the trial court, if so advised.

Doherty JA

Rosenberg JA

Epstein JA

Court File #: 05-CV-5864CM

REMO VALENTE REAL ESTATE (1990) LIMITED v. PORTOFINO RIVERSIDE TOWER INC., ET AL

SUPERIOR COURT OF JUSTICE

Proceedings commenced at Windsor

MOVING PARTY'S MOTION RECORD

GINO MORGA, Q.C.
Barrister and Solicitor
104-2485 Ouellette Avenue
WINDSOR, Ontario N8X 1L5
Tel (519) 561-7413
Fax(519) 971-0577
Solicitor for the Plaintiff
LSUC #13977S

997887

182

TAB “N”

183

CITATION: Valente v. Portofino, 2012 ONSC 2721
COURT FILE NO.: 05-CV-5864CM
DATE: 20120504

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Remo Valente Real Estate (1990) Limited Plaintiff	Gino Morga, for the Plaintiff
– and –	
Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc. Portofino Corporation and Dante J. Capaldi Defendants	Werner H. Keller, for the Defendants
	HEARD: May 3, 2012

REASONS FOR JUDGMENT

JOSEPH G. QUINN:

[1] Plaintiff brings this motion for the following relief:

a) A trial date;

b) An order amending the title of proceedings and the pleadings to add Capaldi General Partner Corporation and Portofino (2005) Limited Partnership as defendants;

c) An order continuing the past security order, namely a $2,000,000 letter of credit, a third mortgage and that the Miller Canfield trust account funds related to this matter be maintained.

d) Directions with regard to the trial.

[2] The parties have agreed that the trial will start January 7, 2013. The trial estimate is five to seven days. The trial date is accordingly fixed for January 7, 2013.

[3] The parties have also agreed to the amendment requested. An order will go for the amendment requested in the Notice of Motion.

[4] The parties have also agreed to a trial management meeting. I have fixed November 16, 2012 at 10:00 a.m. for a trial management meeting. This meeting is designed to shorten and streamline the trial by factual agreements and defining issues.

[5] The issue of security was contested. Security, as a general rule, is not ordered in contract actions. The exception to this rule is where the court is persuaded that there is a real risk that the defendant will dispose of his assets in a manner not consistent with normal business practice.

[6] The defendant Dante J. Capaldi transferred the assets of Portofino Riverside Tower Inc. to other corporations. The trial judge, after listening to the evidence of Dante J. Capaldi, concluded that:

> *Capaldi did not make out a clear business reason for transferring out and locking up the legal title to Portofino I in a revocable trust while transferring the equitable title to a limited partnership controlled by Capaldi other than that suggested by the plaintiffs – to avoid the commission agreement.*

[7] The appellate courts set aside the trial judgment but not on the basis of this finding. Justice Brockenshire's finding is at the very least persuasive evidence that there is a risk that the defendant Dante J. Capaldi may dispose of his assets to avoid the possible consequences of this litigation.

[8] I find, therefore, that the plaintiff has demonstrated the need for a security order. The courts, to date, in this matter to achieve security, have ordered a third mortgage, indemnity agreements, funds to be held in trust and a letter of credit. In my judgment the only security that is required is a letter of credit. The only issue with the letter of credit is the quantum.

[9] The trial judge set the letter of credit security at $2,000,000. There are in total 120 condominiums. Plaintiff, I understand, has sold 50 condominiums. The ancillary commissions claimed may not succeed as contract damages. There may be a prejudgment interest claim. The trial judge unfortunately did not do any calculations.

[10] Respondent's record, Tab A, contains the only helpful accounting on this project. In general terms it would appear plaintiff sold $14,411,956 worth of condominiums and extras, and earned approximately $640,000 in commissions. There are roughly $29,000,000 worth of condominiums either sold by others or left to be sold. These sales would attract commissions of roughly twice what plaintiff has already sold or $1,000,000. There would also be a prejudgment interest claim on any amount awarded. It is also unlikely that plaintiff will succeed on commissions for all of the units.

[11] In conclusion, based on the information available on this motion, I would order security by way of the Bank of Montreal letter of credit in the amount of $2,000,000. Plaintiff should continue to bear the cost of this security. The trial judge can award this cost to plaintiff or defendant. I would assume that the terms of the letter of credit have been resolved by now.

[12] Costs of today fixed at $2,500 and reserved to the trial judge.

Joseph G. Quinn
Justice

Released: May 4, 2012

186

CITATION: Valente v. Portofino, 2012 ONSC 2721

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Remo Valente Real Estate (1990) Limited

Plaintiff

– and –

Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc, Portofino Corporation and Dante J. Capaldi

Defendants

REASONS FOR JUDGMENT

Joseph G. Quinn
Justice

Released: May 4, 2012

TAB "O"

CALCULATION OF COSTS PAID AND OWING TO DATE
BY REMO VALENTE REAL ESTATE (1990) LIMITED
BMO LETTER OF CREDIT

Re: Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc., Westview Park Gardens (2004) Inc., Portofino Corporation and Dante J. Capaldi
Ontario Superior Court of Justice Court File No. 05-CV-5864CM
Court of Appeal for Ontario Court File No. C53256

Re: Payment of costs of BMO Irrevocable Standby Letter of Credit No.: BMTO19410OS
Principal Secured: $2,000,000 | Costs of Letter of Credit $20,000 per year $54.80 per day by Valente pursuant to Order of Justice Doherty dated October 28, 2010 (C53256) and further Order of Justice Quinn dated May 4, 2012 (05-CV-5864CM)

RECEIVED:

Date	**Calculation of amount received for period**	**Received**
April 7, 2011	February 24, 2010 (Divisional Court's reasons) to May 8, 2011 (less $500 credit for costs of motion)	$24,000.40
December 20, 2012	May 9, 2011 to May 8, 2012	$20,000.00
	Total Received to May 8, 2012	**$44,000.40**

CALCULATION OF AMOUNT OWING:

Date	**Calculation of amount owing for period**	**Owing**
December 6, 2013	May 9, 2012 to May 8, 2013 (bond premium)	$20,000.00
December 6, 2013	May 9, 2013 to date (May 9, 2013 to December 6, 2013 = 211 days) at $54.80 per day	$11,562.80
	Total Owing as at December 6, 2013	**$31,562.80**

#1143865

TAB “P”

RE: Portofino Corporation
Alissa Mitchell to: Gino Morga 12/04/2013 01:28 PM
Cc: scherniak, Sherry Kettle, William Sasso

From: Alissa Mitchell/mtca
To: Gino Morga <gmorga@morgalaw.com>
Cc: scherniak@bdo.ca, Sherry Kettle/mtca@MTDOM1, William Sasso <wvs@strosbergco.com>

Thank you for your message.

I have copied Mr. Sasso so that he might confirm receipt of any amounts on account of the L/C. Kindly provide evidence of payments made to date and the Receiver will provide an amended amount for payment to account for any payments by the plaintiff. Regardless of the Receiver's intention to seek advice and direction of the Court, the plaintiff remains liable for payment of these amounts. The 2 issues are mutually exclusive. Kindly remit whatever amounts you hold and believe are owing and the Receiver will reconcile any balance due once it "receives the whole story".

As for discharging the mortgage, I confess I don't follow your logic. The Receiver is not concerned by the fact that the LC is not registered against title. As an aside, it is registered against title as it forms part of the obligations of the Company secured by the BMO mortgage. The Receiver's concern lies with the fact that the Company is now insolvent and the subject of receivership proceedings. Maintaining the LC purports to re-order priorities without any justification for same at law as no longer is there an issue of dissipation of assets by Portofino's principals.

You have the Receiver's position. We were hoping your client would abide by its court-ordered obligations voluntarily. It appears not and the Receiver will therefore include in its relief an order discharging the mortgage from title and an order for payment of the costs of the LC.

Please advise whether or not you are available to argue this motion next Friday or due to scheduling conflicts you will seek a short adjournment.

Regards,

Alissa Mitchell
Partner
Miller Thomson LLP
One London Place
255 Queens Avenue, Suite 2010
London, Ontario N6A 5R8
Direct Line: 519.931.3510
Fax: 519.858.8511
Email: amitchell@millerthomson.com
www.millerthomson.com

Gino Morga Ms Mitchell, It would appear,based on our teleph... 12/04/2013 12:54:25 PM

From: Gino Morga <gmorga@morgalaw.com>
To: Alissa Mitchell <amitchell@millerthomson.com>
Cc: Peter Valente <pvalente@valentecorp.com>, Remo Valente <remov@valenterealestate.com>
Date: 12/04/2013 12:54 PM
Subject: RE: Portofino Corporation

Ms Mitchell,

It would appear,based on our telephone conversation on Nov 20th and your subsequent e-mails,that you are not getting the whole story.

My client has made at least two payments of $20,000 each as directed by Dr Capaldi,one to Portofino and one to the Strosberg law firm.I will have to go through my records to make sure there were no other payments.
I have an additional $20,000 in my trust account and I so advised the court when the Receivership application was before the court.Mr Sasso claimed it pursuant to the previous direction signed by Dr Capaldi but the court directed that I pay it to BMO.
I was,of course,prepared to do that until you advised me in our telephone conversation of Nov 20th that the Receiver might be questioning the validity and priority of the L/C but you did not have all of the material as of yet to formulate your position.
I realize that our conversation was fairly lengthy but that was what I took from that conversation.We also discussed other issues on a without prejudice basis.
You subsequently sent me an e-mail (not part of this thread) which suggested dates to "seek direction" from the court concerning the L/C.I took that to mean that you would be challenging my client's right to be paid any judgment from the L/C .
Even your e-mail of Dec 3 still leaves me in some doubt as to your position.

Accordingly,I propose to also seek advice and direction from the court on the discharge of the "Valente Mortgage".
You had raised concerns about the L/C's validity in creating priorities with respect to the other Stakesholders as it is an unregistered document.If that continues to be a source of concern,then the court should be able to look at what is registered.
There is,respectfully,no prejudice to the Receiver's position,or frankly,any of the other Stakesholders' positions,at this time,in leaving everything as is pending receipt of the Court's "advice and direction" and ,on the contrary,considerable prejudice if my client's mortgage is discharged and then the L/C is attacked in any way.

It was clear throughout,in my view,that the Court,including the Court of Appeal,intended the L/C to stand as independent security and a payment mechanism for any judgment which my client might be awarded and no issue was raised as to that purpose before it was raised by the Receiver.Until that is confirmed,I cannot,I submit,ask my client to discharge its mortgage.

I am,of course,happy to further discuss this issue with you at your convenience.
Regards,
Gino Morga

From: Alissa Mitchell [mailto:amitchell@millerthomson.com]
Sent: Tuesday, December 03, 2013 6:44 PM
To: Gino Morga
Cc: scherniak@bdo.ca; dflett@bdo.ca; Sherry Kettle
Subject: RE: Portofino Corporation

Mr. Morga,

WIth respect, we disagree. The Reasons for Judgment of Justice Quinn require that (i) the L/C to be maintained by the defendants at the cost of the plaintiff; and (ii) the plaintiff discharge its mortgage security.

The Defendant, Portofino Corporation, has complied with its obligations under this order and has maintained the L/C. Conversely, the plaintiff has not complied with its obligations under this court order, namely, satisfying the costs of the L/C and discharging its mortgage. The plaintiff is, therefore, in breach of the Court's order. That order was not appealed and remains in full force and effect.

While the Receiver is seeking only advice and direction with respect to maintaining the L/C. The Receiver is not seeking advice and direction with respect to any other aspect of the order.

The Receiver requires that the plaintiff comply its Court-ordered obligations insofar as those obligations affect the Property of Portofino and the interests of the stakeholders of Portofino. Accordingly, the Receiver reiterates its request that:

1. the plaintiff discharge its mortgage and to this end kindly have the application to discharge charge/mortgage previously provided executed and returned;

2. the plaintiff reimburse Portofino the costs paid by Portofino to maintain the L/C for which the plaintiff is responsible. Attached is documentation to support a total cost claim of $86,202.50 comprised of out of pocket costs incurred to maintain the L/C since October 2010 (date of decision of Justice Doherty first imposing this obligation on the plaintiff) to present together with simple interest thereon calculated at the rate of 5% per annum.

Kindly ensure that these issues are addressed immediately. The Receiver intends to report on these issues in its first report to the Court.

Thank you in advance for your anticipated cooperation.

Regards,

Alissa Mitchell
Partner
Miller Thomson LLP
One London Place
255 Queens Avenue, Suite 2010
London, Ontario N6A 5R8
Direct Line: 519.931.3510
Fax: 519.858.8511
Email: amitchell@millerthomson.com
www.millerthomson.com

From: Gino Morga <gmorga@morgalaw.com>
To: Alissa Mitchell <amitchell@millerthomson.com>
Cc: Peter Valente <pvalente@valentecorp.com>, Remo Valente <remov@valenterealestate.com>
Date: 12/02/2013 11:01 AM
Subject: RE: Portofino Corporation

Good morning,
In light of your previous e-mail indicating your intention to seek directions,I think all of this should be deferred to that time.
Regards,
Gino Morga

From: Alissa Mitchell [mailto:amitchell@millerthomson.com]
Sent: Friday, November 29, 2013 3:56 PM
To: Gino Morga
Cc: scherniak@bdo.ca
Subject: Portofino Corporation

Mr. Morga,

Further to paragraph 8 of the Reasons for Judgment of Justice Quinn dated May 3, 2012, wherein it is stated "In my judgment, the only security that is required is a letter of credit", we append an Application to Register Discharge of Charge in favour of Remo Valente Real Estate (1990) Limited. Kindly have your client execute and return in order that we may discharge the mortgage currently registered against title to the condominium units.

We also note that pursuant to paragraph 11 of the Reasons for Judgment, the cost of the letter of credit is to be paid by the plaintiff. We are endeavouring to obtain a statement of all costs paid to date by Portofino Corporation and will forward same to you for reimbursement by your client.

Many thanks for your anticipated cooperation with respect to these matters.

Alissa Mitchell
Partner
Miller Thomson LLP
One London Place
255 Queens Avenue, Suite 2010
London, Ontario N6A 5R8
Direct Line: 519.931.3510
Fax: 519.858.8511
Email: amitchell@millerthomson.com

Properties

PIN	01872 - 0001 LT
Description	UNIT 1, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0002 LT
Description	UNIT 2, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0003 LT
Description	UNIT 3, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0004 LT
Description	UNIT 4, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0005 LT
Description	UNIT 5, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0006 LT
Description	UNIT 6, LEVEL 1, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0052 LT
Description	UNIT 3, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0053 LT
Description	UNIT 4, LEVEL 2, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0058 LT
Description	UNIT 4, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Properties

PIN	01872 - 0063 LT
Description	UNIT 9, LEVEL 3, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0065 LT
Description	UNIT 1, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0066 LT
Description	UNIT 2, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0072 LT
Description	UNIT 8, LEVEL 4, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0082 LT
Description	UNIT 8, LEVEL 5, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0085 LT
Description	UNIT 1, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0087 LT
Description	UNIT 3, LEVEL 6, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0095 LT
Description	UNIT 1, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0098 LT
Description	UNIT 4, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Properties

PIN	01872 - 0102 LT
Description	UNIT 8, LEVEL 7, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0107 LT
Description	UNIT 3, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0108 LT
Description	UNIT 4, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0109 LT
Description	UNIT 5, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0110 LT
Description	UNIT 6, LEVEL 8, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0115 LT
Description	UNIT 1, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0117 LT
Description	UNIT 3, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0118 LT
Description	UNIT 4, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0120 LT
Description	UNIT 6, LEVEL 9, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Properties

PIN	01872 - 0123 LT
Description	UNIT 1, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0124 LT
Description	UNIT 2, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0130 LT
Description	UNIT 8, LEVEL 10, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0131 LT
Description	UNIT 1, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0132 LT
Description	UNIT 2, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0134 LT
Description	UNIT 4, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0135 LT
Description	UNIT 5, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0138 LT
Description	UNIT 8, LEVEL 11, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0139 LT
Description	UNIT 1, LEVEL 12, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Properties

PIN	01872 - 0140 LT
Description	UNIT 2, LEVEL 12, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0145 LT
Description	UNIT 1, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0146 LT
Description	UNIT 2, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0147 LT
Description	UNIT 3, LEVEL 13, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0151 LT
Description	UNIT 1, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0152 LT
Description	UNIT 2, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0153 LT
Description	UNIT 3, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0154 LT
Description	UNIT 4, LEVEL 14, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0157 LT
Description	UNIT 1, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Properties

PIN	01872 - 0158 LT
Description	UNIT 2, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0159 LT
Description	UNIT 3, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0161 LT
Description	UNIT 5, LEVEL 15, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0162 LT
Description	UNIT 1, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0163 LT
Description	UNIT 2, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0164 LT
Description	UNIT 3, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR
PIN	01872 - 0166 LT
Description	UNIT 5, LEVEL 16, ESSEX STANDARD CONDOMINIUM PLAN NO. 122 AND ITS APPURTENANT INTEREST. THE DESCRIPTION OF THE CONDOMINIUM PROPERTY IS : LT 1, SOUTH SIDE OF SANDWICH STREET, PL 392 & PT LOT 73 CONCESSION 1 WINDSOR; PT 1 PL 12R17829; S/T EASE AS SET OUT IN SCHEDULE 'A' OF DECLARATION CE278123
Address	WINDSOR

Document to be Discharged

Registration No.	*Date*	*Type of Instrument*
CE297353	2007 10 12	Charge/Mortgage

Discharging Party(s)

This discharge complies with the Planning Act. This discharge discharges the charge.

Name	REMO VALENTE REAL ESTATE (1990) LIMITED Acting as a company
Address for Service	2985 Dougall Avenue, Windsor, ON N9E 1S1

I, Michael Valente, President, have the authority to bind the corporation.

This document is not authorized under Power of Attorney by this party.

The party giving this discharge is the original chargee and is the party entitled to give an effective discharge

File Number

Discharging Party Client File Number : 082873.0012

TAB “Q”

BDO Canada Limited Court Appointed Receiver of
Portofino Corporation
Statement of Receipts and Disbursements
October 29, 2013 - November 28, 2013

Receipts:		
Unit rental Income	73,683.00	
Parking space rental	645.00	
		$74,328.00
Disbursements:		
ECC #122 - common fees for the month of November	15,857.00	
Sutts, Strosberg - legal fees	5,000.00	
HST on disbursements	650.00	
Receiver General - receivership filing fee	70.00	
		$21,577.00
Excess receipts over disbursements		$52,751.00
Represented by:		
Balance in Receiver's account as at November 28, 2013		$52,751.00

TAB "R"

Court File No: CV-13-19866

ONTARIO SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE RECEIVERSHIP OF PORTOFINO CORPORATION

AFFIDAVIT OF STEPHEN N. CHERNIAK

I, **Stephen N. Cherniak**, of the City of London, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a Senior Vice-President of BDO Canada Limited, the Receiver of Portofino Corporation, ("Portofino") and, as such, I have knowledge of the matters hereinafter deposed to.
2. By Order dated October 29, 2013 BDO Canada Limited was appointed as Receiver of Portofino (the "Receiver").
3. In preparation for the Receivership and since October 29, 2013 the Receiver has been engaged in the following:

- Review materials /Draft Order from the Bank of Montreal in respect of the Portofino file;
- Attendance at Court on the date the Order was initially sought, however the matter was adjourned and required a subsequent attendance at Court for the approval of the Receivership Order;
- Meet with representatives of Portofino in order to review the assets of Portofino and identify issues;
- Establish a bank account and protocols and procedures for the Receiver to manage the operations of Portofino;
- Review the appraisal of the unsold condominium units and commission second appraisal;
- Review the rent roll and status of the leased units;
- Review of the status of Portofino litigation with Remo Valente Real Estate (1990) Limited and Bank of Montreal letter of credit with the Receiver's legal counsel;

- Review of the status of common area fees payable to Essex Standard Condominium Corporation No. 122 ("ESCC 122");
- Review of the status of outstanding property taxes and various phone calls and correspondence with the City of Windsor re same;
- Prepare and issue notice of Receiver's appointment, pursuant to Sections 245(1) and (246(1) of The Bankruptcy and Insolvency Act;
- Begin drafting the Receivers' First Report to the Court to obtain approval of the Receiver's proposed sale process for the unsold units;
- Various phone calls and correspondence with the stakeholders and their respective counsel.

4. In the course of performing the duties pursuant to the Order and as set out above at paragraph 2, the Receiver's staff expended 72.15 hours for the period of July 19, 2013 through November 28, 2013. Attached hereto and marked as Exhibit "A" to this my Affidavit is the account of the Receiver together with a summary sheet.
5. To the best of my knowledge, the rates charged by the Receiver throughout the course of these proceedings are comparable to the rates charged by other insolvency practitioners in the Ontario mid-market for providing similar insolvency and restructuring services.
6. The hourly billing rates outlined in Exhibit "A" to this my Affidavit are not more than the normal hourly rates charged by BDO Canada Limited for services rendered in relation to similar proceedings.
7. Although the assets of Portofino are located in Windsor and the Receiver's primary office is located in London the Receiver has not charged for travel time or travel expenses.
8. I verily believe that the fees and disbursements incurred by the Receiver are fair and reasonable in the circumstances.

9. This Affidavit is sworn in support of the motion for approval of the Receiver's fees and disbursements and for no other or improper purposes.

SWORN BEFORE ME at the City of London in the Province of Ontario on the 5th day of December, 2013

STEPHEN N. CHERNIAK, CPA•CA•CIRP

Commissioner for Taking Affidavits

Karen Elizabeth Liberty, a Commissioner, etc.,
Province of Ontario, for BDO Canada Limited,
Trustee in Bankruptcy.
Expires December 8, 2014.

Court File No: CV-13-19866

Attached is Exhibit A
To the Affidavit of Stephen N. Cherniak
Sworn the 5 th day of December, 2013.

K Liberty
A Commissioner, Etc

Karen Elizabeth Liberty, a Commissioner, etc.,
Province of Ontario, for BDO Canada Limited,
Trustee in Bankruptcy.
Expires December 8, 2014.

Court File No: CV-13-19866

Summary of Receiver's Accounts for the period July 19, 2013 through November 28, 2013

Invoice Date	Hours Expended	Invoice Total
December 3, 2013	72.15	$28,266.32
	72.15	$28,266.32

BDO

Invoice # 03122013
Portofino Corporation
HST Reg # 101518124RT0001

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

December 3, 2013

Re: Portofino Corporation

For professional services rendered for the period July 19, 2013 through November 28, 2013 as per the attached detail:

Our Fee	$25,000.00
Disbursements (courier)	$14.45
Sub Total	$25,014.45
HST	$3,251.87
Total	$28,266.32

REMITTANCE ADVICE

Cheque Payments to:
103-252 Pall Mall Street
London, ON N6A 5P6

Invoice # 03122013

Amount $28,266.32

Portofino Corporation

December 3, 2013

For professional services rendered

Staff	Date	Time	Narrative
Cherniak, S	19-Jul-13	0.5	Call from Greg Fedoryn. Potential receivership
Cherniak, S	12-Aug-13	0.7	Call with Greg Fedoryn. Prepare conflict search. Call to Miller Thomson.
Cherniak, S	14-Aug-13	0.5	Conversation with Windsor office re potential conflict.
Cherniak, S	22-Aug-13	0.2	Review and execute consent.
Cherniak, S	10-Sep-13	0.5	Review of draft order. Call from Miller Thomson.
Cherniak, S	11-Sep-13	0.2	Emails re potential changes to Order.
Cherniak, S	13-Sep-13	0.2	Email re court date. Respond.
Cherniak, S	26-Sep-13	0.5	Review of email correspondence from David Taub.
Cherniak, S	27-Sep-13	0.1	Email from BMO.
Cherniak, S	30-Sep-13	1.2	Various emails and correspondence re court attendance.
Cherniak, S	1-Oct-13	2.3	Attendance at Court re adjournment. Discussion of file with David Taub, counsel for BMO and Miller Thomson.
Cherniak, S	2-Oct-13	2.5	Begin review of BMO motion materials.
Cherniak, S	3-Oct-13	0.3	Call from Greg Fedoryn.
Cherniak, S	4-Oct-13	1.5	Review of BMO materials.
Cherniak, S	7-Oct-13	1.5	Finish review BMO initial materials. Call from Greg Fedoryn re LC.
Cherniak, S	21-Oct-13	0.3	Review of emails re court attendance.
Cherniak, S	22-Oct-13	0.1	Email from David Taub.
Cherniak, S	23-Oct-13	0.2	Call from Miller Thomson re condo corp.
Cherniak, S	25-Oct-13	0.5	Review of Miller Thomson firewall memo. Send email to Miller Thomson.
Cherniak, S	29-Oct-13	3	Attend court in Windsor. Calls to Miller Thomson. Meet with parties after court. Arrange staffing for Thursday meeting.
Cherniak, S	30-Oct-13	1	Calls with Greg Fedoryn. Call to branch in Windsor. Call from Vince Grillo, City of Windsor. Email from Dr. Capaldi. Review of Capaldi claims.
Flett, D	30-Oct-13	1	review of BMO affidavit and other background materials
Finnegan, M	30-Oct-13	0.2	email to BMO re bank account opening
Flett, D	31-Oct-13	3.7	Meeting with Dr. Capaldi at Portofino - review background, unit status, rental arrangements; condo corp and other issues; tour of finished and unfinished units
Prieur, C	31-Oct-13	3.7	Meeting at location with Dr. Capaldi
Cherniak, S	31-Oct-13	3.7	Meet with Dante Capaldi and tour premises. Email from Vince Grillo at City of Windsor. Emails to/from Miller Thomson/Taub re Telecon.
Prieur, C	1-Nov-13	1	Meet with Dr. Capaldi to collect rent/information

Staff	Date	Time	Narrative
Cherniak, S	1-Nov-13	0.5	Call from Greg Fedoryn. Update on Capaldi meeting.
Cherniak, S	4-Nov-13	2	Emails from BMO re cheques. Conference call with BMO counsel and Miller Thomson re Valente lawsuit. Review of correspondence from Dr. Capaldi. Call to Metrix re appraisal. Review of Finlay appraisal.
Flett, D	4-Nov-13	0.4	Review documents on leases, floor plans provided by Dr. Capaldi
Finnegan, M	4-Nov-13	2	Prepare rent roll summary. copy appraisal report
Prieur, C	5-Nov-13	0.75	Meet with Dr. Capaldi to collect rent, email and call to S. Cherniak
Cherniak, S	5-Nov-13	1.6	Emails re Order. Emails to BMO re funds on deposit. Call from Greg Fedoryn re property taxes. Emails from Dr. Capaldi. Email to Metrix re appraisal. Email update on funds.
Cherniak, S	6-Nov-13	2.1	Email from BMO re bank account. Call from BMO re conflict issue. Review of correspondence. Call to/from Miller Thomson.
Cherniak, S	7-Nov-13	0.6	Emails from BMO. Call from Mel Muroff. Review of draft correspondence to Bill Sasso re Valente litigation.
Cherniak, S	8-Nov-13	0.6	Update on rent collection. Emails to/from BMO.
Prieur, C	8-Nov-13	1.3	Meet with Dr Capaldi re rent collection, update November rent schedule, phone call with Wilma Capaldi
Finnegan, M	11-Nov-13	1	Update rent collection summary and balance
Flett, D	11-Nov-13	0.4	review Muroff proposal and memo; review rental schedules provided by Dr. Capaldi
Cherniak, S	11-Nov-13	0.6	Review email from Muroff. Respond. Review email re rent roll.
Cherniak, S	12-Nov-13	0.2	Review of emails re appraisal.
Flett, D	12-Nov-13	0.3	Emails with Metrix and Dr. Capaldi on appraisals
Finnegan, M	12-Nov-13	0.5	Begin Receiver's 245 notice to creditors
Finnegan, M	13-Nov-13	0.8	Run PPSA. Edits to 245 Receiver notice
Flett, D	13-Nov-13	0.3	Call and email Metrix on appraisal and background
Cherniak, S	13-Nov-13	1.1	Work on 245 report. Email to BMO re Order.
Cherniak, S	14-Nov-13	0.5	Emails from counsel.
Cherniak, S	15-Nov-13	0.1	Email re court date.
Cherniak, S	18-Nov-13	0.2	Updates on court matters.
Flett, D	18-Nov-13	2.2	Review of BMO affidavit materials for background and commence Receiver's First Report
Flett, D	19-Nov-13	0.8	Continue with Receiver's First Report
Cherniak, S	19-Nov-13	1.3	Call from BMO. Email from BMO. Call from Valente Real Estate. Call to Miller Thomson. Letter from Morga. Email from BMO. Email from Lombard.
Cherniak, S	20-Nov-13	1	Strategize re court report. Begin review of Sasso response. Update from Miller Thomson on call with Sasso.
Flett, D	20-Nov-13	1.6	Review Receiver's report content and issues; Continue with Receiver's report
Flett, D	21-Nov-13	2.2	Review ECC 122 management agreement with Capaldi Holdings; Continue with Receiver's First Report
Cherniak, S	21-Nov-13	0.5	Emails from Capaldi re PMA. Call with Miller Thomson re lawsuit.

Staff	Date	Time	Narrative
Cherniak, S	22-Nov-13	1	Preparation for and attendance at conference call re Valente litigation
Flett, D	22-Nov-13	3.5	Review of insurance policy and continue with Receiver's First Report
Flett, D	25-Nov-13	1.3	Review emails and schedule on Common area charges and continue with Receiver First report
Finnegan, M	25-Nov-13	1	Package and mail 245 notice
Cherniak, S	25-Nov-13	0.6	Review of Order. Emails re ECC payment.
Cherniak, S	26-Nov-13	1	Emails from Miller Thomson with Morga re Valente ligation. Call from BMO. Email to Capaldi re LC payments. Update on rent arrears.
Finnegan, M	26-Nov-13	1	Set up bank account. Deposit November rent cheques
Flett, D	26-Nov-13	2.6	Review of price lists, rent roll and other appendices to court report; email to Dr. Capaldi regarding unsold unit status, vacancies etc; Review court report content and continue with preparation of Receiver's First report
Finnegan, M	27-Nov-13	0.5	Bill payment. Pay filing fee with OR
Cherniak, S	27-Nov-13	1.1	Emails to/from Capaldi re LC. Call to BMO re funds. Emails re ECC 122 payments and marketing plan.
		72.15	**Total Time**

Staff	Position	Rate	Time
Cherniak, S	Sr. Vice President	$450	38.1
Finnegan, M	Administrative	$175	7
Flett, D	Vice President	$325	20.25
Prieur, C	Estate Administrator	$200	6.8
			72.15

TAB “S”

Court File No. CV-13-29866

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

AFFIDAVIT OF SHERRY A. KETTLE

I, SHERRY A. KETTLE, of the City of London, in the Province of Ontario, MAKE OATH AND SAY:

1. I am an associate lawyer with the law firm of Miller Thomson LLP ("**MT**"), lawyers for BDO Canada Limited ("**BDO**"), in its capacity as Court-appointed Receiver (the "**Receiver**") of the property, assets and undertakings of Portofino Corporation ("**Portofino**") and, as such, have knowledge of the matters to which I hereinafter depose. Unless I indicate to the contrary, the facts herein are within my personal knowledge and are true. Where I have indicated that I have obtained facts from other sources, I believe those facts to be true.

2. I make this Affidavit in support of the Receiver's motion (the "**Motion**") for, among other things, having the fees and disbursements of MT, as legal counsel to the Receiver, approved.

3. Attached hereto to this my Affidavit and marked as **Exhibit "A"** is a copy of the invoice rendered by MT to BDO which reflect, *inter alia*, fees and disbursements of MT relating to the period September 9, 2013 through November 15, 2013 (the "**Period**"). I affirm that the invoice rendered by MT and appended hereto as Exhibit "A" (the "**MT Invoice**") accurately reflects the services provided by MT in connection with the Period and the fees and disbursements claimed by it. During the Period, the total fees billed were $7,346.00, the disbursements billed were $1,875.95, plus applicable taxes in the amount of $1,198.85. Attached hereto to this my Affidavit and marked as **Exhibit "B"** is a statement summarizing

MT's fees for the Period. Lawyers and staff at MT have collectively expended a total of 16.40 billable hours in connection with this matter during the Period as outlined in the summary of fees attached as Exhibit "B".

4. To the best of my knowledge, the rates charged by MT throughout these proceedings are comparable to the rates charged by other firms in the Southwestern Ontario market for the provision of similar services. No premiums have been charged on the invoices.

5. This Affidavit is sworn in connection with the Motion, namely, among other things, the approval of the fees and disbursements of MT, as legal counsel to the Receiver, and for no improper purpose.

SWORN before me at the City of London, in the County of Middlesex, this 6th day of December, 2013

A Commissioner for taking affidavits.

Catherine Joanne Levy, a Commissioner, etc., Province of Ontario, for Miller Thomson LLP, Barristers and Solicitors. Expires November 8, 2016.

Sherry A. Kettle

Attached are Exhibits "A" and "B" to the Affidavit of Sherry A. Kettle sworn the 6th day of December, 2013

A Commissioner, Etc.

Catherine Joanne Levy, a Commissioner, etc.,
Province of Ontario, for Miller Thomson LLP,
Barristers and Solicitors.
Expires November 8, 2016.

212

EXHIBIT "A"

Miller Thomson
lawyers | avocats

MILLER THOMSON LLP
MILLERTHOMSON.COM

ONE LONDON PLACE + 255 QUEENS AVENUE, SUITE 2010
LONDON, ON + N6A 5R8 + CANADA

T 519.931.3500
F 519.858.8511

ACCOUNT

November 29, 2013

Invoice Number 2538919

BDO Canada Limited
252 Pall Mall Street
Suite 103
London, ON N6A 5P6

Attention: Stephen N. Cherniak

TO PROFESSIONAL SERVICES RENDERED in connection with the following matter including:

Re: Portofino Corporation
Our File No. 082873.0012

Date	Initials	Description	Hours
09/09/2013	AM	Telephone conversation with David Taub re receivership application;	0.40
09/10/2013	AM	To receipt of initial instructions from client, consideration of matter and instructions to staff	0.20
09/11/2013	AM	Review draft receivership order; Electronic mail messages to David Taub;	0.30
09/13/2013	AM	Review and respond to electronic mail message from David Taub;	0.10
09/24/2013	AM	Telephone converstion	0.30
09/25/2013	AM	Telephone conversation with Audrey Loeb; Discussion with Tony Van Klink; Telephone conversation with David Taub;	0.20
09/26/2013	AM	Telephone conversation with David Taub; Review correspondence from David Taub re return of motion; Review correspondence from Sutts Strosberg;	0.20
09/27/2013	AM	Review and respond to electronic mail messages from David Taub; Review application materials;	0.60

Date	Initials	Description	Hours
09/30/2013	AM	Review and respond to various electronic mail messages regarding receivership application and appointment;	0.40
10/01/2013	AM	Telephone conversation with Steven Cherniak re various issues including Valente trial;	0.80
10/21/2013	AM	Review motion materials and in particular the claims of Valente Real Estate for breach of contract; Exchange of electronic mail messages with David Taub;	1.80
10/23/2013	AM	Telephone conversation with Joyce Harris; Telephone conversastion with Steve Cherniak;	0.40
10/25/2013	AM	Electronic mail message to Steve Cherniak;	0.20
10/29/2013	AM	Conference call with Steve Cherniak and David Taub re form of appointment order;	0.50
10/30/2013	AM	Review and respond to electronic mail message from David Taub;	0.20
10/31/2013	AM	Review and respond to electronic mail messages from David Taub;	0.10
11/04/2013	AM	Conference call with Steve Cherniak and David Taub; Consider issues re Valente litigation; Draft letter to Bill Sasso;	1.50
11/05/2013	AM	Review draft order; Letter to William Sasso re Valente litigation; Electronic mail message to Janet Ford re scheduling;	1.90
11/06/2013	AM	Review and revise draft letter to Bill Sasso; Telephone conversation with Steve Cherniak (x2); Review provisions of Condominium Act;	1.60
11/07/2013	AM	Review and revise letter to Steve Cherniak; Electronic mail message to David Taub and Steve Cherniak; Consider issue of priority of s.85 Condominium Lien and report to the Receiver on priority of lien;	1.00
11/07/2013	JL	Telephone conference with assistant; obtain and review parcel register;	0.20
11/07/2013	JL	Obtain various parcel registers;	0.80
11/08/2013	JL	Obtain parcel register;	0.20
11/12/2013	AM	Telephone conversation with Bill Sasso re Valente litigation;	1.10
11/13/2013	AM	Review various electronic mail messages from David Taub and Steve Cherniak; Conference call with Steve Cherniak and David Flett re various issues;	0.60

Date	Initials	Description	Hours
11/14/2013	AM	Attend to scheduling of motion to report to court; Exchange of electronic mail message with counsel re motion scheduling; Review draft order; Telephone conversation with Janet Ford; Exchange of electronic mail messages with Joyce Harris;	0.60
11/15/2013	AM	Electronic mail message to Janet Ford;	0.20

TOTAL HOURS		16.40
OUR FEE:		**$7,346.00**
TAXABLE DISBURSEMENTS		
Copywork	210.95	
Online Searches - Teranet	1,665.00	
TOTAL TAXABLE	1875.95	$1,875.95
TOTAL FEES AND DISBURSEMENTS:		**$9,221.95**
Harmonized Sales Tax (R119440766)		
On Fees		$954.98
On Disbursements		$243.87
TOTAL AMOUNT DUE:		**$10,420.80**

E.&O.E.

215

EXHIBIT "B"
Miller Thomson's Fees

	Year of Call	Rate 2013	Inv.#2538919 November 29, 2013	**Total Invoices**
Hours				
A. Mitchell			15.20	**15.20**
J. Lehmann - Clerk			1.20	**1.20**
			16.40	16.40
Total $				
A. Mitchell	1994	$475.00	$7,220.00	**$7,220.00**
J. Lehmann - Clerk		$105.00	$126.00	**$126.00**
			$7,346.00	$7,346.00
Summary				
Fees			$7,346.00	**$7,346.00**
Disbursements			$1,875.95	**$1,875.95**
HST			$1,198.85	**$1,198.85**
Total			$10,420.80	$10,420.80

BANK OF MONTREAL
Applicant

and

PORTOFINO CORPORATION
Respondent

Court File No. CV-13-29866

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

AFFIDAVIT OF SHERRY A. KETTLE

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Alissa K. Mitchell LSUC#: 35104E
Tel: 519.931.3510
Fax: 519.858.8511

Lawyers for BDO Canada Limited, Court-appointed Receiver of Portofino Corporation

BANK OF MONTREAL
Applicant

and

PORTOFINO CORPORATION
Respondent

Court File No: CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

MOTION RECORD
(RETURNABLE DECEMBER 13, 2013)

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Alissa K. Mitchell LSUC#: 35104E
Tel: 519.931.3510
Fax: 519.858.8511
Email: amitchell@millerthomson.com

Lawyers for BDO Canada Limited, Court-appointed Receiver of Portofino Corporation