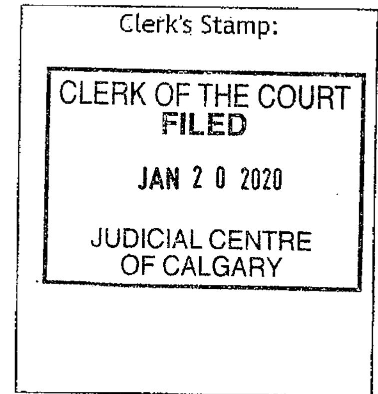


COURT FILE NUMBER	1501 - 11817
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	EASY LOAN CORPORATION AND MIKE TERRIGNO
RESPONDENTS	BASE MORTGAGE AND INVESTMENTS LTD. AND BASE FINANCE LTD., ARNOLD BREITKREUTZ, SUSAN BREITKREUTZ, SUSAN WAY AND GP ENERGY INC.
DOCUMENT	NINTH REPORT OF THE RECEIVER
	DATED JANUARY 17, 2020
	PREPARED BY BDO CANADA LIMITED

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	OSLER, HOSKIN & HARCOURT LLP SUITE 2500 TRANSCANADA TOWER 450 - 1st Street SW Calgary, Alberta T2P 5H1 Lawyers: Randal Van De Mosselaer Phone Number: 403.260.7060 Fax Number: 403.260.7024 Email Address: rvandemosselaer@osler.com

Table of Contents

EXHIBITS 3
INTRODUCTION 4
PURPOSE OF THE REPORT 5
DISCLAIMER 6
RECEIVER'S ACTIVITIES SINCE ITS LAST REPORT 7
STATEMENT OF RECEIPTS AND DISBURSEMENTS 7
ADVICE AND DIRECTION FOR THE CANCELLATION OF T5s AND VOIDING THE LOAN AGREEMENT OF BASE FINANCE WITH THE INVESTORS 7
SETTLEMENT WITH MIKE TERRIGNO AND RELEASE OF TRUST FUNDS 13
TERRIGNO'S ACTION AGAINST THE RECEIVER 15
BOOKS AND RECORDS OF THE COMPANY 23
STEPS FOR THE COMPLETION OF THE ADMINISTRATION OF THE RECEIVERSHIP 24
PROFESSIONAL FEES 25
RELIEF SOUGHT 26

EXHIBITS

1. Statement of Receipts and Disbursement for the period October 15, 2015 to November 30, 2019
2. Letter from Jill Medhurst re: application for cancellation of T5s, dated October 26, 2019
3. Mike Terrigno's personal investment history in Base Finance Ltd.
4. Email from the Receiver's legal counsel re: clarification, dated September 9, 2019
5. Email from Mr. Bill Janman requesting support in dealing with CRA, dated September 13, 2019
6. Summary of T5 Issue with CRA provided by the investors
7. Court cases supplied by the investors supporting their position
8. Memo to CRA re T5 reversal
9. Email from the Receiver's counsel regarding settlement details, dated May 8, 2019
10. Email from the Receiver's counsel regarding the settlement funds, dated August 12, 2019
11. Letter and bank draft from Mr. Mike Terrigno, dated August 19, 2019
12. Email from the Receiver's counsel regarding set-off cases, dated August 28, 2019
13. Email from the Receivers counsel regarding pursuit of costs for the settlement funds, dated August 30, 2019
14. Statement of Claim filed by Mr. Terrigno on February 12, 2019
15. Memorandum of the Judgement from the Court of Appeal of Alberta
16. Transcript from the Court of Appeal of Alberta Application
17. Security for cost calculation
18. Application of Mike Terrigno, dated March 25, 2019
19. Email from Mr. Mike Terrigno to the receiver regarding the withdrawal of matter from the March 25, 2019 application
20. Discharge Certificate
21. Summary of invoices for professional fees of the Receiver and its legal counsel

INTRODUCTION

1. On October 15th, 2015, pursuant to an Ex Parte Order (the "**Receivership Order**") issued by the Honourable Justice K. Yamauchi of the Court of Queen's Bench of Alberta (the "**Court**"), pursuant to section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2 and section 99(a) of *The Business Corporations Act*, R.S.A. 2000, c.B-9, BDO Canada Limited (hereinafter referred to as "**BDO**" or the "**Receiver**") was appointed Receiver of all current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated, of Base Mortgage & Investments Ltd. and Base Finance Ltd. ("**Base Mortgage**" and "**Base Finance**" respectively, or jointly the "**Debtors**" or the "**Companies**"), including (without limitation) certain specifically enumerated property (collectively, the "**Property**").

2. On November 5, 2015, the First Report of the Receiver ("**First Report**") was filed with the Court.

3. On November 6th, 2015, the Court granted an Order (the "**Amended Receivership Order**") amending the Receivership Order and making certain directions against Mr. Arnold Breitkreutz, Mrs. Susan Breitkreutz, Ms. Susan Way, Mr. Brian Fox, and all corporations controlled by any of them.

4. On January 19, 2016, the Second Report of the Receiver ("**Second Report**") was filed with the Court. On January 20, 2016, the Receiver filed the First Supplement to the Second Report.

5. On May 16, 2016, the Third Report of the Receiver ("**Third Report**") was filed with the Court. On July 29, 2016, the Supplementary Report to the Third Report was filed with the Court.

6. On April 11, 2017, the Fourth Report of the Receiver ("**Fourth Report**") was filed with the Court.

7. On May 5, 2017, the Fifth Report of the Receiver ("**Fifth Report**") was filed with the court.

8. On August 23, 2017, the Sixth Report of the Receiver ("**Sixth Report**") was filed with the Court.

9. On March 2, 2018, the Alberta Securities Commission ("**ASC**") released a decision (the "**ASC Decision**") on their investigations into various allegations against Arnold Breitkreutz, Base Finance Ltd., Base Mortgage and Investments Ltd., and Susan Way. The ASC Decision concluded that the named parties had contravened s.93 (b) of the *Securities Act* by engaging in prohibited acts relating to securities that they knew would perpetrate a fraud on investors, including (a) deceiving investors into thinking that they were investing in mortgages held by Base Finance rather than in a loan to an undisclosed entrepreneur involved in oil and gas developments in the US, and (b) operating a Ponzi scheme that recirculated investors' funds to pay purported returns to existing investors. Attached, as Exhibit D to the Supplemental Report to the Sixth Report, is a copy of the ASC Decision.

10. On March 14, 2018, the Supplemental Report to the Sixth Report of the Receiver ("**Supplemental Sixth**

Report") was filed with the Court.

11. On January 14, 2019, the Seventh Report of the Receiver ("**Seventh Report**") was filed with the Court.

12. On February 21, 2019, the ASC released a decision regarding sanctions against Base, Mr. Breitkreutz, Ms. Way, and (the "**ASC Sanction Decision**"). The table below summarizes the monetary sanctions against Mr. Breitkreutz and Ms. Way.

Name	Disgorgement	Administrative penalty	Costs	Total
Mr. Breitkreutz	$2,671,406	$1,000,000	$100,000	$3,771,406
Ms. Way	362,049	150,000	50,000	562,049
Total	$3,033,455	$1,150,000	$150,000	$4,333,455

In addition to the monetary sanctions, there are nonmonetary sanctions against the parties.

13. On March 11, 2019, the Eighth Report of the Receiver ("**Eighth Report**") was filed with the Court.

14. On March 28, 2019, the First Supplemental Report to the Receiver's Eighth Report ("**First Supplemental Eighth Report**") was filed with the Court.

15. On April 3, 2019, the Second Supplemental Report to the Receiver's Eighth Report ("**Second Supplemental Eighth Report**") was filed with the Court.

16. On November 30, 2019, the Ninth Report of the Receiver ("**Ninth Report**") was filed with the Court.

17. A copy of the Receivership Orders, the Receivers Reports and various other relevant documents can be accessed by the public on BDO's website at www.extranets.bdo.ca/base/.

PURPOSE OF THE REPORT

18. The purpose of the Receiver's Ninth Report is to provide this Honourable Court with the following information:

    a) The Receiver's activities since its last report;
    b) A Statement of Receipts and Disbursements for the period October 15, 2015, to January 15, 2020;
    c) A discussion with respect to Mike Terringo's action against the Receiver;
    d) Information related to the settlement agreement between Mike Terrigno and the Receiver and Mr. Terrigno's refusal to pay the costs agreed in that settlement agreement;
    e) Steps for the completion of the administration of the Receivership;

f) Information concerning the Books and Records of the Company; and,
g) The professional fees of the Receiver and its legal counsel since they were last approved.

19. The Receiver is seeking a Court Order:

a) Approving the Receiver's actions to date;
b) Providing the Receiver with advice and direction regarding the cancellation of Mr. Terrigno's 2013 T5, the cancellation of the T5s for all investors and a declaration that the loan documents are declared void
c) Approving the release of the settlement funds to the Receiver in accordance with the settlement agreement reached with Mr. Terrigno;
d) Striking the action commenced by Mr. Terrigno against the Receiver without the consent of the Receiver or leave of the Court, or, in the alternative, providing advice and directions with respect to same;
e) Approving the Receiver's proposal for the handling of the books and records of the Company;
f) Approving the Receiver and its legal counsel fees and charges to date and to completion; and
g) Discharge of the Receiver.

DISCLAIMER

20. The information contained in the Receiver's Ninth Report has been obtained from the records of the Company, publicly available information and/or based upon discussions with and representations made by the Company's management and other professional advisors retained in this matter. The information was not audited nor otherwise verified by the Receiver as to its accuracy or completeness, nor has it necessarily been prepared in accordance with generally accepted accounting principles, and the reader is cautioned that this report may not disclose all significant matters about the Company. Accordingly, we do not express an opinion or any other form of assurance on the information presented herein. The Receiver may refine or alter its observations as further information is obtained or is brought to its attention after the date of this Ninth Report.

21. The Receiver assumes no responsibility or liability for any loss or damage occasioned by any party because of circulation, publication, reproduction, or use of the Receiver's Ninth Report. Any use that any party makes of this Ninth Report or reliance on or decisions to be made based on its responsibility of such party.

RECEIVER'S ACTIVITIES SINCE ITS LAST REPORT

22. The primary activities undertaken by the Receiver since its Eighth Report, are as follows:
    a) Completed the assignment of the claim regarding the 69th Avenue Property to Luigi Pisano in accordance with the April 9, 2019 Order of this Honourable Court in these proceedings;
    b) Obtained the refund from Billington Barristers for fees paid, based on the 15% discount agreed upon and as ordered by this Honourable Court in the April 9, 2019 Order in these proceedings;
    c) Setoff the Receiver's discount (as ordered by this Honourable Court in the April 9, 2019 Order in these proceedings) one of its most recent invoice;
    d) Responded to inquiries from investors;
    e) Continued discussions with CRA to set up a process to assist the investors who are trying to deal with the T5 information slip which had issued to them by virtue of their investment in the Base companies;
    f) Entered into a settlement agreement with Mr. Mike Terrigno regarding several matters, including the costs awarded against Mr. Terrigno following the April 5, 2019 Order of this Honourable Court granted in these proceedings; and
    g) Completed the filing of appeal materials and set down the date of June 11, 2020, for the hearing of an appeal brought by Mr. Arnold Breitkreutz.

STATEMENT OF RECEIPTS AND DISBURSEMENTS

23. Attached as **Exhibit 1** to this Ninth Report is a Statement of Receipts & Disbursements for the period October 15, 2015, to January 15, 2020. The Receiver collected $1,691,316 mainly from the recovery of the sale of the Properties as defined in the Fourth Report.

24. The receivership has approximately $3,363 remaining in its bank accounts to complete the outstanding tasks, and if any funds remain, distribute them to the Investors of the Debtors.

ADVICE AND DIRECTION FOR THE CANCELLATION OF T5s AND VOIDING THE LOAN AGREEMENT OF BASE FINANCE WITH THE INVESTORS

25. In August 2018, the Receiver held a meeting of investors to discuss what the investors believed were the most relevant and pressing matters in this estate. The main issue raised by the investors present at the meeting (and as represented by a signed petition) was dealing with the Canadian Revenue Agency in relation to the various T5s issued by Base to the investors, as well as the allowable business investment loss.

26. At the request of various investors the Receiver had intended to make an application (the "T5 Application") to this Honourable Court in November 2018 seeking the cancellation of the various T5's which had been issued by Base. An Application was prepared and filed on or about October 19, 2018, returnable November 6, 2018, by the Receiver's previous legal counsel, seeking relief with respect to these T5s.

27. On October 26, 2018, Jill Medhurst from the Department of Justice Canada, sent a letter to the Receiver's legal counsel at the time, taking issue with the T5 Application the Receiver proposed to bring on November 6, 2018, and pointing out that in any event she was not available on November 6, 2018 to speak to the T5 Application. Attached as **Exhibit 2** is a copy of that letter. Ms. Medhurt pointed out a number of concerns with respect to the proposed T5 Application, and requested that the Receiver adjourn the T5 Application and seek to have the matter dealt with under the procedures established by the Income Tax Act.

28. Accordingly the Receiver's previous legal counsel adjourned the T5 Application, and it has not been rescheduled to be heard.

29. In February 2019, the Receiver was informed by its current legal counsel (who had been engaged in November 2018) that they had spoken to Ms. Medhurst about the T5 issues raised in the T5 Application, and that Ms. Medhurst advised of the following:

    a) She had contacted the CRA about the possibility of developing a form for completion by the investors which would authorize the CRA to discuss the investors' tax information with the Receiver, including the contact person to whom the authorization form should be addressed;
    b) She was going to make inquiries with the CRA about the possibility of establishing a specified "task force" of appeals officers to address all investor T5 issues. Ms. Medhurst indicated that she was going encourage the CRA to have such a task force established in Alberta but advised that this would depend on business levels of the various offices across Canada;
    c) She was of the view that the ASC decision was valid to establish the existence of a Ponzi scheme, and that a further Court order should not be required.

30. Ms. Medhurst also inquired if the Receiver would be prepared to act as a representative of the investors for purposes of dealing with the CRA concerning their outstanding T5 issues. The Receiver advised that it would not be prepared to act as a representative of the investors for this purpose, but would be prepared to assist with providing the necessary information which is in its possession to the CRA and the investors as the investors pursued their remedies with the CRA.

31. Ms. Medhurst advised that she would get back to us as soon as possible. Many months have now elapsed without any apparent progress with the CRA (despite many follow up inquiries by Receiver's counsel) and investors are still having difficulties in dealing with CRA and the T5 issues.

32. On August 25, 2019, Mr. Mike Terrigno, emailed the Receiver's legal counsel, requesting that the Receiver cancel the T5 which had been issued to him by Base, ostensibly for interest earned by him in 2013. Attached to his email was a letter which the CRA sent to Mr. Terrigno advising him that he needed the Company to cancel the T5 for it to be removed from his income in 2013.

33. On August 26, 2019, the Receiver's legal counsel informed Mr. Terrigno that we are unable to cancel the T5. Counsel advised Mr. Terrigno as follows:

"We have received similar requests from a large number of other Base investors, and have advised all of them that cancelling and reissuing the T5s is not a feasible or effective solution for two significant reasons:

> *1. The Receiver does not have sufficient records or information to determine the necessary changes to the T5s. The records kept by Base were incomplete, did not consistently distinguish between principle and interest, and often did not provide information on whether the documented amounts were in fact paid to the investor.*
>
> *2. If the Receiver were to prepare amended T5s based on the available information:*
>
> > *a. It is very to be expected that the CRA will not take the amendments at face value. Before accepting the amended T5s, the CRA will scrutinize the amendments in the same manner as the CRA is currently approaching the various requests by investors for amendment to their historical tax returns. As detailed in point #1 above, the Receiver does not have sufficient records to ensure the defensibility of any amendments. As a result, cancelling and reissuing T5s is not expected to be a more efficient or effective process.*
> >
> > *b. the volume of T5s which the Receiver would have to amend and reissue to every investor is significant. Given the comments above, the substantial time and resources required by the Receiver to amend the T5s is disproportionate to the expected benefit (if any).*

Other investors have had success in dealing with the CRA Appeals Division to facilitate the reversal of T5s and allowable business investment loss (ABIL). We are aware that in April 2019, the CRA assigned the matter to a project team in the CRA's Appeals Division. The matter of the T5 reversal is currently with CRA Headquarters in Toronto. The project leader at CRA Appeals Division has confirmed that the CRA will treat all Base taxpayers consistently. However, the CRA has put all Base related reassessments on hold until CRA Headquarters has made a decision on the T5 issue.

We would therefore suggest that you contact the CRA Appeals Division with respect to this matter."

34. In response, on August 27, 2019, Mr. Terrigno requested that the Receiver provide him with the Receiver's analysis on his personal investments, deposit, and "interest" payment history. On August 30,

2019, the Receiver provided Mr. Terrigno with the requested information, a copy of which is attached as **Exhibit 3.**

35. Exhibit 3 shows that Mr. Terrigno received a payment from Base of $22,000 on November 7, 2013, and Mr. Terrigno and Ms. Eva Smosznska received a payment on May 30, 2013 of $14,000 (50% of which was allocated to Mr. Terrigno). Based on the 2013 T5 issued to Mr. Terrigno, it is clear that Base took the view that Mr. Terrigno had been paid "interest" in 2013 in the amount of $29,000 ($22,000 + $14,000/2). The Receiver advised Mr. Terrigno that it was not in a position to determine whether this payment of $29,000 should or should not be characterized as an interest payment.

36. On September 9, 2019, the Receiver's counsel indicated via email to Mr. Terrigno that the Receiver would be prepared to agree with the following facts:

    a) According to the books and records of the Base companies, in 2013 Base Finance received no income other than investment funds provided by investors;
    b) The books and records of the Base companies suggest that the $29,000 that was paid to Mr. Terrigno by Base Finance in 2013 was paid per the investment agreements that he had with Base Finance;
    c) The books and records of the Base companies suggest that the $29,000 that was paid to Mr. Terrigno by Base Finance in 2013 was funded by investment funds provided by Base Investors.

37. On September 9, 2019, Mr. Terrigno requested that the Receiver clarify its position. Attached as **Exhibit 4** is a copy of an email responding to the request for clarification.

38. Exhibit 4 provides the following reasons on why the Receiver believes it cannot simply cancel Mr. Terrigno's T5, nor the other investors who have requested this to occur. The reasons are as follows:

    a) Firstly, it is not entirely clear that the Receiver has the authority under the Receivership Order to cancel the 2013 T5;

    b) Moreover, even if the Receiver does have the authority under the Receivership Order to cancel the 2013 T5, the Receiver is unable to do so for the simple reason that it is unable to determine that the 2013 T5 was issued incorrectly. As indicated in my earlier email to you, whether the $29,000 that you received in 2013 should be characterized as an interest payment or if it should be characterized as a return of capital is not a decision for the Receiver to make. Before the Receiver could cancel the 2013 T5 the Receiver would need to decide that the payment was a return of capital and was not interest - which is precisely the question we have told you the Receiver is unable to make;

c) In addition, the difficultly with your request that the Receiver cannot place itself in a position where it is taking sides in disputes between stakeholders. All investors, as well as the CRA, are stakeholders in this estate, and for the Receiver to cancel the 2013 T5 would be to prefer your position over that of other stakeholders in the estate. The Receiver cannot do that;

d) You are of course free to argue with the CRA (as you are doing) that the payment should be treated as a return of capital rather than interest. The CRA will arrive at its own opinion, irrespective of what the Receiver might opine, on whether the $29,000 should be characterized as interest or a return of capital. The CRA will come to its own conclusion on the basis of the underlying facts surrounding this payment. The cancellation of the T5 may or may not be a relevant factor in the CRA's review, but it certainly won't be determinative and you can expect the CRA to probe the Receiver's basis for cancelling the T5. As noted, the Receiver doesn't have sufficient information to conclude that the T5 should be cancelled, and this will be clear to the CRA;

e) We understand that your request that the T5 be cancelled originated with the August 19, 2019 letter that you received from "S. Macklin" at the CRA (copy attached) which suggests that you contact the issuer of the T5 to have it deleted. But there are a couple of things that you need to understand about how the CRA operates and specifically about this letter:

i) Firstly, this appears to be a form letter issued by an employee in a processing function; and,

ii) Secondly, the letter itself really doesn't say anything and makes no promises of any sort. It simply says: "Upon receipt of additional information, we will review your return for possible adjustment." Note that the letter specifically doesn't say: "Upon receipt of a cancelled T5, we will not treat this $29,000 as interest income." All the CRA is saying is that they will consider your case on the basis of information which is provided, the letter does not say that the T5 (or the cancellation of the T5) will be dispositive of the issue.

f) Accordingly, the Receiver is prepared to work with you (and all investors) by providing the "additional information" that may assist in your dealings with the CRA and which will allow you and the CRA to discuss whether the funds you received should be treated as interest or a return of capital. That is all the at the Receiver can do.

39. On September 13, 2019, the Receiver received an email from Mr. Bill Janman, one of the investors of Base Finance. Attached as **Exhibit 5** is a copy of the email. The email included several attachments:

a) A Summary of T5 Issue with CRA attached as **Exhibit 6**;
b) Four letters to various investors, requiring a that a court order needed to be obtained for the CRA to recognize the interest payments as a return of capital;
c) A copy of the letter from Jill Medhurst;
d) Two court cases dealing which the investors believe are similar to the Base facts and support the cancellation of the documents, attached as **Exhibit 7**; and
e) A memo to CRA regarding the T5 reversal attached as **Exhibit 8.**

40. The summary indicates that CRA would only treat the T5s as a return of capital if the investors obtained a Court Order. Further, the summary states:

> *"On the advice of the DOJ, since October 2018, the investors have continued to ask the CRA for the reversal of their T5s without success. Given that the CRA is not amendable to processing the investors request through the procedures under the ITA, we ask again that BDO Canada Limited, as Receiver of Base Finance Ltd., make an application to Court of Queen's Bench of Alberta to obtain the following Order:*
>
> > *1. To have the interest report in T5s declared a return of capital; and*
> > *2. To have the contracts, 'irrevocable assignment of mortgage interest documents declared void.'*

41. Based on the Receiver's Third report, since 2010 the Receiver can state with certainty the following:
    a) According to the books and records of the Base companies, from 2010 onward Base Finance received no income other than investment funds provided by investors; and
    b) The books and records of the Base companies suggest that any investor receiving payments by Base was funded by investment funds provided by Base Investors since 2010.

42. However, whether these two facts alone are sufficient to permit the Receiver to characterize payments which have been made to investors since 2010 as a return of capital rather than interest (as suggested by the T5s issued by Base) is not clear to the Receiver.

43. As indicated above, several of the investors have tried to use the process under the ITA to seek redress. However, they have been unsuccessful, and the CRA has advised some of the investors that they require a court order that calls for the cancellation of the loan agreement entered into by these parties and the treatment of the interest payments to be recognized as a return for capital. However, it is unclear as to the basis upon which such a court order is to be granted, or by which Court such an Order is to be granted. Based on advice which the Receiver has received from its legal counsel, the Receiver believes that the investors would need to seek such an Order in tax court.

44. As of the date of this Ninth Report, the Receiver is unaware of the position of CRA regarding this matter.

45. The Receiver believes that it may have sufficient records to calculate the various parties whose' T5 should be cancelled. However, it does not have sufficient funds to cover the expense of such a calculation. It is difficult to estimate the cost of such a procedure due to the number of investors, handwritten ledgers, and having the majority but not all of the bank statements dating back to 2004.

SETTLEMENT WITH MIKE TERRIGNO AND RELEASE OF TRUST FUNDS

46. On April 2, 2019, Mr. Terrigno brought an application seeking to have the Receiver's legal counsel removed from the file on the basis of an alleged conflict of interest. After argument in respect of the matter on April 2, 2019 (including by conflict counsel engaged by the Receiver's legal counsel for this purpose), on April 5, 2019 this Court dismissed Mr. Terrigno's application, with solicitor-client costs against Mr. Terrigno and in favour of the Receiver, in a quantum to be determined by a process established by the Court on April 5, 2019.

47. On May 1, 2019 Mr. Terrigno filed a Civil Notice of Appeal appealing this Court's decision to dismiss his application to have Receiver's legal counsel removed from the file on the basis of an alleged conflict of interest.

48. On May 8 and 9, 2019, the Receiver's counsel and counsel for Mr. Terrigno entered into a settlement agreement (the "Omnibus Settlement Agreement") regarding several matters, including settlement of the April 5, 2019 solicitor-client cost award against Mr. Terrigno (the quantum for which had not yet been decided by the date of the Omnibus Settlement Agreement). Attached as **Exhibit 9** is a copy of the email exchange between Osler and Riverside Law confirming the details of the Omnibus Settlement Agreement.

49. Two of the terms of the Omnibus Settlement Agreement were as follows:

    a) Mr. Terrigno would made a $5,000 payment (by certified funds or solicitors trust cheque) payable to Osler's or BDO Canada LLP, or any other party as the Receiver may direct in satisfaction of the cost award against Mr. Terrigno for applying to have Receiver's counsel removed for conflict.

    b) Mr. Terrigno would provide a discontinuance of the appeal of the April 5, 2019 order of the Court dismissing Mr. Terrigno's application to have Receiver's counsel removed from the file for an alleged conflict of interest, on a without costs basis.

50. On August 9, 2019 the Court issued its costs decision from the April 5, 2019 decision, and awarded solicitor-client costs against Mr. Terrigno and in favour of the Receiver in the amount of $16,136.05.

51. On August 10, 2019, the Receiver's counsel emailed Mr. Terrigno as follows:

> *Mike,*
>
> *I presume you have also received and reviewed the attached letter from Justice Romaine in which she agrees with our submissions that the appropriate quantum of solicitor-client costs which she had awarded against you following the dismissal of your application to have me removed from the file on the basis of an alleged conflict is $16,136.*
>
> *As you will recall, as part of the settlement we reached in May, we had agreed to accept and you had agreed to pay $5,000 for these costs. See the attached email exchange in this regard. You had taken the position (with which we disagreed) that as part of the settlement you were to pay the lessor of $5,000 or the amount of Justice Romaine's award. In view of this decision, our disagreement on this point is now moot.*
>
> *Please forward payment of this $5,000 (by certified cheque, solicitor's trust cheque, or wire transfer) immediately, and in any event within 10 days of today's date. Please advise by return when we can expect to receive this payment and if you have a preference for how you wish to make it.*

52. On August 10, 2019 Mr. Terrigno replied saying that: "I'm looking at this in terms of set off", and asking "you okay with set off??" Not surprisingly, the Receiver was not "okay" with set-off, advised Mr. Terrigno of this position, and insisted upon payment of the agreed $5,000. By email dated May 11, 2019 Mr. Terrigno advised Receiver's counsel the following: "The estate and the receiver owe me significant sums! I will give you a consent judgment for the $5k in accordance with the settlement agreement and I will take a set off." A copy of this email exchange is attached hereto as **Exhibit 10.**

53. On August 12, 2019, the Receiver's legal counsel followed up with Mr. Terrigno regarding payment of the agreed $5,000, pointing out that:
    a) It was an express term of the Omnibus Settlement Agreement that such amount would be paid by certified funds or solicitors trust cheque, and
    b) He is not permitted to set-off the $5,000 he owes the estate pursuant to the Omnibus Settlement Agreement against pre-filing amounts that he claims Base owes to him.

54. On August 19, 2019, Mr. Terrigno provided Receiver's counsel with a bank draft for $5,000 for payment of the costs under the Omnibus Settlement Agreement. However, these funds were provided on the "express undertaking" that they not be released until further order of the court (i.e. a resolution of the set-off issue) or Mr. Terrigno's consent. Attached as **Exhibit 11** is a copy of the letter and bank draft sent by Mr. Terrigno. These funds continue to be held in the Receiver's counsel's trust account.

55. On August 19, 2019, the Receiver's counsel informed Mr. Terrigno that the funds were received and that the Receiver intended to bring an application to have the funds released.

56. On August 20, 2019, Mr. Terrigno responded and told the Receiver's counsel to "send the law and set out your position" on why a claim of set-off was not available was not available to him. Mr. Terrigno went on to say that "If it solid then I have no issue conseting [sic] to release funds."

57. On August 28, 2019, Receiver's counsel provided Mr. Terrigno with an email setting out the requested law. A copy of that email is attached hereto as **Exhibit 12.** Also on August 28, 2019 Mr. Terrigno requested to know how much had been spent by Receiver's counsel in the attempt to recover the $5,000 that he had refused to pay pursuant to the Omnibus Settlement Agreement and to provide the law on set-off that he had requested.

58. On August 30, 2019, Mr. Terrigno emailed the following:

> *Just want to know how much is being expended in receiver's attempt to recapture $5k in dispute.... I will see you time records when your records are produced for purposes of court approval for payment of your fees so your cooperation now would be appreciated and will alleviate issue later.... Thanx.*

59. The Receiver's counsel responded to Mr. Terrigno, informing him that the Receiver would be seeking costs for the breach of the Omnibus Settlement agreement. Attached as **Exhibit 13** is a copy of that email.

60. Due to the size of the settlement, the flagrant breach by Mr. Terrigno of his obligation to make the payment he was obliged to make under the Omnibus Settlement Agreement, and his putting the estate to the expense of attempting to recover the settlement amount of $5,000 to which the Receiver was entitled (combined with Mr. Terrigno's transparent efforts to avoid payment by attempting to make the cost of pursuing recovery of this amount too expensive) the Receiver is seeking an order directing that the $5,000 currently held in Receiver's counsel's trust account be released from Mr. Terrigno's undertaking and paid to the Receiver, and that an award of costs be made against Mr. Terrigno for the costs to which he had put the estate in connection therewith. The Receiver and its legal counsel estimate that approximately $5,000 of professional fees have occurred dealing with this matter.

TERRIGNO'S ACTION AGAINST THE RECEIVER

61. On February 12, 2019, without leave of the Court, Mike Terrigno, Easy Loan Corporation, Barile Investments Inc. and Darrell Winch filed a Statement of Claim (the "**Terrigno SOC**") against BDO Canada LLP. Attached as **Exhibit 14** is a copy of the Terrigno SOC.

62. On April 2, 2019, this Honourable Court stayed the Terrigno SOC pending further order of this Honourable Court. Notwithstanding that nearly a year has elapsed since the Terrigno SOC was filed, and notwithstanding the serious allegations raised against the Receiver in the Terrigno SOC, the plaintiffs in the Terrigno SOC action have taken no steps to attempt to obtain leave of this Honourable Court to be permitted to pursue the action.

63. As stated in the Receiver's Eighth Report, the Receiver denies the allegations in the Terrigno SOC, and denies that it was either negligent or grossly negligent during the administration of the receivership. The Receiver denies that the Plaintiffs have a cause of action against the Receiver, as alleged in the Terrigno SOC. The Receiver's more detailed response to each allegation in the Terrigno SOC is set out below.

64. Paragraph 12 of the Terrigno SOC alleges the following:

> *"The Plaintiffs claim that they incurred damages as a result of the Receiver's negligence in administrating the estate of Base Finance as a result of 3 specific matters as follows:*
>
> *a. Failing to appeal the Yamauchi Decision (as defined herein and below);*
>
> *b. Failing to commence proceedings or take legal action as against Robert Smyth; and*
>
> *c. Failing to undertake a claw back of the Base Finance bank account within the limitation period."*

Failing to appeal the Yamauchi Decision

65. The Receiver makes the following comments in response:

    a) These allegations are set out at paragraphs 32 through 39 of the Terrigno SOC. As alleged on the face of the Terrigno SOC (paragraphs 38 and 39), although the complaint is that the Yamauchi Decision (as defined in the Terrigno SOC) was not appealed by the Receiver, the Yamauchi Decision was in fact appealed by Mr. Terrigno and Easy Loan Corporation, and the appeal was denied. Based on paragraph 39 of the Terrigno SOC, the Appellants' expenses totalled $81,957.

    b) A Receiver is not obligated to appeal a decision of the Court; it is up to the Receiver to decide if such an appeal would be the best use of estate funds and would be in the best interests of creditors in an effort to ensure the maximum recovery for all stakeholders. The

fact that the appeal was denied would suggest that the Receiver's position in this regard was sound.

c) At paragraph 36 of the Terrigno SOC, the Plaintiffs allege that the Receiver did not appeal for the following reasons:

   a. *The Receiver did not have money to pursue the appeal.*

   b. *The Receiver opined that it had to stay neutral amongst the investors.*

   It should be noted that as at the date of the appeal (February 12, 2017) unpaid professional fees to both the Receiver and its legal counsel exceeded $500,000. In addition, the Receiver has a duty to all stakeholders in the estate. For these reasons, amongst others, the Receiver elected not to appeal the Yamauchi Decision.

d) However, as alleged at paragraph 37 of the Terrigno SOC, Mr. Terrigno and Easy Loan Corporation *"filed the appeal for the benefit of all investors seeking to overturn Justice K. Yamauchi decision to disburse the frozen funds in the Bank Account using LIBR instead of the pro rata ex post facto approach."*

e) It should be noted that paragraph 38 of the Terrigno SOC alleges that:

   "The Appeal was denied, however, the Court of Appeal opined that, had the Receiver filed the appeal on the basis that Justice K Yamauchi errored by finding a constructive trust as there was Receiver in place and thereby failing to satisfy the 4th part of the Solous test, the appeal would have been allowed. The result would have been roughly $1,085,000 remaining with the Receiver for the benefit of the general body of creditors."

f) The Alberta Court of Appeal's Memorandum of Judgment is attached hereto as **Exhibit 15**. While it is true that Justice Yamauchi's finding of a constructive trust was not appealed (including by the Appellants) it is simply not the case that the Court of Appeal opined that if this issue had been appealed "the appeal would have been allowed", as alleged by the Plaintiffs at paragraph 38 of the Terrigno SOC.

g) Neither did the Court of Appeal make such a comment at the hearing of this appeal. The transcript of the hearing of the appeal is attached hereto as **Exhibit 16**. Accordingly, the allegation at paragraph 38 of the Terrigno SOC is demonstrably false.

h) At paragraph 59 of the Terrigno SOC, the plaintiffs claim damages for their pro rata share of the funds frozen by the Yamauchi Decision in the "estimated amount" as follows:

Easy Loan Corporation - $18,000;
Mike Terrigno - $4,000;
Barile Investment Inc. - $9,000; and
Darrell Winch - $4,000.

i) But it should be noted that, as alleged at paragraph 34 of the Terrigno SOC, that even if the Receiver had elected to appeal the Yamauchi Decision, and even the Receiver had been successful in having the constructive trust decision overturned, the Receiver would have used the resulting funds to investigate matters further, and the resulting funds would not simply have been distributed on a pro rata basis. Rather, the resulting funds would have been used to fund the estate.

66. For all of the foregoing reasons, the allegations in the Terrigno SOC in this regard are clearly without merit.

Failing to take legal action against Robert Smyth

67. The Receiver makes the following comments in response:

a) At paragraphs 45 to 48 of the Terrigno SOC the plaintiffs allege that the Receiver was negligent in not pursuing legal action against Robert Smyth.

b) The main allegation from plaintiffs is contained in Paragraph 45 of the Terrigno SOC, which alleges the following:

"The Plaintiffs assert that there was a chose in action against Robert Smyth ("Robert"), legal counsel for the Fraudster by the estate. The chose in action arose from a hearing in the QB Action held before the Honorable Madam Justice Romaine B.E. on August 17, 2016, wherein Robert, stated the following:

> *The $192,000 through my trust account... $82,000 came from a line of credit of Mr. Breitkruets and $110,000 came from the savings of Mr. and Mrs. Breitkruets... they deposited in my trust account and it was, according to the direction, given back to them in various amounts and money was retained for fees.*

c) It is important to note that pursuant to the October 15, 2015 Receivership Order (as well as the subsequent Amended Amended Order granted November 6, 2015) the Receiver was only appointed Receiver of the assets of Base Finance Ltd. and Base Mortgage & Investments Ltd. (who are defined as the "Debtors" in those Orders). The assets of Mr. and Mrs. Breitkreutz were not brought under the Receiver's appointment.

d) The Receiver is of the view that an action against Mr. Smyth on the basis of the admission set out in paragraph 45 of the Terrigno SOC would be doomed to fail unless the Receiver could establish that the funds which were paid to Mr. Smyth came from the Debtor companies, and that Mr. Smyth therefore had an obligation to pay those funds to the Receiver. Based on the records available to the Receiver, the Receiver would not be able to establish this. (In any event, it should be noted that $82,000 of the total amount was borrowed by Mr. and Mrs. Breitkreutz from a line of credit, and so clearly did not originate with funds belonging to the Debtors.) Accordingly, the Receiver elected not to pursue an action against Mr. Smyth because the Receiver was of the view that it would not be able to establish any liability against him.

e) At paragraph 60 and 61 of the Terrigno SOC, the plaintiffs claim damages for their pro rata portion of the $192,000. But as noted above, even if the Receiver had brought such a claim, and even if it were successful in recovering these funds from Mr. Smyth (and for the reasons set out above, the Receiver does not believe it would have been able to establish liability against Mr. Smyth) any funds received by the estate would have been used to fund the estate and to preserve and investigate the affairs of the Debtor companies. It is a superficial and overtly simplistic allegation to suggest that the plaintiffs would have received their pro rata share - or any share - of any amounts recovered.

<u>Failing to undertake a claw back of the Base Finance bank account within the limitation period</u>

68. The Receiver makes the following comments in response:

a) At paragraphs 50, 56 to 58 of the Terrigno SOC the plaintiffs allege that the Receiver was negligent in not performing a Clawback Calculation (also known as a "Titan Proceeding");

b) At paragraph 62 of the Terrigno SOC, the plaintiffs claim damages, and allege that due to the Receiver's neglect in commencing the Titan Proceeding within the timeline imposed under the Limitations Act, the Plaintiffs suffered damages in the following amounts:

   Easy Loan Corporation - $2,500,000;
   Mike Terrigno - $200,000;
   Barile Investment Inc. - $150,000; and
   Darrell Winch - $93,000.

c) As stated in the Receiver's Seventh Report, the Receiver has a number of issues with performing a Clawback Calculation. Some of the key items outlined in the Seven Report were:

i) *Given that the Companies at one time appear to have operated a legitimate mortgage investment program, it is difficult (or impossible) to determine precisely when this legitimate business ended and the Ponzi scheme began;*
ii) *Base's financial records are kept in handwritten ledgers that are not complete. The fact that the books and records are in handwritten ledgers makes it extremely difficult and time-consuming to analyze the information in the records. The fact that the records are incomplete means that it will be impossible to be certain that any Clawback Calculation which would be based on those records is correct or complete;*
iii) *The Receiver only has bank statements from the Companies from 2006 onward, and does not have all of those statements...*

d) Given the foregoing, the Receiver does not believe it has the necessary information in order to accurately perform a complete and reliable "Clawback Calculation";

e) The Receiver does not believe that it is statute-barred as the "Clawback Calculation" has not been completed, the information required to complete the Clawback Calculation is not available, and accordingly it is not possible to determine which investors are "net winners" and which investors are "net losers".

69. In paragraph 63 of the Terrigno SOC, the plaintiffs allege that Mr. Terrigno has paid $200,000 for legal fees to Mr. Chris Souster, which he states *"the Receiver supported reimbursement for those fees from the estate and acknowledged the assistance of Mike and his counsel in the Receiver's 6th Report (the Representations")*.

70. At paragraphs 41 to 66 of the Receiver's Seventh Report the Receiver undertook a detailed review of the pre- and post-Receivership costs incurred by Mr. Souster, and the settlement which was reached in respect of the pre-Receivership costs, which was subject to Court approval.

71. On January 23, 2019, the Honourable Madam Justice B.E. Romaine, granted an Order (the "Pre-Receivership and Post-Receivership Cost Settlements Order") approving the settlement of Pre-Receivership costs, and further directed (at paragraph 4) that:

> *[Mike Terrigno and Easy Loan Corporation] have leave to reapply to this Court for payment from the Debtors' estate for further Post-Receivership Costs and for a determination of the priority of such Post-Receivership Costs, provided however, any further Post Receivership Costs shall rank behind the Receiver's Charge or the Receiver's Borrowing Charge (as those terms are defined in the Receivership Order.)*

72. Accordingly, the costs alleged in paragraph 63 of the Terrigno SOC have been dealt with in the Pre-Receivership and Post-Receivership Cost Settlements Order granted by this Honourable Court on January 23, 2019. As of the date of this report neither Mr. Terrigno nor Easy Loan Corporation have brought a further application pursuant to paragraph 4 of that Order.

Striking of Terrigno SOC / Posting of Security for Costs

73. In light of the foregoing, the Receiver submits that the Terrigno SOC should be struck. In the alternative, it is submitted that:

    a) The plaintiffs in the Terrigno SOC be required to post security for costs in the amount set out in **Exhibit 17** hereto within 30 days, and

    b) Set down their application for leave to pursue the Terrigno SOC to be heard within 60 days (or such other time as may be agreed by the Receiver in writing)

failing which the Terrigno SOC shall be struck without further Order of this Court.

March 25, 2019 Application filed by Mike Terrigno

74. On March 25, 2019, Mike Terrigno filed an application (the "April 2 Application") returnable April 2, 2019, at 2:00 pm for a variety of relief. Attached as **Exhibit 18** is a copy of the April 2 Application. The April 2 Application was adjourned sine die on April 2, 2019.

75. Many of the matters sought in the April 2 Application were the subject of the Omnibus Settlement Agreement discussed previously (and which is set out in Exhibit 9). As part of the Omnibus Settlement Agreement, Mr. Terrigno agreed to discontinue (and not re-file an application seeking the same relief) the following paragraphs contained in his April 2 Application:

    a) Paragraph 1 - Seeking an order granting leave to Mike Terrigno, or any creditor of Base Finance Ltd. ("Base Finance") to petition Base Finance into bankruptcy. Alternatively, directing the receiver to petition Base Finance into bankruptcy.

    b) Paragraph 3 - Seeking an order directing a trial of an issue, or such other procedure, to determine whether the receiver/trustee is statute barred to pursue a fraudulent preference claim on behalf of the estate unwinding certain transaction pursuant to a net/winner loser analysis.

c) Paragraph 4 - Seeking an order directing the receiver/trustee to complete the aforesaid net winner/loser analysis with estate funds.

d) Paragraph 5 - Seeking an order directing that the receiver shall not use estate funds for purposes of defending the Terrigno SOC or its wrongdoing.

e) Paragraph 6 - Seeking an order directing the receiver/trustee to assign the fraudulent preference claim to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

f) Paragraph 7 - Seeking an order directing the receiver/trustee to assign any interest of the estate available against Robert Smyth to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

g) Paragraph 8 - Seeking an order directing the receiver/trustee to assign the debtor estate claim against 69th Avenue SW property to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

h) Paragraph 10 - Seeking an order directing the receiver/trustee to disclose to Mike Terrigno, and/or any interested party to these proceedings, the receiver's net winner/loser analysis already completed to 2004 including source material and electronic material but not working papers.

i) Paragraph 12 - Seeking an order directing the receiver to file amended T5s for Base Finance on such terms and conditions as this Honorable Court deems fit.

j) Paragraph 13 - Seeking an order winding down and discharging the receiver on such terms and conditions as the Court deems appropriate.

k) Paragraph 14 - Seeking an order of costs on a fully indemnity basis (or such other basis as this Court deems fit) against legal counsel for the receiver, Randal van De Mosselaer.

76. Attached as **Exhibit 19** are a copy of a May 13, 2019 letter and email from Mr. Terrigno to this Court confirming that he has withdrawn the foregoing paragraphs from his April 2 Application.

77. Accordingly, only paragraphs 2 and 11 remained extant in the April 2 Application following the Omnibus Settlement Agreement. Those paragraphs were for:

a) Paragraph 2 - An Order granting leave to Mike Terrigno and other interested parties to pursue legal action against BDO Canada LLP and thereby lifting the stay on QB Action #1901-01990 [i.e. the "Terrigno SOC"] in which BDO is a named Defendant on such terms and conditions as the Court deems appropriate.

b) Paragraph 11 - An order directing the receiver/trustee to assign the estate's claim against the following individuals to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit. Furthermore, lifting the stay and allowing Mike Terrigno, and other Plaintiffs, to pursue the various Actions against the following parties:

   a. Arnold Breitkreutz
   b. Susan Breitkreutz
   c. Susan Way
   d. Bonnie Way
   e. Robert Way
   f. Lyle Hogaboam
   g. Brian Fox
   h. John Manolescu
   i. BDO Canada
   j. Such other parties as the Applicant may identify and this court deems fit to consider.

78. As noted above, Mr. Terrigno has taken no steps to pursue the relief sought in paragraph 2, and in any event the Receiver denies the allegations set out in the Terrigno SOC.

79. The relief sought in paragraph 11 was argued by Mr. Terrigno's counsel before the Honourable Court on July 25, 2019, and a decision has been reserved.

BOOKS AND RECORDS OF THE COMPANY

80. The Receiver is currently in possession of approximately 21 boxes of the Companies' records. Ordinarily, in connection with an Order for its discharge the Receiver would seek authority to destroy the records. However, given the unique circumstances of this case, the Receiver is seeking Court approval to store these records for five (5) years, so that investors or other interested parties may

access the records if they would like to do so (at their expense), following which the Receiver would be permitted to destroy the records.

81. The Receiver is proposing that for an interested party to access the records, the following procedure would apply:

    a) The interested party (the "Requestor") makes request of BDO Canada Limited, in writing, to review the records;

    b) BDO Canada Limited provides the Requestor with an estimate of the costs associated with pulling the records from storage and arranging for their review (which estimate would include the cost of retrieving the documents from and returning the documents to storage, arranging for a staff member to supervise the review, and photocopying);

    c) The Requestor provides BDO Canada Limited with payment for such estimate within 7 days, by certified cheque or bank draft, failing which such request may be ignored;

    d) The records would be retrieved from storage, the Requestor would attend at one of the BDO Canada Limited offices in Calgary, review the records in a boardroom in the presence of a BDO Canada Limited staff member, and mark any pages they wish to be photocopied;

    e) The Requestor would be responsible for paying the costs of retrieving the records, photocopying charges of $.25 per page, and a staff member hourly rate. To the extent that these costs exceed the initial estimate which was paid, the balance would need to be paid before BDO Canada Limited released the photocopies of the requested records. To the extent that the total costs was less than the initial estimate, the balance would be refunded to the Requestor.

82. Alternatively, the Receiver believes that the records should be destroyed immediately.

STEPS FOR THE COMPLETION OF THE ADMINISTRATION OF THE RECEIVERSHIP

83. The following steps need to be completed to complete the administration of the Receivership:

    a) Complete the Breitkreutz Appeal matter (which is discussed at paragraph 80 of the 7 Report), and which is scheduled to be argued on June 11, 2020;

    b) Pay all outstanding professional fees; and,

    c) Complete all other statutory requirements under the BIA.

Attached as **Exhibit 20** is the Discharge Certificate indicating all of the above duties have been completed that the Receiver proposes to execute once all of the above steps have been completed.

PROFESSIONAL FEES

84. Professional fees charged by the Receiver and its legal counsel from December 1, 2018, to December 31, 2019, excluding GST and disbursements, are $498,732. This amount includes estimate cost to close of $20,000 for the remaining professional fees. Attached, as **Exhibit 21** is a summary of invoices of both the Receiver and its legal counsel. Detailed invoices, including time records, are available from the Receiver upon request and will be available to the Court at the hearing of the application for which this Report is prepared.

85. In the Receiver's view, the services rendered by the Receiver and its legal counsel, which gave rise to these fees and disbursements have been duly rendered in response to the required and necessary duties of the Receiver, and are reasonable in the circumstances.

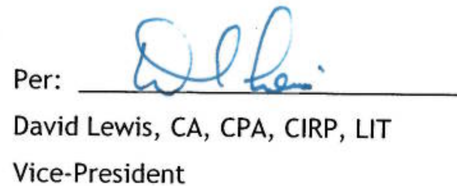
RELIEF SOUGHT

86. The Receiver respectfully submits this Ninth Report of the Receiver in support of the Receiver's application to this Honourable Court seeking the following:

    i. Approval of the reported actions of the Receiver to date in respect of administering these receivership proceedings;
    ii. Providing advice and directions to the Receiver regarding the cancellation of Mr. Mike Terrigno's 2013 T5;
    iii. Providing advice and direction to the Receiver regarding the cancellation of the T5's of the investors and declaring the contracts of irrevocable assignment of mortgage interest documents declared void;
    iv. Approving the release of the settlement funds from Mr. Terrigno;
    v. Approving the handling of the books and records of the Companies;
    vi. An Order discharging the Receiver upon the filing the proposed discharge certificate attached as Exhibit 20; and,
    vii. Approving the accounts of the Receiver and the Receiver's legal counsel.

BDO CANADA LIMITED, solely in its capacity As Court Appointed Receiver (as defined in the Order), and not in its personal Capacity

Per:



David Lewis, CA, CPA, CIRP, LIT
Vice-President

EXHIBIT 1

To the Receiver's Ninth Report to Court
Dated January 17, 2020

BDO CANADA LIMITED
INTERIM STATEMENT OF RECEIPTS AND DISBURSMENTS FOR
BASE FINANCE LTD. AND BASE MORTGAGE & INVESTMENT LTD.
FOR THE PERIOD FROM OCTOBER 15, 2015 - JANUARY 15, 2020

Receipts:			
Sale of assets enbloc		$ 1,496,853	
Sale of Ceduna property		218,944	
Recoverable expenses paid by Trustee		16,728	
Cash on hand		5,381	
Interest		7,551	
Miscellaneous income	Note 1	3,465	
Insurance refund		357	
Utilities refund		109	
Total receipts			$ 1,749,388
Disbursements:			
Legal fees		$ 925,023	
Receiver's fees		626,252	
Pre and post Receivership costs settlement		90,476	
GST on Legal fees		50,467	
GST on Receiver's fees		29,954	
Insurance		15,744	
Commission		3,890	
Bailiff		1,000	
Consulting fees		921	
Change of locks		486	
GST on Disbursements		1,673	
Fees paid to the Official Receiver		140	
Total disbursements			$ 1,746,025
Funds on hand			$ 3,363

Notes

(1) These funds are attributable to the payment of invoices of professional fees and copy charges for document reviews facilitated by the Receiver, as per the Document Review protocol established at the onset of the receivership.

(2) The business operations of Base Finance Ltd. and Base Mortgage & Investments Ltd. were co-mingled and effectively possessed the same assets. The Court Order appointing the Receiver dated October 15, 2015 refers to the Companies collectively as the Debtor and the Receiver attributes any realizations for the Debtor to be for the benefit of both Companies. For efficiency, the Receiver has used the receivership account of Base Finance Ltd. as the general operating account for the entities of the receivership and will from time-to-time transfer funds to cover the general administrative costs of the receivership estate of Base Mortgage & Investment Ltd., as necessary.

EXHIBIT 2

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Department of Justice Canada | **Ministère de la Justice Canada**

Prairie Region
601, 606 - 4 Street SW
Calgary AB T2P 1T1

Région des Prairies
601, 606 - 4e rue SO
Calgary AB T2P 1T1

Telephone/*Téléphone:* 403-299-3985
Facsimile/ *Télécopieur:* 403-299-3507
Email/*Courriel:* Jill.Medhurst@justice.gc.ca
Our File/*Notre dossier:*

October 26, 2018

VIA ELECTRONIC MAIL
RBillington@billingtonbarristers.com

Billington Barristers
1910 Elveden House
717 7 Ave SW
Calgary, AB T2P 0Z3

Attention: Richard Billington

Dear Sir:

Re: Easy Loan Corporation and Mike Terrigno v. Base Mortgage & Finance Ltd., et al. Court File No. 1501-11817

Further to your letter of October 19, 2108 and my telephone with Mr. Hayles of your office, this is to confirm that I am not available for a court application on November 6, 2018. I would ask that before we turn to the court to deal with these issues that we try to use remedies provided for under the *Income Tax Act of Canada* ("*ITA*").

The relief that you seem to be seeking would appear to be more in the nature of rectification rather than declaration relief. Usually in seeking rectification relief, the moving party seeks this relief because a mistake was made that needs to be rectified. However, in this case, it would be the rogue corporation that that made the mistake in issuing the T5s, but, it probably will not admit that the issuance of the T5s was fraudulent. In this case, it is the investors who want the T5's to be rectified, yet, they have no way to rectify the T5s on their own.

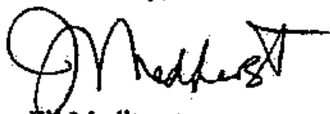
Also, another problem with the relief that you are seeking is that you are asking for a broad declaration that all of the T5's issued were fraudulently issued, but, some of the investors may have legitimately received interest income or further income over and above the capital investment they made to the company and the T5 would be valid. As such, it will be inappropriate for the Queen's Bench court to make such a broad declaration to cancel all the T5's or change the nature of the amount declared on the T5s.

Given these problems in seeking court assistance, I would ask that you adjourn your application indefinitely and that the Receiver and the investors seek to have the matter dealt with under the *ITA* procedures. There are two *ITA* procedures which could assist the investors. Specifically, where aT5 was issued and there was only a return of capital and no interest/small amount of interest, the

investor can claim a "bad debt" under section 20(1)(p) (a bad debt in the year the investor discovered the fraud) for the amount of the investment that was not returned to the investor. The investor/taxpayer can agree to the reassessment which includes the bad debt request, and this reassessment should reduce the income of the investor by the amount of the bad debt investment. Bad debts can be carried back 3 years or carried forward 20 years. Or alternatively, the investor can file an amended tax return pursuant to section 152(4.2) (reassessment with taxpayer's consent) to remove the T5 income (if it only covers the capital and no interest) if the application is made within 10 years of the year at issue – back to the 2008 tax year.

I am happy to discuss this matter with you at your earliest convenience. I do think it is better to try to resolve this matter through the procedures provided for under the *ITA* rather than burdening the court, whom I do not believe can provide the relief that you are seeking. My submissions at any court hearing will raise these arguments set out above and in all likelihood, the Court will most likely direct that the Receiver look to the *ITA* rather than to the Court, for remedies.

Yours truly,



Jill Medhurst
Counsel
Prairie Region
Department of Justice Canada
JM/jt

cc:

Attn: Paul A. Kazakoff
Barrister & Solicitor
590, 10201 Southport Road SW
Calgary, AB T2W 4X9
Email: pakazakoff@bkalaw.com
VIA ELECTRONIC MAIL

Attn: Ken Reh
DLA Piper (Canada) LLP
1000, 250 – 2 Street SW
Calgary, AB T2P 0C1
Email: ken.reh@dlapiper.com
VIA ELECTRONIC MAIL

Attn: Christopher Souster
Riverside Law Office
4108 Montgomery View NW
Calgary, AB T3B 0L9
Email: cmas@riversidelawoffice.ca
VIA ELECTRONIC MAIL

Attn: Mike Terrino
Email: mike@terrigno.ca
VIA ELECTRONIC MAIL

EXHIBIT 3

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Base Finance Ltd.
Analysis of Mike Terrigno Investment

Date	Chq #		Deposits	Payments
10/05/2011	Deposit	Terrigno, M	100,000	-
05/01/2012	Deposit	Terrigno M	100,000	-
05/02/2012	1,860	Ewa Smoszynska or Michael terrigno	-	14,000
05/02/2012	1,861	Michael Terrigno	-	7,000
11/07/2012	2,568	Michael Terrigno	-	22,000
11/08/2012	2,567	Ewa Smoszynska or Michael terrigno	-	14,000
05/30/2013	3,265	Eva Smoszynska or Michael Terrigno	-	14,000
11/07/2013	3,841	Michael Terrigno	-	22,000
02/19/2014	4,229	Michael Terrigno - Principle Repayment		20,000
05/08/2014	4,511	Ewa Smoszynska or Michael Terrigno	-	14,000
05/09/2014	4,512	Michael Terrigno	-	7,000
11/10/2014	605	Eva Smosznyska or Michael Terrigno	-	14,000
11/10/2014	606	Michael Terrigno	-	7,000
05/07/2015	1,236	Michael Terrigno	-	14,000
Total			200,000	169,000

EXHIBIT 4

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Sent:	September 9, 2019 9:37 PM
To:	Mike Terrigno
Cc:	Lewis, David; Paplawski, Emily
Subject:	[EXT] RE: 1501 11817 - EASY LOAN CORP. v. BASE MORTGAGE & INVESTMENTS LTD. - Oct 17, 2019 11:00 AM - ROMAINE, J - Confirmed
Attachments:	scan0004.pdf

Mike,

Unfortunately there are a number of problems with your request that the Receiver cancel your 2013 T5:

- Firstly, it is not entirely clear that the Receiver has the authority under the Receivership Order to cancel the 2013 T5;
- Moreover, even if the Receiver does have the authority under the Receivership Order to cancel the 2013 T5, the Receiver is unable to do so for the simple reason that it is unable to determine that the 2013 T5 was issued incorrectly. As indicated in my earlier email to you, whether the $29,000 that you received in 2013 should be characterized as an interest payment or if it should be characterized as a return of capital is not a decision for the Receiver to make. Before the Receiver could cancel the 2013 T5 the Receiver would need to decide that the payment was a return of capital and was not interest – which is precisely the question we have told you the Receiver is unable to make;
- In addition, the difficultly with your request that the Receiver cannot place itself in a position where it is taking sides in disputes between stakeholders. All investors, as well as the CRA, are stakeholders in this estate, and for the Receiver to cancel the 2013 T5 would be to prefer your position over that of other stakeholders in the estate. The Receiver cannot do that.
- You are of course free to argue with the CRA (as you are doing) that the payment should be treated as a return of capital rather than interest. The CRA will arrive at its own opinion, irrespective of what the Receiver might opine, on whether the $29,000 should be characterized as interest or a return of capital. The CRA will come to its own conclusion on the basis of the underlying facts surrounding this payment. The cancellation of the T5 may or may not be a relevant factor in the CRA's review, but it certainly won't be determinative and you can expect the CRA to probe the Receiver's basis for cancelling the T5. As noted, the Receiver doesn't have sufficient information to conclude that the T5 should be cancelled, and this will be clear to the CRA.
- We understand that your request that the T5 be cancelled originated with the August 19, 2019 letter that you received from "S. Macklin" at the CRA (copy attached) which suggests that you contact the issuer of the T5 to have it deleted. But there are a couple of things that you need to understand about how the CRA operates and specifically about this letter:
    - Firstly, this appears to be a form letter issued by an employee in a processing function.
    - Secondly, the letter itself really doesn't say anything and makes no promises of any sort. It simply says: "Upon receipt of additional information, we will review your return for possible adjustment." Note that the letter specifically doesn't say: "Upon receipt of a cancelled T5, we will not treat this $29,000 as interest income." All the CRA is saying is that they will consider your case on the basis of information which is provided, the letter does not say that the T5 (or the cancellation of the T5) will be dispositive of the issue.
- Accordingly, the Receiver is prepared to work with you (and all investors) by providing the "additional information" that may assist in your dealings with the CRA and which will allow you and the CRA to discuss whether the funds you received should be treated as interest or a return of capital. That is all the at the Receiver can do.

Please let me know if you have any further questions.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Monday, September 09, 2019 10:53 AM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - EASY LOAN CORP. v. BASE MORTGAGE & INVESTMENTS LTD. - Oct 17, 2019 11:00 AM - ROMAINE, J - Confirmed

Okay let's run with that...

Please clarify your position as to why the reciever cannot cancel or amend a T5? Are you saying that the reciever doesn't have the power to do so? Are you saying that the reciever opens itself up to liability? Please be detailed and supply the legal proposition if any. Thanx

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

EXHIBIT 5

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	BJanman <Bjanman@shaw.ca>
Sent:	September 13, 2019 9:10 AM
To:	Lewis, David
Cc:	'Van de Mosselaer, Randal'; 'Susanne Young'
Subject:	[EXT] Solution for T 5 Issue with CRA
Attachments:	A Summary of T5 Issue with CRA version Final.pdf; Letter from CRA to Brian Clarke - July 13 2018.pdf; Letter from CRA to S.Young - Aug 3 2018.pdf; Letter from CRA to R.Young - Aug 3 2018.pdf; Letter from RB to Court - Oct 19 2018.pdf; Letter from Jill Medhurst to RB - Oct 26 2018.pdf; Letter from S. Young to Chief of Appeals - April 3 2019.pdf; Memo to CRA re T5 reversal.pdf; Roszko v. The Queen appeal.pdf; Orman et al v Marnat Inc. et al (2012 ONSC 549).pdf; Letter to Barabara Clarke from CRA.pdf
Importance:	High

Hi David

Thanks for taking the time to speak to me about the T5 issue.

I have attached a summary of the T5 issue and where we are at this time with along with many attachments in our quest to get CRA to have the T5s to be a return of capital.

David and Randal, we are asking for your help on behalf on the informal group of investors who you know have been devasted financially, emotionally, physically , most who will never recover financially and some who feel they are in financial prison.

I am hopeful you will be able to take this request forward. This is our only hope of having something to help us deal with CRA and slay the dragon.

Please let me know if we are able to proceed and what additional information you require.

Sincerely

Bill Janman

Virus-free. www.avast.com

EXHIBIT 6

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Case Law >> Tax Court of Canada and Other Courts >> 2011 - 2020 >> 2014 >> February >> 2014/02/21 — (TCC) Roszko v The Queen (Docket: 2012-793(IT)G)

2014/02/21 — (TCC) Roszko v The Queen

2014 TCC 59; 2014 DTC 1083; [2014] 4 CTC 2308

Read: Full text of case

HEADNOTE:

At issue was whether the minister was correct in including in the taxpayer's income the amount of $156, 000 as interest income for the 2008 taxation year. The taxpayer, who unknowingly loaned $800, 000 to a corporation that ran a Ponzi scheme, argued that the amount in question was a return of part of that loan. Specifically at issue was whether the amount in question was interest income or the return of capital.

Appeal allowed. **Français**

REFERENCES: ITA: 12(1)(c)

CASES CITED WITHIN THIS CASE:

Date: 20140221

Docket: 2012-793(IT)G

Citation: 2014 TCC 59

BETWEEN:

LEONARD ROSZKO, Appellant,

and

HER MAJESTY THE QUEEN, Respondent.

COURT/JUDGE/DATE:

Tax Court of Canada, Miller, J., February 21, 2014. (Docket: 2012-793(IT)G)

COUNSEL:

S. Dane ZoBell, for the Appellant.
Donna Tomljanovic, for the Respondent.

REASONS FOR JUDGMENT

C. Miller J.:—

[1] In 2008 Mr. **Roszko** received $156, 000 from TransCap Corporation ("TransCap"). Unbeknownst to Mr. **Roszko**, TransCap ran a well-orchestrated Ponzi scheme. The issue before me is whether the $156, 000 was interest received by Mr. **Roszko** duly taxable as income from a source, or whether the $156, 000 was a return of part of the $800, 000 Mr. **Roszko** believed he had loaned to TransCap.

[2] The Parties provided me with an Agreed Statement of Facts as follows:

1. At all material times, the Appellant was an individual resident in Canada and Alberta for the purposes of the *Income Tax Act*.

2. From February 2006 to December 2007 the Appellant provided TransCap Corporation with a series of four amounts which totalled $800, 000.

3. With each amount provided to TransCap Corporation, the Appellant received documents as follows:

(a) Exhibit 1 – Copies of TransCap Corporation Schedule A – Lenders Document, Schedule B – Promissory Note and Wire Payment Services confirmation report respecting the $100, 000 February/March 2006 funds;

(b) Exhibit 2 – Copies of TransCap Corporation Schedule A – Lenders Document, Schedule B – Promissory Note and Wire Payment Services confirmation report respecting the $100, 000 May/June 2006 funds;

(c) Exhibit 3 – Copies of TransCap Corporation Schedule A – Lenders Document, Schedule B – Promissory Note and Wire Payment Services confirmation report respecting the $300, 000 January 2007 funds; and

(d) Exhibit 4 – Copies of TransCap Corporation Schedule A – Lenders Document, Schedule B – Promissory Note and Wire Payment Services confirmation report respecting the $300, 000 October 2007 funds;

4. Each of the Schedule A – Lenders Documents and Schedule B– Promissory Notes found at Exhibits 1 through 4 were issued according to the T.C.C. Master Loan Agreement. A copy of the T.C.C. Master Loan Agreement is attached as Exhibit 5.

5. In 2008, the Appellant received a total of $156, 000 from TransCap Corporation, broken down as follows:

(i) $7, 500 monthly, by way of cheque or direct deposit; and

(ii) A $66, 000 annual sum by way of cheque.

Copies of the cheques for the period May 2008 through December 2008 are attached as Exhibit 6.

6. The Appellant reported the $156, 000 received from TransCap Corporation in his 2008 T1 personal income tax return as interest income and paid both federal and provincial income taxes on this amount.

7. TransCap Corporation did not ever issue the Appellant any T5 Statement of Investment Income slips for any funds received from TransCap Corporation.

8. TransCap Corporation perpetrated a fraud on Alberta investors, including the Appellant, contrary to the *Securities Act* (Alberta), RSA 2000 c. S-4. A copy of the Alberta Securities Commission decisions *Re TransCap Corporation*, 2013 ABASC 201, and *Re TransCap Corporation*, 2013 ABASC 326 are attached as collectively at Exhibit 7.

9. In total, TransCap Corporation provided $408, 000 to the Appellant between 2006 and 2009, inclusive, as follows:

2006: $22, 500

2007: $81, 000

2008: $156, 000

2009: $148, 500

The annual amounts were received by the Appellant by way of monthly cheques or direct deposits and, in 2008 and 2009, one larger lump sum in the amount of $66, 000. The Appellant has not received any additional funds from TransCap Corporation.

10. On December 6, 2012, the Appellant sent correspondence to TransCap Corporation declaring all funds received from TransCap Corporation to be a return of capital. A copy of the December 6, 2012 correspondence is attached as Exhibit 8.

[3] Rather than attach all the exhibits referred to in the Agreed Statement of Facts, I have attached the following:

Appendix A Promissory Note for $100, 000 dated the 1st day of March, 2006; (the second Promissory Note for $100, 000 is similar)

Appendix B Promissory Note for $300, 000 dated January 18, 2007; (the second Promissory Note for $300, 000 is similar)

Appendix C Excerpts from Master Loan Agreement.

[4] Mr. Roszko testified, flushing out in greater detail some of the above facts. He had sold the family farm in 2006 and invested his portion of the proceeds with a reputable Alberta financial enterprise. However, as he was concerned about taxes arising from the sale of the farm, he attended a presentation by TransCap in Edmonton, hoping that he may receive some advice to assist with his tax position. Instead, with promises from Blair Carmichael of TransCap that he could achieve significant returns on his investments in the range of 18% to 22%, and following a subsequent meeting with Mr. Carmichael, Mr. Roszko decided to try an initial $100, 000 investment. As is clear from the schedules attached this was set up in the form of a loan. Mr. Roszko was led to believe TransCap bought and sold commodities at considerable profit to achieve the high returns.

[5] Having received the monthly payments promised on the first $100, 000, he proceeded to make an additional $100, 000 investment and again received the promised monthly payments. He then made the two additional $300, 000 investments, receiving payments from TransCap as set out in paragraph 9 of the Agreed Statement of Facts.

[6] In December 2009, after the accidental death of his son, Mr. **Roszko** approached TransCap for a return of some funds to cover funeral expenses. His request was denied in a manner which caused Mr. **Roszko** some suspicion. He made enquiries which eventually led to an Alberta Securities Commission investigation, and a finding by the Alberta Securities Commission that TransCap perpetrated a fraud on investors. The Alberta Securities Commission[1] indicated in their decision of May 9, 2013 that:

> 143 The "prohibited act" asserted by Staff was, essentially, the misrepresentations to Alberta investors that their money would be applied in bond trading and bridge financing that would fund interest payments and principal payments on TCC and STC securities, whereas in fact payments to investors in this Ponzi scheme were funded from their own and their fellow investors subscription money – something sustainable only for so long as investment subscriptions covered the payments out.

Issue

[7] Is the $156, 000 received by Mr. **Roszko** in 2008 from TransCap interest income within the meaning of paragraph 12(1)(*c*) of the *Income Tax Act* (the "*Act*") or does it represent the return of capital?

Analysis

[8] The Appellant's position is that the sum of $156, 000 received by the Appellant is a return of the principal loan to TransCap and is not includable in his income, for the following two reasons:

> a) First, the Appellant entered into the lending arrangement having relied on fraudulent misrepresentations. As the innocent party, the Appellant has rescinded the lending arrangement, rendering the contract void *ab initio* and of no effect with respect to any payment of interest. In the alternative, the Appellant argues that the transfer of funds by him to TransCap in circumstances where there is no enforceable agreement, and no consideration payable by TransCap, creates a resulting trust. The beneficial ownership of the funds advanced by Mr. **Roszko** therefore always remained with him. The only possible characterization of the payment to the Appellant is the transfer to him of legal title to funds that were beneficially already owned by him.
>
> b) Second, the lending arrangement itself provides that any misrepresentation or breach of the agreement would result in all principal and interest becoming due and payable, without demand. As such, it is reasonable for the Appellant to characterize the amount received as return of principal.

[9] The Respondent relies on the four contracts along with the Master Loan Agreement to argue that the $156, 000 clearly falls into interest within the meaning of paragraph 12(1)(*c*) of the *Act*, and the fact of fraud does not negate a finding of interest from a source. The Respondent considered the factors cited in the case of *R v Cranswick*[2] and also relied on the Federal Court of Appeal's decision in *Johnson v R*[3] to reach this conclusion. The Respondent also identified three requirements, based on the Federal Court of Appeal decisions of *Perini v R.*[4] and *Sherway Centre Ltd. v R*,[5] that, if met, would render an amount interest:

> a) the amount was compensation for the borrower's use of the money;
>
> b) the amount was ascertainable on a daily basis;
>
> c) the amount was related to the outstanding principal sum.

[10] The basic distinction between the Respondent's approach and the Appellant's first reason is that the Appellant maintains that, legally, Mr. **Roszko** could rescind the contract and render it void *ab initio* (which he did by letter of December 6, 2012), whereas the Respondent maintains one has to look to the terms of the contract, which are enforceable, and they evidence Mr. **Roszko**'s right to interest income. In effect, the Respondent relies on the contract and the Appellant does not.

[11] The Parties raise these rather technical arguments addressing contract law, creditor-debtor law and tax law. I am not convinced the situation needs to be as technically dissected. In the *Johnson* case, which also involved a Ponzi scheme, the Federal Court of Appeal concluded there can indeed be a source of income in a Ponzi scheme. It confirmed that, where, as in that case, the investor ultimately receives back more than she invested, applying the factors in the *Cranswick* case, there is indeed income from a source.

[12] However, in *Johnson*, the situation was quite different from the situation before me. In *Johnson*, the Federal Court of Appeal found that the contract was simply Ms. Johnson agreeing to invest money on the basis she would receive the money she invested "with a return in instalments in the amounts and on the

dates indicated by the post-dated cheques he gave her in exchange". The Federal Court of Appeal went on to say:

> 39. Ms. Johnson may well have believed that Mr. Lech was going to use the money to earn profits by option trading, because that is what he told her he would do. However, the record discloses no evidence upon which the judge could reasonably conclude that Mr. Lech was under a contractual obligation to Ms. Johnson to generate profits in that manner, or in any particular manner.
>
> ...
>
> 43. ... Hypothetically, if Ms. Johnson had made her payments to Mr. Lech knowing that he would use the money to operate a Ponzi scheme, she would have profited exactly as she did in the years in issue in this case ...
>
> ...
>
> 49. However, the principle on which Mr. Hammill was precluded from claiming tax relief for his losses is not applicable to Ms. Johnson. Their circumstances are entirely different, not because she profited from her transactions with Mr. Lech, but because her contractual rights were respected. As a matter of law, the fact that Mr. Lech used the proceeds of his unlawful Ponzi scheme to fund the profits he was contractually obliged to pay to Ms. Johnson is not relevant in determining the income tax consequences to Ms. Johnson of her transactions with Mr. Lech.
>
> [emphasis added]

[13] There are significant differences between Ms. Johnson's situation and Mr. Roszko's:

> a) Mr. Roszko's agreement with TransCap stipulated how the funds were to be invested;
>
> b) Mr. Roszko was led to believe the funds would be so invested;
>
> c) the funds were not so invested: Mr. Roszko's contractual rights were not respected; although he got a $156, 000 payment, it was not derived as contracted;
>
> d) it was agreed as a fact TransCap perpetrated a fraud;
>
> e) the fraud was as described by the Alberta Securities Commission in paragraph 143 of their decision quoted earlier.

[14] The Respondent argued that I could not rely on facts raised in the Alberta Securities Commission decision, not proven in the trial before me. While I accept such a general proposition, I am of the view that the description of the fraud as set out in the above quote from paragraph 143 is the Alberta Securities Commission's finding of law. It is unnecessary for Mr. Roszko to have to subpoena the individuals who perpetrated the fraud on behalf of TransCap to describe the fraud. The Alberta Securities Commission has done so, and I am prepared to rely on that finding.

[15] Mr. Roszko was misled to believe interest would be funded by TransCap. It was not. The funding of those payments, described as interest, was from Mr. Roszko and other investors' own money. That is not what was contracted for: it is not interest.

[16] Putting this analysis in terms of the Respondent's argument, I find that of the requirements to find interest, there is one missing element; that is, that TransCap did not use Mr. Roszko's money as it had contracted to do so – the payment of $156, 000 cannot be seen as a payment for the use of the money. Indeed, it is even questionable that TransCap could be considered a "borrower" if it simply took from Peter to pay Paul: that is not interest, that is a return of capital, and only if, as in Ms. Johnson's case, the investor receives more than a return of capital can we ask whether such profit is business income from a source.

[17] Further, in the *Johnson* decision, the Federal Court of Appeal went on to distinguish the case before it from the *Hammill v R*[6] case. The Federal Court of Appeal in addressing the *Hammill* decision stated:

> 48. ... It was determined at trial, however, that Mr. Hammill was the victim of a fraud that commenced when he was contacted about the profits to be made from buying and selling gems, and continued with the purported efforts of the perpetrators to sell the gems. This Court confirmed that his expenditures were not deductible because they were not connected to any source of income – or in other words, there was in fact no business even though Mr. Hammill honestly believed that there was. Justice Noël, writing for the Court, summarized this conclusion as follows at paragraph 28 of the reasons:
>
> A fraudulent scheme from beginning to end or a sting operation, if that be the case, cannot give rise to a source of income from the victim's point of view and hence cannot be considered as a business under any definition.

[18] Mr. Roszko's situation of having a fraud perpetrated upon him from the outset is more similar to the situation Mr. Hammill found himself in, and, as Justice Noël confirmed, this cannot give rise to a source of

business income. Granted, in the case before me, the Respondent is not suggesting there is a source of business income, but a source of property income in the form of interest. The principle I would suggest is the same: the purported interest is a fraud from the outset. It cannot be considered income from property, but rather a return of capital to the extent of the original amounts invested: only excess returns might be considered income. This is quite different from Ms. Johnson's situation where there were excess returns, and the court found she entered into a contract and her rights under that contract were respected. No fraud, as such, was found: she got exactly what she contracted for.

[19] Having reached this conclusion, I find it unnecessary to tackle the thorny issues raised by the Appellant of the effect of rescission on a contract, the concept of a resulting trust, or the impact of an ongoing breach of a contract. I see the matter in simpler terms. Mr. **Roszko** was defrauded – that has been agreed. He trusted TransCap to wisely invest his $800, 000 to yield a significant return. TransCap did not do that. In effect, TransCap just gave Mr. **Roszko** his own money back or that of other duped investors. There is a distinction, I would suggest, between earning income based on a fraudulent act or illegal activity versus a finding that the contract itself is a fraud. In the former situation there can be a source of income which can be taxable. In the latter situation there cannot.

[20] I allow the Appeal and refer the matter back for reconsideration and reassessment on the basis that Mr. **Roszko** did not earn interest income of $156, 000 in 2008.

Signed at Ottawa, Canada, this 21st day of February 2014.

"Campbell J. Miller"
C. Miller J.

Appendix A

SCHEDULE B – PROMISSORY NOTE

LENDER:	Len Roszko Box 1386 Mayerthorpe, AB T0E 1N0	BORROWER: TransCap Corporation 10 Discovery Ridge Heath S.W. Calgary, AB T3H 4Y2

Transaction Code: BJP0308-LR100-000C

This certifies that the Borrower is indebted to the Lender in the amount of $100,000.00 Canadian dollars (the "Principal"). This Promissory Note is issued according to the T.C.C. Master Loan Agreement and is further subject to the following terms and conditions:

1. PRINCIPAL AND INTEREST: Incorporated under the laws of Alberta, Canada, the Borrower, for value received, hereby acknowledges itself indebted and promises to pay the Lender on or about February 28th 2011, the Principal plus interest at the rate of one-point-five (1.5%) percent per month, paid monthly in arrears, all amounts received to be applied firstly against interest and then principal.

2. WAIVER: No consent or waiver by the Lender shall be effective unless made in writing and signed by an authorized officer of the Lender.

3. NOTICE: Any notice to the Borrower may be given by prepaid registered mail to the Borrower at its address set forth herein and any notice so given shall be deemed to have been duly given on the date following the day on which the envelope containing the notice was deposited prepaid and registered in a post office. Notwithstanding the above notice to the Borrower which designates a place or a person to which payment is to be given which is different from that contained above, shall be deemed to have been received by the Corporation six (6) days after the date such notice is sent by registered mail.

4. APPLICABLE LAW: This agreement shall be interpreted in accordance with the laws of Province of Alberta of the country of Canada and the parties hereto do hereby irrevocably submit to the jurisdiction of these courts for all matters related to this agreement, its validity or interpretation.

5. SUCCESSION: This agreement shall enure to the benefit of and be binding upon the parties and their respective successors and assigns.

6. NON-NEGOTIABLE AND NON-TRANSFERABLE: This Promissory Note is non-negotiable and non-transferable.

Dated this 1st day of March 2008.

Signed for and on behalf of TransCap Corporation

Per:
Dale E. St. Jean (President)

Appendix B

SCHEDULE B – PROMISSORY NOTE

LENDER: Len Roszko
Box 1386
Mayerthorpe, AB T0E 1N0

BORROWER: TransCap Corporation
10 Discovery Ridge Heath S.W.
Calgary, AB T3H 4Y2

Transaction Code: SJE0207-LR300-000C

This certifies that the Borrower is indebted to the Lender in the amount of $300,000.00 Canadian dollars (the "Principal"). This Promissory Note is issued according to the T.C.C. Master Loan Agreement and is further subject to the following terms and conditions:

1. PRINCIPAL AND INTEREST: Incorporated under the laws of Alberta, Canada, the Borrower, for value received, hereby acknowledges itself indebted and promises to pay the Lender on or January 31st 2012, the Principal plus interest at the rate of one-point-five (1.5%) percent per month, paid monthly in arrears, all amounts received to be applied firstly against interest and then principal.

2. WAIVER: No consent or waiver by the Lender shall be effective unless made in writing and signed by an authorized officer of the Lender.

3. NOTICE: Any notice to the Borrower may be given by prepaid registered mail to the Borrower at its address set forth herein and any notice so given shall be deemed to have been duly given on the date following the day on which the envelope containing the notice was deposited prepaid and registered in a post office. Notwithstanding the above notice to the Borrower which designates a place or a person to which payment is to be given which is different from that contained above, shall be deemed to have been received by the Corporation six (6) days after the date such notice is sent by registered mail.

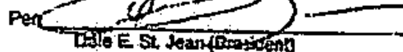
4. APPLICABLE LAW: This agreement shall be interpreted in accordance with the laws of Province of Alberta of the country of Canada and the parties hereto do hereby irrevocably submit to the jurisdiction of these courts for all matters related to this agreement, its validity or interpretation.

5. SUCCESSION: This agreement shall enure to the benefit of and be binding upon the parties and their respective successors and assigns.

6. NON-NEGOTIABLE AND NON-TRANSFERABLE: This Promissory Note is non-negotiable and non-transferable.

Dated this 1st day of February 2007.

Signed for and on behalf of TransCap Corporation

Per 
Dale E. St. Jean (President)

Appendix C

1.1 The Lender shall be those parties who from time to time lend funds to the Borrower.

1.2 The Indebtedness of the Borrower to the Lender shall, from time time, be equal to the aggregate amount outstanding at any time of all loans and advances made or which mat be made by the Lender to the Borrower pursuant to this Agreement and any interest/capital gain thereon (the "Indebtedness").

...

2.2 The Loan (s) amount plus all accrued and unpaid interest/capital gain, and such other amounts which may be due and payable to the Lender from the Borrower, shall become due and payable in any event on the various Loan Maturity Date (s) as agreed between the particular Lender and the Borrower. Notwithstanding anything herein contained, and in addition to any payment deadlines or accelerated provisions herein contained, all Indebtedness shall become due and payable, without demand, in the event an interest/capital gain payment is not made in a timely manner or upon a Default occurring.

...

3.3 Under Irrevocable Representation and Warranty made with various organizations and institutions and under specific arrangements the loaned funds can only be utilized for "Qualified Transactions" which are defined as the acquisitions of assets only where TransCap has first acquired "Forward Commitment Contracts" with organizations or institutions with the financial strength to provide guaranteed purchases of those assets at a predetermined price and date, which will allow TransCap to make a profit in the transaction. Further conditions of the TransCap Corporation ESCROW is that the original loaned funds can only be returned to the Lender and the original co-ordinates unless notification of change is received from the Lender.

...

5.1.2 Keep the loaned funds in "TransCap Corporation ESCROW"and be managed according to the conditions as stated in Article 3.3. herein.

5.1.3 Continue to be liable for any Indebtedness remaining outstanding should the funds for any reason not be recovered from the "TransCap Corporation ESCROW", and in the event of Default, to satisfy all the Indebtedness, and the Lender shall be entitled to pursue full payment thereof.

...

7.1.2 If the Borrower neglects to carry out or observe any covenant or condition under this Agreement;

...

Document ID: CITE Roszko v The Queen (TCC) [2014/02/21]

Footnotes

La question en litige consistait à déterminer si le ministre avait correctement inclus dans le revenu du contribuable la somme de 156 000 $ en tant que revenu d'intérêt pour l'année d'imposition 2008. Le contribuable, qui sans le savoir avait prêté 800 000 $ à une société qui exploitait une combine à la Ponzi, a soutenu que la somme en question était le retour d'une partie du prêt. Plus particulièrement, il s'agissait de déterminer si la somme en question était du revenu d'intérêt ou un remboursement de capital. Appel accueilli.

1. TransCap Corporation, Re, 2013 ABASC 201.
2. [1982]1 FC 813, 82 DTC 6073.
3. 2012 FCA 254.
4. 82 DTC 6080.
5. (1998) 98 DTC 6121.
6. [2005] 4 CTC 29.

Help Desk: Mon-Fri, 9am-5pm ET 1-888-352-2228 Contact us
© 2001-2015 Ernst & Young Electronic Publishing Services, Inc. All rights reserved.

2012/01/23 — (ONSC) Orman et al v Marnat Inc. et al

2012 DTC 5052; [2012] 4 CTC 274; 2012 ONSC 549

Read: Full text of case

HEADNOTE:

Application for orders rectifying the corporate records of the respondent corporations, as well as for declarations showing that (i) the monies received from an investment enterprise were not interest payments but a return of capital, and (ii) the monies paid by the respondent corporations to the applicants were not bonuses, but repayment of corporate loans. At issue was (i) whether the court was barred from ordering rectification or making a declaratory order, on the basis that such orders would interfere with the jurisdiction of a specialized tribunal or another court, and (ii) whether the applicants were entitled to rectification. Between 1998 and 2004 the applicants, individually and through their corporations (the respondent corporations), were the victims of a **Ponzi** scheme. As a result of the scheme, the applicants paid **income** tax on monies that they reported as **income**, and which they argued was a return of principal or capital and not subject to **income** tax. Application allowed in part.
Français

CASES CITING THIS CASE:

CASES CITED WITHIN THIS CASE:

Citation: 2012 ONSC 549
Docket: 10-CV-397948
Date: 20120123

BETWEEN:

Alan Orman and Gerald L. Freed, Applicants

and

Marnat Inc., D.S.D. Holdings Inc., The Attorney General of Canada, and Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance, Respondents

COURT/JUDGE/DATE:

Ontario Superior Court of Justice, Perell J., January 23, 2012. (Docket: 10-CV-397948)

COUNSEL:

William V. Sasso and *Jacqueline A. Horvat*, for the Applicants.
Lori E.J. Patyk, for Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance.
Marie-Thérèse Boise and *Diana Aird*, for the Attorney General of Canada.

REASONS FOR DECISION

PERELL, J.:—

A. INTRODUCTION

[1] Between 1998 to 2004, the Applicants, Alan Orman and Gerald L. Freed, individually and through their corporations, the respondents D.S.D. Holdings Inc. and Marnat Inc., were the victims of a **Ponzi** scheme perpetrated by the late Howard Waxenberg, an investment advisor, and by Downing & Associates, the entity he used to defraud investors.

[2] As a result of the **Ponzi** scheme, Messrs. Orman and Freed, who I will sometimes refer to as the Taxpayers, paid **income** tax on monies that they reported as **income**, and which they now say was a return of principal or capital and not subject to **income** tax. Mr. Orman says that he unnecessarily paid $550, 823.33 in **income** tax, and Mr. Freed says he unnecessarily paid $654, 182.23. They also suffered capital losses on their investments.

[3] Messrs. Orman and Freed seek orders rectifying the corporate records of D.S.D. Holdings and Marnat respectively, and they seek declarations to show that: (a) the monies received from Downing & Associates were not interest payments but a return of capital; and (b) the monies paid by D.S.D. Holdings and Marnat to Messrs. Orman and Freed were not bonuses but were repayment of corporate loans.

[4] The motion to rectify the corporate records of D.S.D. Holdings and Marnat is not resisted by these corporations but by the respondents, The Attorney General of Canada for the Minister of National Revenue and Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance.

[5] The Federal Government and the Ontario Government, which I will refer to collectively as the Taxman, submit that rectification is not necessary and that, in any event, the conditions for rectification have not been satisfied. Further, the Taxman submits that granting rectification to Messrs. Orman and Freed would privilege them over other taxpayers. The Taxman submits that the application for rectification and for declarations should be dismissed.

[6] For the reasons that follow, I agree with the Taxman that Messrs. Orman and Freed are not entitled to rectification. At the time of the preparation of the documents and records they seek to have rectified, Messrs. Orman and Freed each intended that the documents express the meaning that the payments from Downing & Associates were **income**. There is no error in the expression of that intent in the corporate and tax documents, and, therefore, the equitable remedy of rectification is not available.

[7] I, however, disagree with the Taxman that the application for a declaration should be dismissed. In my opinion, it is appropriate to make a declaration that the monies received by Messrs. Orman and Freed were not **income** but a return of principal or capital.

[8] It is important to note that this declaration is very specific and that the declaration may or may not be particularly helpful to Messrs. Orman and Freed. The declaration is without prejudice to and is not a declaration of how, as a legal question, the payments should be treated for tax purposes nor is it a determination that the Taxman should refund the $550, 823.33 paid by Mr. Orman and the $654, 182.23 paid by Mr. Freed.

[9] Put shortly, the court's order will not determine whether or not the Taxman must or should make tax refunds to Messrs. Orman and Freed.

[10] I add that in so far as this case may be a precedent for others in similar predicaments to Messrs. Orman and Freed, it is important to note not only the precision or narrowness of the declaration but also that the reason that it is at all binding on the Taxman is that the Taxman intervened in this application to become a party, which may not always be the case.

B. FACTUAL BACKGROUND

[11] There is no dispute about the following facts.

[12] D.S.D. Holdings is an investment company wholly owned by Mr. Orman and his family. Marnat is an investment company wholly owned by Mr. Freed and his family.

[13] Between 1998 to 2005, D.S.D. Holdings entered into investment agreements with Downing & Associates, which was an investment enterprise operated or used by Howard Waxenberg, a Florida investment adviser. Messrs. Orman and Freed, who are partners in a clothing business in Windsor, Ontario, had met Mr. Waxenberg during sojourns at their winter residences in Boca Raton, Florida.

[14] Downing & Associates sent investors like Messrs. Orman and Freed account statements along with cheques that were represented to be interest **income** on the investments less a management fee. The statements indicated a return of between 18 percent to 20 percent per annum.

[15] As set out in the chart below, between 1998 and 2005, D.S.D. Holdings made investments with Downing & Associates, and it received payments that were reported as **income** in its financial and tax statements. Each year, D.S.D. Holdings paid bonuses to Mr. Orman, which were deducted as a business expense. The bonuses were loaned back to D.S.D. Holdings, and it agreed to pay interest on the loans, as set out in following chart.

	Investment	**Income** Reported	Bonuses to Orman	Interest Accrued
1998	$100, 000			$54, 317.69
1999	$400, 000	$39, 162.48		$72, 027
2000	$600, 000	$187, 075.51	$69, 000	$75, 667
2001	$300, 000	$344, 640.69	$188, 000	$83, 452
2002	$400, 000	$438, 505.27	$324, 000	$62, 363
2003	$397, 459.20	$510, 184.15	$348, 000	$69, 400
2004	$260, 000($57, 459.20)	$541, 845.72	$374, 000	$54, 459
2005		$276, 030		

[16] In 1998 and 1999, Mr. Freed entered into investment agreements with Downing & Associates, which investments were transferred to Marnat in 1999, after which it was Marnat that made investments, until the **Ponzi** scheme was discovered in 2005. In 1998 and 1998, Mr. Freed received $52, 842.52 from Downing & Associates that he reported in his **income** tax returns as taxable **income**.

[17] As set out in the chart below, between 1999 and 2005, Marnat made investments with Downing & Associates, and it received payments that were reported as **income** in its financial and tax statements. Each year, Marnat paid bonuses to Mr. Freed, which were deducted as a business expense. The bonuses were loaned back to Marnat, and it agreed to pay interest on the loans, as set out in the following chart.

	Investment	**Income** Reported	Bonuses to Freed	Interest Accrued
2000	$520, 000	$184, 515.51	$117, 000	$1, 963
2001	$400, 000	$333, 249.23	$231, 000	$65, 758
2002	$400, 000	$438, 505.27	$348, 000	$69, 707
2003	397, 459.20	$510, 184.15	$380, 000	$48, 645
2004	$110, 000.00 ($57, 459.20)	$535, 152.06	$404, 400	$62, 103
2005		$258, 778.12		

[18] In 2005, Mr. Waxenberg committed suicide, and it was subsequently discovered that Downing & Associates was operating a **Ponzi** scheme.

[19] The U.S. Securities and Exchange Commission charged Downing & Associates and Waxenberg's Estate with violations of U.S. securities laws. The Receiver appointed by the United States District Court reported that Mr. Waxenberg had defrauded about 200 investors, who had invested about $141 million.

[20] The Receiver reported and it is uncontested that Downing & Associates did minimal trading, made marginal or negative returns, and falsely reported earnings that were actually a return of the investors' principal.

[21] At the time of Mr. Waxenberg's death, D.S.D. Holding's investment with Downing & Associates was US$2, 400, 000. The return on this investment in monies received from Downing & Associates by D.S.D. Holdings (it is a matter of debate whether as a matter of tax law the return was principal or a return of **income**) was US$1, 686, 696.

[22] At the time of Mr. Waxenberg's death, Marnat's investment with Downing & Associates was US$2, 250, 000. The return on this investment in monies received from Downing & Associates by Mr. Freed and Marnat (it is a matter of debate whether as a matter of tax law the return was principal or a return of **income**) was US$1, 683, 148.40.

[23] The Receiver recovered approximately $10 million for investors, being a 27.45% recovery. Mr. Freed received $18, 852.09. Marnat received $159, 751.17 and D.S.D. Holdings received $201, 279.43.

Thus, Mr. Orman lost approximately $512, 000 ($US) in capital and also paid approximately $551, 000 in **income** taxes on **Ponzi** fund monies. Mr. Freed lost approximately $388, 000 ($US) in capital and also paid approximately $654, 000 in **income** taxes on **Ponzi** fund monies.

C. PROCEDURAL BACKGROUND

[24] On December 15, 2006, Messrs. Orman and Freed commenced an application against D.S.D. Holdings and Marnat. In their notice of application, they seek the following order:

(a) rectifying Marnat Inc.'s financial statements, Canada tax returns and Ontario tax returns and other corporate records, reports and filings in each of the years 1998 to 2004 to record that the amounts received from Downing Associates Technical Analysis ("Downing") particularized in the affidavit of Gerald Freed filed in support of this application, are treated and accounted for as a return of the principal amount invested and not as **income** and a declaration accordingly;

(b) rectifying Marnat Inc.'s financial statements, Canada tax returns and Ontario tax returns and other corporate records, reports and filings so that the payment to Gerald Freed of the bonus and interest authorized in each of the years 1998 to 2004 inclusive, set out in paragraphs 14 and 16 of his affidavit, is treated and accounted for as payments on account of Marnat Inc.'s indebtedness to him and on account of capital and a declaration accordingly;

(c) rectifying D.S.D. Holding Inc.'s financial statements, Canada tax returns and Ontario tax returns and other corporate records, reports and filings in respect of each of the years 1998 to 2004 to record that the amounts received from Downing particularized in the affidavit of Alan Orman are treated and accounted for as a return of the principal amount invested and not as **income** and a declaration accordingly;

(d) rectifying D.S.D. Holding Inc.'s financial statements, Canada tax returns and Ontario tax returns and other corporate records, reports and filings so that the payment to Alan Orman of the bonus and interest authorized in each of the years 1998 to 2004 inclusive, set out in paragraphs 10 and 12 of his affidavit, be treated and accounted for as payments on account of D.S.D. Holding Inc.'s indebtedness to him and on account of capital and a declaration accordingly.

[25] After the application had been commenced, Messrs. Orman and Freed wrote Canada Revenue and the Ontario Ministry of Finance to advise that the business **income** reported by D.S.D. Holdings and Marnat was not **income** but was a return of capital invested.

[26] The Taxman disagreed and did not issue any reassessments. The Taxman's position is that in a **Ponzi** scheme, the investors do not receive a return of capital but rather investors receive funds from the contribution of new investors into the **Ponzi** scheme, which is a source of **income** for tax purposes.

[27] To date, Messrs. Orman and Freed have not sought judicial review of the Minister of National Revenue's decision not to reassess the **income** tax liability, and the matter is currently before the Minister on a "Second Level Review," which is a reconsideration of the decision not to reassess.

[28] To date, Messrs. Orman and Freed have also not sought judicial review of the Ontario Minister of Finance's decision not to reassess.

[29] In February 2007, on consent and because the relief claimed in the application might affect the tax assessments of Messrs. Orman and Freed, D.S.D. Holdings, and Marnat under the ***Income** Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, and the *Corporations Tax Act*, R.S.O. 1990, c. C.40, the federal and provincial governments were added as respondents.

[30] After being added as parties, the Taxman moved for an order striking the application on the grounds that the Superior Court did not have jurisdiction to grant the rectification orders being sought by Messrs. Orman and Freed. Justice Desotti, however, dismissed the motion by order dated October 20, 2009.

D. DISCUSSION AND ANALYSIS

[31] As a general proposition, the Taxman submits that taxpayers, like Messrs. Orman and Freed, are free to restate or rectify their **income** tax returns and corporate financial statements, and they do not need a court order to do so. The Taxman submits that taxpayers can rectify their documents without a court order and then re-apply under the tax legislation for a re-assessment. In the circumstances of this case, if this is correct, it means that Messrs. Orman and Freed's request for a re-assessment may eventually be a matter of judicial review to determine whether the Taxman's treatment of their tax liability should be changed.

[32] Visualize, if the Taxpayers challenge the decision of the Minister of Revenue under s. 152 (4.2) of the ***Income** Tax Act* not to reassess for a statute-barred request for a reassessment, then the decision is subject to judicial review exclusively in the Federal Court pursuant to s. 18 (1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Taxpayers may also request a remission order under the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 23 (2). If the Taxpayers challenge the decision of Ontario Minister of Finance's decision, under the *Corporate Tax Act*, there is an appeal to the Superior Court. Also the Minister of Finance has discretion to accept a portion of tax assessed where it would be inequitable to collect the full amount, which exercise of discretion is subject to judicial review. Taxpayers may also request a remission order under the *Financial Administration Act*, R.S.O. 1990, c. F.12, s.5.1.

[33] In other words, the Taxman submits that the Superior Court should defer or not interfere with a matter that is within the designated jurisdiction of a Minister or another court. The Taxman submits that the court should not order rectification or make a declaratory order that would interfere with the jurisdiction of a specialized tribunal or another court: *GLP NT Corp. v. Canada (Attorney General)* (2003), 65 O.R. (3d) 840 (S.C.J.) at paras. 20-22; *422252 Alberta Ltd. and HMTQ*, 2003 BCSC 1362.

[34] In my opinion, the Taxman's submission fails for three reasons. First, as a general proposition, independent of the affect, if any, of this court's order on a taxpayer's liability, there may be reasons for this court to order rectification or to make declarations for taxpayers. In the case at bar, it just happens that Messrs. Orman and Freed and their corporations agree that the financial statements and other documents should be rectified, but this will not always be the case, and the court should not defer the appropriate exercise of its own jurisdiction when there is a genuine reason to exercise it. Further, an administrator, a tribunal, or another court may not have the jurisdiction to order rectification of the documents that would affect tax liability, and the court may be the only recourse for a taxpayer. For example, it was conceded during argument that the Tax Court would not have jurisdiction to order rectification of the corporate documents.

[35] *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728 (C.A.), aff'g (2000), 46 O.R. (3d) 104 (S.C.J.), leave to appeal to the S.C.C. ref'd [2000] S.C.C.A. No. 621 is authority that a court should not defer from making rectification orders because the order might affect the Taxman's imposition of tax. See also *Aim Funds Management Inc. v. Aim Trimark Corporate Class Funds Management Inc.*, [2009] O.J. No. 4798 (S.C.J.).

[36] Second, in the case at bar, although the court's order may be relevant to the exercise of the Minister's discretion to re-assess and to the determinations of other administrative or judicial proceedings, the order will not interfere with the jurisdiction of the other administrator or tribunal to make determinations within their jurisdiction. This court will make a declaration about a state of facts but not make a declaration of the legal outcome of that state of facts.

[37] Third, the submission fails because the Taxman joined these proceedings, and as a party to the application, the Taxman is now bound by the outcome (which will be declaratory relief but not

rectification). In my opinion, if, as the Taxman submits, the Taxpayers should have exercised self-help and rectified their own documents and then resorted to the administrative and judicial proceedings designed to determine tax liability, then it is equally true that the Taxman should not have become a party to these proceedings. Rather, the Taxman should have confined its involvement to the administrative tax assessment or re-assessment procedures, in which case, it could have argued that it was not bound at all by the Superior Court's termination. The Taxman, however, participated and it will be bound by the declaration, although not in a way that interferes with the jurisdiction of another administrator or tribunal.

[38] Thus, I conclude that the court should decide and not defer deciding Messrs. Orman and Freed's request for rectification and declaratory relief.

[39] Turning to the merits of the claim for rectification, in my opinion, equity's remedy of rescission of documents is not available in the circumstances of this case.

[40] Rectification is available when parties - and often the reference is to contracting parties - make a mistake in expressing their intent in the document that expresses their intent.

[41] In addition to contracts, courts have ordered rectification of:

- articles of amalgamation: *TCR Holding Corp. v. Ontario*, 2010 ONCA 233, leave to appeal refused 2010] S.C.C.A. No. 206; *Amalgamation of Aylwards (1975) Ltd. (Re)*, (2001), 16 B.L.R. (3d) 34 (NL SCTD)
- articles of amendment: *Di Battista v. 874687 Ontario Inc.* (2006), 80 O.R. (3d) 136 (S.C.J.)
- an arrangement under the *Companies' Creditors Arrangement Act*: *GT Group Telecom Inc. (Re)*, [2004] O.J. No. 4289 (S.C.J.)
- corporate resolutions: *Winclare Management Services Ltd. v. Canada (Attorney General)* (2009), 57 B.L.R. (4th) 68 (Ont. S.C.J.); *QL Hotel Service Ltd. v. Ontario (Minister of Finance)* (2008), 90 O.R. (3d) 760 (S.C.J.)
- share transfers: *Razzaq Holdings Ltd. (Re)* 2000 BCSC 1829
- a retirement plan under a collective agreement: *Kraft Canada Inc. v. Pitsadiotis*, [2009] O.R. No. 885 (S.C.J.).

[42] Rectification is concerned with mistakes in recording the parties' intent or purpose in their writing. It is not concerned about mistakes in the underlying purpose. Rectification is designed to ensure that the parties' documents express the parties' purpose at the time the document was finalized. See: *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1973] 2 O.R. 57 (C.A.) at para. 25, rev'd on other grounds, [1976] 1 S.C.R. 319; *Waskauksing First Nation v. Wasausink Lands Inc.* [2004] O.J. No. 810 (C.A.) at paras. 76-81, aff'g [2002] 3 C.N.L.R. 287 (S.C.J.); *Juliar v. Canada (Attorney General), supra.*

[43] To obtain an order rectifying a document, usually a contract, the applicant must prove: (1) a common intention held by the parties before the making of the document alleged to be incorrect; (2) the common intention remained unchanged at the date that the document was finalized; and (3) the document, by mistake, does not conform to the parties' prior common intention: *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.J.) at para. 13, aff'd (1980), 26 O.R. (2d) 746 (C.A.), leave to appeal to the S.C.C. ref'd., 32 N.R. 538, [1980] 1 S.C.R. xi.

[44] The court has an equitable jurisdiction to rectify documents that do not reflect the intentions of the parties where it can be said that the parties shared a common and continuing intention up to the time of the finalization of the documents: *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 (B.C.C.A.); *Razzaq Holdings Ltd. (Re), supra.*

[45] The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake provided certain demanding preconditions are met: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC19 at para. 31.

[46] In *Wasauksing First Nation v. Wasausink Lands Inc., supra*, at paras. 77 and 81, the Court of Appeal stated:

> 77. [A]n applicant seeking rectification of a written agreement must demonstrate, on "convincing proof", that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention.
>
> 81 ... Rectification is not used to vary the intentions of the parties, or to speculate on the substance of those intentions; rather it is designed to correct a mistake in carrying out the settled intentions of the parties as established by the evidence. As well, and importantly, rectification is not available to correct erroneous assumptions or beliefs as to what was intended.

[47] At the time when Messrs. Orman and Freed were preparing or having prepared the documents that they now seek to rectify, their intent, was to prepare or have documents prepared to express that their corporations were in receipt of investment **income** and that Messrs. Orman and Freed were in receipt of salary and investment **income.** At the time when the documents were finalized, the documents correctly expressed Messrs. Orman and Freed's intent. Rectification is not available to correct what is a mistake in the underlying purpose that was accurately expressed in the parties' documents. Rectification is not available to correct erroneous assumptions or beliefs as to what was intended.

[48] In the case at bar, I regard *Juliar v. Canada (Attorney General), supra, 771225 Ontario Inc. v. Bramco Holdings Co.* (1994), 17 O.R. (3d) 571 (Gen. Div.), aff'd (1995), 21 O.R. (3d) 739 (C.A.) and other cases about rectification where rectification is sought in order to avoid or reduce the imposition of tax are helpful only insofar as they illustrate the general principles about rectification and equitable relief because Messrs. Orman and Freed were never engaged in arranging their affairs to obtain a more favourable tax treatment. Rather, their intent at the time the documents were prepared was to pay tax, because they perhaps mistakenly thought that they were obliged to do so. By seeking rectification, they are not seeking to be taxed in a more favourable manner; they are seeking rectification because they now believe that it was a mistake to believe that they were obliged to pay tax.

[49] *771225 Ontario Inc. v. Bramco Holdings Co.* is a useful case for demonstrating the general principle that rectification is not available to correct a document because of a mistake in forming a party's or the parties' intentions, but rather it is available to correct a mistake in implementing the party's or the parties' intentions. In this case, Audrey Ho transferred property to 6840002 Ontario Ltd. This was a mistake because the grantee was a non-resident corporation and liable for a higher rate of land transfer tax. The court held that it could not order rectification to "re-do" the transaction. Ms. Ho never had an intention other than to transfer to 6840002 Ontario Ltd., and thus the documents correctly expressed her intent and there was no basis for rectification.

[50] In *Juliar v. Canada (Attorney General), supra*, a majority of the Court of Appeal distinguished *771225 Ontario Inc. v. Bramco Holdings Co.* In *Juliar*, the applicants transferred shares into a holding company in a manner that had adverse tax consequences. The choice of a conveyance mechanism was a mistake because the applicants always intended a transaction designed to avoid the adverse tax consequences. Thus, the documents used by the parties did not correctly express their pre-existing and

continuing intention, and rectification was appropriate to align the expression of the intent with the pre-existing intent. See also *QL Hotel Service Ltd. v. Ontario (Minister of Finance), supra.*

[51] Messrs. Orman and Freed rely on the Court of Appeal's decision in *Danso-Coffey v. Ontario*, 2010 ONCA 171 in support of their claims for relief, and the case supports their claim for a declaration but not their claim for rectification.

[52] The Court of Appeal's reasoning in *Danso-Coffey* is intricate, and the judgment requires a close and careful reading. The facts were that without her consent, Ms. Danso-Coffey was made a director of her brother's corporation, which went bankrupt. Under s. 43 of the *Retail Sales Act*, R.S.O. 1990, c. R.31, the directors of a bankrupt corporation are liable to pay unremitted retail sales tax, and as a director, Ms. Danso-Coffey became liable to remit $64, 020.78. Because of bad advice, she did not challenge the assessment under the Act, but instead, she sued the Ontario Government to obtain a cancellation of the tax liability. The judge at first instance declared that she was never a director and, accordingly, that she was not liable for the unremitted retail sales tax. The judge at first instance also held that the assessment was unlawful because she was not a director.

[53] In a judgment written by Justice Weiler, the Court of Appeal held that the judge at first instance was correct in declaring that Ms. Danso-Coffey was not a director but incorrect in concluding that the assessment was unlawful.

[54] Justice Weiler held that the Minister's assessment was lawful and that Ms. Danso-Coffey could have raised the issue that she was never a director as a defence to the assessment. Further, Justice Weiler held that assuming that the Superior Court had a general jurisdiction to grant declaratory relief, the application judge erred in declaring that Ms. Danso-Coffey was not liable for retail sales tax.

[55] Since Ms. Danso-Coffey could have raised a defence under the assessment procedure of the *Retail Sales Tax Act*, there was no jurisprudential reason for the Superior Court to exercise its jurisdiction to make a declaration. Justice Weiler concluded that the Legislature intended that disputes about the validity of an assessment of tax were to be resolved within the procedures of the Act.

[56] In the result, the Court of Appeal allowed the Minister's appeal, but Justice Weiler noted that this outcome did not mean that the declaration that Ms. Danso-Coffey had never been a director had no legal effect. Since the factual basis on which the assessment was made did not exist, Ms. Danso-Coffey could ask the Minister to reassess the imposition of liability for tax based on the true state of facts.

[57] Applying the analytical approach of *Danso-Coffey v. Ontario* to the circumstances of the case at bar, the uncontested evidence establishes as a fact that the payments received from Downing & Associates were not investment **income.** It is uncontested that Downing & Associates was not using the monies it received to make investments and earn **income**, but it was operating a **Ponzi** scheme and using the investors' own money or the money of other investors to make payments purporting, but not being in truth, a return on the investors' investments.

[58] This factual determination is binding on the Taxman and the Taxpayers who are parties to this proceeding. However, this factual determination is not a legal determination of the legal propriety of the Taxman's treatment of this factual truth.

[59] The question of law as to whether a payment or a receipt is on account of **income** or of capital is a determination to be determined under the procedures of the ***Income** Tax Act* and the *Corporate Tax*

Act. See *Johns-Manville Canada Inc. v. R.*, [1985] 2 S.C.R. 46; *422252 Alberta Ltd. v. The Attorney General of Canada*, 2003 BCSC 1362.

[60] This subtle distinction between influencing an administrator's decision in law and making the legal decision for the administrator was recognized in *Danso-Coffey v. Ontario* and explains why Justice Weiler's judgment is so careful and intricate. In that case, it was appropriate for the judge at first instance to declare that Ms. Danso-Coffey was not a director, but it was wrong for him to declare that she was not liable as a director to remit retail sales tax.

[61] Similarly, in the case at bar, it would be wrong of me to declare how for tax purposes the monies received by D.S.D. Holdings and Marnat as investment **income** but now know in truth to be something other than genuine investment **income** should be treated for tax purposes. At this juncture, the determination of the legal effect of the nature of the payments received by D.S.D. Holdings and Marnat is for the Minister of National Revenue and the Minister of Finance subject to judicial review in the Federal Court with respect to the ***Income** Tax Act* or this court with respect to corporate tax under the *Corporate Tax Act*.

[62] Therefore, I do not have to agree or disagree with *Simmonds v. R.*, [1997] 2 CTC 2293 (T.C.C.), where the Tax Court held that money from a **Ponzi** scheme is a source of **income** for tax purposes or with *Johnson v. R.* 2011 TCC 540, where the opposite decision was reached.

[63] I also do not have to address the Taxman's argument that treating Messrs. Orman and Freed's monthly payments from the **Ponzi** scheme as a return of capital would be unfair to other investors who lose money on their investments for other reasons and this unfairness was a reason for the court not to grant any relief but to dismiss the application. However, I did address this argument during oral argument and expressed the view that I did not see any unfairness because the **Ponzi** scheme investors are not similarly situated to other investors because there is a difference between investors whose investment losses are a result of fraud and investors whose losses are a result of a failure in performance of the investment. For whatever it is worth, I have not changed my opinion.

E. CONCLUSION

[64] For the above reasons, I dismiss the request for rectification.

[65] For the above reasons, without prejudice to how as a matter of law the monies received by D.S.D. Holdings and Marnat from Downing & Associations and used by those corporations to provide bonuses and interest **income** to Messrs. Orman and Freed is treated for tax purposes, I declare the monies are not **income** but rather a return of principal or capital to D.S.D. Holdings and Marnat.

[66] I regard success on this application as being equally divided, and my inclination is not to make an order as to costs. However, the parties may disagree and, therefore, if any party seeks costs, they may do so within 20 days of the release of these Reasons for Decision to be followed by reply submissions within a further 20 days.

[67] I would like to thank counsel for their interesting and helpful arguments.

Perell, J.

Released: January 23, 2011

Document ID: CITE Orman et al v Marnat Inc. et al (ONSC) [2012/01/23]

Footnotes

Demande d'ordonnances rectifiant les livres des sociétés intimées, ainsi que des déclarations indiquant que (i) les sommes reçues d'une société de placement ne constituaient pas des paiements d'intérêt, mais plutôt un retour de capital, et que (ii) les sommes versées par les sociétés intimées aux demandeurs n'étaient pas des indemnités, mais plutôt le remboursement de prêts de sociétés. La question en litige consistait à déterminer (i) si la Cour était empêché d'ordonner la rectification ou de rendre une ordonnance déclaratoire au motif que de telles ordonnances empiéteraient sur la compétence d'un tribunal spécialisé ou d'un autre tribunal, et (ii) si les demandeurs avaient droit à la rectification. Entre 1998 et 2004, les demandeurs, individuellement et par le biais de leurs sociétés (les sociétés intimées), ont été victimes d'un stratagème à la Ponzi. À l'issue du stratagème, les demandeurs ont payé un impôt sur les sommes qu'ils ont déclarées comme revenus, et qu'ils ont soutenu être un retour de capital et ne pas être assujetties à l'impôt sur le revenu. Demande accueillie en partie.

Help desk: Mon-Fri, 8am-6pm ET 1-888-352-2228 Contact us
© 2001-2018, Ernst & Young Electronic Publishing Services, Inc. All rights reserved.

EXHIBIT 7

To the Receiver's Ninth Report to Court
Dated January 17, 2020

A Summary of T5 Issue with CRA

As you are aware, since 2016, the investors have been trying to get the matter of the T5 reversals resolved by dealing with CRA and going through the procedures provided for under the *Income Tax Act* (ITA) such as filing T1 Adjustment Requests or Notices of Objection. To date, the CRA continues to reject investor's requests to have T5s be reassessed as a return of capital.

The CRA has indicated on several occasions that they would only treat the T5s as a return of capital if investors obtained a **Court Order** (see attached 4 taxpayer letters).

In October 2018, the Receiver attempted to obtain a Court Order on behalf of all the investors, but the Department of Justice (DOJ) opposed the application on the basis that some investors may have received legitimate interest income and valid T5s. The DOJ advised that investors file amended tax returns instead of pursuing the Court Order and 'burdening the Court'.

On the advice of the DOJ, since October 2018, the investors have continued to ask the CRA for the reversal of their T5s without success. Given that the CRA is not amenable to processing the investor requests through the procedures under the ITA, we ask again that BDO Canada Limited, as Receiver for Base Finance Ltd., make an application to the Court of Queen's Bench of Alberta to obtain the following Order:

1. to have the interest reported in T5s declared a return of capital; and
2. to have the contracts, 'Irrevocable Assignment of Mortgage Interest' documents, declared void.

Our request is supported by two Court cases (attached):

- *Roszko v. The Queen* (2014 TCC 59)
- *Orman et al v. Marnat Inc. et al* (2012 ONSC 549)

Despite the DOJ's view that some investors may have received valid T5s, based on the Receiver and ASC Reports it is clear that virtually 100% of the funds paid out by Base since 2004 are a return of capital and not interest. No T5s should have been issued from at least 2004 as there was no interest earned or paid out by Base. Some investors may have received distributions in excess of their capital investments resulting in a gain; however, it would be unreasonable to expect either Base, or the Receiver, to determine whether an investor received excess distributions and how such excess or gain should be reported: on account of income or capital. Such a determination can only be made by the

individual investor. I compare this to a trust situation where the trust reports a return of capital in their T3s. However, the trust has no obligation to further determine what the tax implications are to the investor. It is up to the investor to determine whether they have received excess distributions, to report a gain and whether this gain should be on account of income or capital.

We have come full circle since the Clarke's and the Young's received letters from CRA indicating they would treat the T5s as a return of capital if the investors obtained a Court Order. Such a Court Order would be invaluable to investors in their dealings with the CRA. It could be used by investors to support their requests for a tax reassessment or as evidence in Tax Court. We believe that the best approach is to file a blanket application and have DOJ present their position and let a Judge make the decision on the Court Order being requested.

We ask that you, the Receiver, consider an application similar to the one prepared by Richard Billington. We have 6 investors who would participate in this application. If the Receiver is successful in obtaining a Court Order for a small number of investors, we expect the CRA to consider such a Court Order persuasive evidence for other investors.

It took 3 years and many hours of volunteer time to take the ABIL issue to Tax Court without legal support. In the end, the DOJ conceded and issued a Consent to Judgement. We are not able to make an Application to the Court of Queen's Bench of Alberta on our own, without legal support, due to the various procedural requirements. However, we feel that we have an excellent case for a Judge to grant an Order on the T5 issue with the support of the Receiver and Osler's expertise.

I am providing several documents in support of this request, including a tax memo we prepared in support of the T5 be a return of capital that we previously provided to the CRA.

Please let me know what you need to proceed.

Highlight of Events in Chronological Order

- On July 13, 2018, Brian and Barbara Clarke received letters from CRA (attached) which, amongst other things, states the following:

  The CRA acknowledges that ASC's opinion that there were no underlying funds to create interest income. However, the document does not represent a Judge's ruling.

... in some rare instances, the income inclusion of interest income declared by the taxpayer in prior years can be revised and the amounts received now be considered a return of capital when:

- *The taxpayers* ***themselves*** *went to Court and, based on the facts relating to their own situation,* ***the Court*** *confirmed that the money received was a return of capital; and*

- *The taxpayers went to Court to have their contracts voided. If the Court voided the contracts, then the amounts received would be treated as a return of capital. ...*

We have pointed out to the CRA on several occasions that the Judge in paragraph 61 of *Rozko* stated that a decision by the ASC is indeed a finding in law.

- On August 3, 2018, Robert and Susanne Young received a letter from CRA (attached) which, amongst other things, states the following:

  In some instances such as when a Court ruling confirmed that the money received by the taxpayers was a return of capital based on the facts related to that taxpayer's personal situation or when the Court voided the taxpayer's investment contract, the amounts received could be considered a return of capital.

  Furthermore, in reference to paragraph 150 of the third report of the Receiver dated May 9, 2016 presented to the Court of Queen's Bench of Alberta, the following comments are the comments from a receiver and are not a judge's ruling: 'interest earned and or paid on the investor's investments should be considered a repayment of principal and no 2015 tax slips will be issued for "interest income"'. Furthermore, this comment pertains to taxation year 2015 and not the years under review.

- At the August 3, 2018 investor meeting held by BDO Canada Limited, the investors presented a petition signed by 188 investors requesting that BDO Canada Limited, as the Receiver for Base Finance Ltd., obtain a Court Order on behalf of the investors deeming the amounts reported in Base T5s as a return of capital.

- On October 19, 2018, Richard Billington, solicitor for the Receiver, contacted the Court of Queen's Bench of Alberta to schedule a hearing for the application (attached).

- On October 26, 2018, Jill Medhurst, Counsel with the Department of Justice responded to Richard Billington (attached):

  ... the investor can file an amended tax return pursuant to section 152(4.2) (reassessment with taxpayer's consent) to remove the T5 income (if it only covers the capital and not interest) if the application is made within 10 years of the year at issue ...

  I do think it is better to try to resolve this matter through the procedures provided for under the ITA rather than burdening the Court ...

- On April 3, 2019, Susanne Young contacted the Chief of Appeals in Ottawa, Manish Goel, regarding the reversal of T5s (attached). We received verbal confirmation that the matter is being considered by CRA headquarters in Ottawa and that CRA will issue a written document setting out their position. No timeline has been provided.

- To date we have not received anything in writing from CRA regarding the T5s. Investors are continuing to have their adjustment requests denied. Investors who have filed a Notice of Objection with CRA have either had their requests denied or have not yet received a decision. Some objections have been with CRA for over 2 years with no resolution.

- On September 11, 2019, Bill Janman was advised by a Senior Appeals Officer at CRA HQ in Ottawa that the CRA "will never agree to reverse the T5s and that a decision on the T5s could take years".

EXHIBIT 8

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Memo

Date:	June 20, 2019
To:	CRA, Appeals Division, Toronto North
Subject:	Base Finance Ltd. Support for the reversal of T5 Interest

The purpose of this memo is to set out the facts and relevant Canadian tax law to support our position that the interest reported in the Base T5s was not interest but a return of capital and should be reversed in accordance with subsection 152(4.2) and the CRA's Information Circular IC07-1R1 *Taxpayer Relief Provision.*

Supporting Documentation

This memo refers to various documents listed in attached Schedule A. All of this supporting documentation has previously been provided to CRA. If you require a copy of any of the supporting documentation, we will provide it on request.

Background

The Ponzi fraud scheme was perpetrated by Base Finance Ltd., Arnold Breitkreutz and Susan Way. Following are key points of the fraud that have been identified in the *ASC Panel Decision*. For greater certainty, the *ASC Panel Decision* represents a legal determination of the facts as they relate to the Ponzi fraud scheme carried on by Base[1]. The *ASC Panel Decision* was based on expert witness testimony[2] and documents from the receivership, including three of the Receiver's reports to the court (plus a supplementary report to its third report).[3]

- Investigations performed by the ASC and the Receiver for the period of 2004 to 2015 revealed the following:
  - Base had been operating as a fraudulent Ponzi scheme since at least 2004.[4]
  - Base did not carry on a commercial lending business, earning no significant income of any kind.[5]
  - Base did not use the funds received from investors as agreed upon to earn interest income.[6]
  - Base used funds received from investors to make periodic payments to investors.[7]
  - Base issued T5s to investors for payments that had no characteristic of income but were a return of capital.[8]
  - Funds provided to Base by investors were loans.[9]
  - Each loan to Base was made on the explicit understanding that Base was lending the money in relation to real estate in Alberta.[10]

[1] Roszko v. The Queen (2014 TCC 59), para. 14
[2] ASC Panel Decision, para.14
[3] ASC Panel Decision, para. 61
[4] ASC Panel Decision, para. 36, 144
[5] ASC Panel Decision, para. 59, 62, 63
[6] ASC Panel Decision, para. 144, 147
[7] ASC Panel Decision, para. 36, 59, 62, 63, 144
[8] Third Report of the Receiver, para. 150
[9] ASC Panel Decision, para. 32
[10] ASC Panel Decision, para. 35, 47

- Funds were not invested by Base as contracted for with the investors.[11]
- Base provided its investors with "Irrevocable Assignments of Mortgage" detailing loan duration and interest rate of the loan, typically signed by Susan Way.[12]

- On September 29, 2015, the Alberta Securities Commission ("ASC") issued an order freezing the bank accounts of Base.[13]
- On October 15, 2015, BDO Canada Limited was appointed the Receiver for Base (hereinafter referred to as the "Receiver") as Base had become insolvent.

Analysis

Table of Contents

1. **Paragraph 12(1)(c) of the Income Tax Act requires that amounts paid on account of interest be included in income. Based on current binding Canadian case law, the funds Base paid to investors from at least 2004 to 2014 do not have characteristics of interest but are a return of capital.**

   a. **Case law has established that taxation consequences should flow from the economic realities of a transaction rather than the legal arrangement as it appeared to be. Base did not honour its contractual obligation and investors did not receive what they contracted for.**

   b. **A fraudulent scheme from beginning to end cannot give rise to a source of income from the victim's point of view. Transactions that investors entered into with Base were a fraud from beginning to end starting in 2004 or earlier.**

   c. **Consent Judgments (2018-3092(IT)I dated April 9, 2019 – AND – 2019-1054(IT)I dated May 29, 2019) granting Base investors their allowable business losses in respect of their investments in Base necessarily imply that Base Finance Ltd. qualified as a small business corporation and had no income from property, interest or otherwise.**

   d. **Excess returns may be income.**

2. **The CRA's Request for a Court Order/Ruling is unnecessary and unreasonable**

   a. **The facts of the Base Ponzi scheme have been established by the ASC Panel, Madam Justice Romaine's findings of fact and the Receiver, which constitute a finding in law.**

   b. **"Irrevocable Assignment of Mortgage Interests" and T5s issued by Base from 2006 through 2014 have no economic basis and should be disregarded. There is no need for a court order to void the investment contract.**

---

[11] ASC Panel Decision, para. 35, 36, 147
[12] ASC Panel Decision, para. 32
[13] ASC Panel Decision, para. 9

c. **The CRA's position that similar cases tried before the courts (Tax Court of Canada and Federal Court of Appeal) do not represent binding Canadian law is unreasonable and goes against the concept of jurisprudence and the basis of Canadian law.**

3. **Other**

a. **Comments from the Receiver regarding the characteristic of investor payments pertain to the entire period under review, being from August 2004 to September 2015**

b. **The CRA's current administrative positon is not law and is not binding on either the taxpayer or CRA. In fact, it does not even reflect current Canadian legal jurisprudence.**

c. **Our requests to have the tax returns amended for 2006 to 2014 is relying on subsection 152(4.2) and the CRA's Information Circular IC07-1R1 Taxpayer Relief Provision.**

Analysis

1. **Paragraph 12(1)(c) of the *Income Tax Act* requires that amounts paid on account of interest be included in income. Based on current binding Canadian case law, the funds Base paid to investors from at least 2004 to 2014 do not have characteristics of interest but are a return of capital.**

While paragraph 12(1)(c) requires the inclusion of interest as follows:

> Interest ... any amount received or receivable by the taxpayer in the year ... on account of, in lieu of payment of or in satisfaction of interest ...

the Act does not define interest. One must therefore turn to the realities of the transaction as set out in current binding Canadian Case Law.

a. **Case law has been established that taxation consequences should flow from the economic realities of a transaction rather than the legal arrangement as it appeared to be. Base did not honour its contractual obligation and investors did not receive what they contracted for.**

In order to determine whether the funds received from Base from 2006 to 2014 constitute interest, we must look at the reality of the situation. This principal was recognized and applied by Madam Justice Campbell in 2009, in *Langille v. The Queen*[14], which considered a taxpayer that had been subject to a similar fraud as that conducted by Base. In *Langille*[15], the appellant fell victim to a pyramid scheme in which the perpetrator, Trev-Cor, deceived investors with a façade of a legitimate business operation, when, in reality, its activities were an elaborate fraud scheme with no substance. In her conclusion, Madam Justice Campbell makes reference to this principal in her conclusion:

> [35] From the perspective of this decision, it would appear to be more appropriate to examine the principal purpose of Alland based on the facts as they actually existed rather than as they appeared to be. From this perspective would it be reasonable to conclude that Alland was deriving

[14] 2009 TCC 139
[15] Langille v. The Queen (2009 TCC 139)

> income from property when its "principal purpose" was to enter into transactions by which it was being defrauded? In fact, to the extent that such a fraud is successful, then potentially Alland's principal purpose would ensure it either had no income at all or that it incurred a loss. Even if the principal purpose of Alland could be considered to be deriving income, when the principal source of such income is designed to ultimately fail, acknowledging the fraud suggests that the source of any income would be the re-shuffling of advances from other participants within the pyramid scheme. Therefore in reality it is not income at all or at least not from sale of inventory.

This principal was similarly recognized by Mr. Justice Miller in the 2014 case of *Roszko v. The Queen*[16], a case which also involved a Ponzi scheme with facts mirroring that of Base. In paragraph 11, Mr. Justice Miller dismisses the Respondents technical argument of contract law, creditor-debtor law and tax law. Instead, Mr. Justice Miller bases his conclusion on the economic reality of the transactions, specifically, that the funds Mr. Roszko advanced to TransCap were **not invested as contracted for:**

> [15] Mr. Roszko was misled to believe interest would be funded by TransCap. It was not. The funding of those payments, described as interest, was from Mr. Roszko and other investors' own money. That is not what was contracted for: it is not interest.
>
> [16] ... I find that of the requirements to fund interest, there is one missing element; that is, that TransCap did not use Mr. Roszko's money as it has contracted to do so – the payment of $156,000 cannot be seen as a payment for the use of the money. Indeed, it is even questionable that TransCap could be considered a "borrower" if it simply took from Peter to pay to Paul: that is not interest, that is a return of capital, and only if, as in Ms. Johnson's case, the investor receives more than a return of capital can we ask whether such profit is business income from a sources.

Mr. Justice Miller differentiates between *Roszko*[17] and the *Johnson*[18] case, which also involved a Ponzi scheme:

> [18] ...This is quite different from Ms. Johnson's situation where there are excess returns, and the court found she entered into a contract and her rights under that contract were respected. No fraud, as such, was found: she got exactly what she contracted for.

Similar to the taxpayers in *Roszko*[19] and *Langille*[20], but unlike the *Johnson*[21] case, the ASC Panel concluded that **Base investors did not get what they contracted for.** The ASC Panel concluded that Base was perpetrating a fraud on investors including:

> [147] ... (1) deceiving investors into thinking that they were investing in mortgages held by Base Finance rather than in a loan to an undisclosed entrepreneur involved in oil and gas developments in the US; and (2) operating a Ponzi scheme that recirculated investors' funds to pay purported returns to existing investors.

---

[16] Roszko v. The Queen (2014 TCC 59)
[17] Roszko v. The Queen (2014 TCC 59)
[18] Johnson v. The Queen (2012 FCA 254)
[19] Roszko v. The Queen (2014 TCC 59)
[20] Langille v. The Queen (2009 TCC 139)
[21] Johnson v. The Queen (2012 FCA 254)

More specifically:

> [35] ... Investors generally understood that their investments were secured by a mortgage over real estate located in Alberta. However, aside from two exceptions, we received no evidence of any Alberta-based mortgages, or in fact any first mortgages, held by Base Finance for the period in question. ... [emphasis mine]
>
> [36] ... Since at least 2004, most of the investors' money was used to make interest payments and principal repayments to other Base Finance investors. [emphasis mine]
>
> [59] ... From his review, the investigator determined that there was no significant source of business revenue contributing to investment returns and investors' funds were pooled into Base Finance's accounts with returns on new or renewed investments largely paid from other investors' contributions. He also found "very little evidence of mortgage-lending business", ... [emphasis mine]

Similarly, Madam Justice Romaine[22] noted:

> [27] ... In fact, no investments were made and no interest was earned, but the payments gave the illusion that the Base corporations were continuing to earn significant returns on investments. [emphasis mine]

The ASC Panel's conclusion makes reference to Mr. Breitkreutz' purported "loan to an undisclosed entrepreneur involved in oil and gas developments in the US". This statement is based on testimony to the ASC Panel and affidavit to Madam Justice Romaine, in which Mr. Breitkreutz alleged the existence of significant loans to US companies. Both the ASC Panel and the Receiver subsequently established that the purported existence of such loans was **fictitious and part of the fraud**.

In their letter of February 7, 2019, the Receiver confirmed that:

> Based on this review, the Receiver has concluded that during the above periods [August 1, 2006 to October 15, 2015], the majority of transaction in these accounts were deposits and payments to investors in Canada, with no indication of investments into oil and gas investments in Texas. The fact that there is no indication of investments in oil and gas in Texas is further detailed in the above noted reports [Third Report, paragraphs 34 to 36; Seventh Report, paragraphs 87 to 89]. This was also the findings of the ASC decision of March 2, 2018, and the instigations of the RCMP, which found that the Companies conducted a Ponzi scheme which new investor funds were used to pay principal and returns to earlier investors, all residing in Canada.

Looking at the economic realities, Base did not use the funds advanced by investors as contracted for to earn interest or income of any type. The funds were not lent in relation to Alberta real estate as contracted for. The funds were also not lent to "an undisclosed entrepreneur involved in oil and gas developments in the US". Instead, advances by investors were paid back out to the same or other investors as part of the Ponzi scheme. Base did not honour its contractual obligations to investors. **Base investors did not get what we contracted for.**

[22] Easyloan Corporation v. Base Mortgage & Investment Ltd., 2016 ABQB682

b. **A fraudulent scheme from beginning to end cannot give rise to a source of income from the victim's point of view. Transactions that investors entered into with Base were a fraud from beginning to end starting in 2004 or earlier.**

The principal that a fraud perpetrated from the outset cannot give rise to a source of income was confirmed in 2006 in the Federal Court of Appeal by Mr. Justice Noël in *Hammill v. The Queen*[23]:

> [28] A fraudulent scheme from beginning to end ... cannot give rise to a source of income from the victim's point of view and hence cannot be considered a business under any definition.

Mr. Roszko's situation is similar to that of Mr. Hammill in that a fraud was also perpetrated on him from the outset. Mr. Justice Miller relies on the findings of Mr. Justice Noël in determining that a fraud from the outset cannot give rise to income:

> [18] Mr. Roszko's situation of having a fraud perpetrated upon him from the outset is more similar to the situation Mr. Hammill found himself in, and, as Justice Noël confirmed, this cannot give rise to a source of business income. Granted, in the case before me, the Respondent is not suggesting there is a source of business income, but a source of property income in the form of interest. The principle I would suggest is the same: the purported interest is a fraud from the outset. It cannot be considered income from property, but rather a return of capital to the extent of the original amounts invested ...

Moreover, Mr. Justice Miller concludes that:

> [19] ... In effect, TransCap just gave Mr. Roszko his own money back or that of other duped investors. There is distinction, I would suggest, between earning income based on a fraudulent act or illegal activity versus a finding that the contract itself is a fraud. In the former situation there can be source of income which can be taxed. In the latter situation there cannot.

The contracts Base investors entered into with Base were a fraud from the onset. This is supported by the ASC Panel findings that Base perpetrated a fraud by carrying on a Ponzi scheme:

> [147] In summary we find that Breitkreutz, Way and Base finance contravened s 93(b) of the Act by engaging in prohibited acts relating to securities that they knew would perpetrate a fraud on investors, including: (1) deceiving investors into thinking that they were investing in mortgages held by Base Finance rather than in a loan to an undisclosed entrepreneur involved in oil and gas developments in the US; and (2) operating a Ponzi scheme that recirculated investors' funds to pay purported returns to existing investors.

In our analysis, above, we have already addressed Mr. Breitkreutz' fraudulent claim of "a loan to an undisclosed entrepreneur involved in oil and gas developments in the US". The ASC Panel and the Receiver established that this claim has **no basis in fact and is part of the fraud.**

In regards to timing of the Base Ponzi schemed, the ASC Panel found that Mr. Breitkreutz has been carrying on the Base Ponzi scheme since at least 2004:

[23] Hammill v. The Queen (2005 FCA 252)

> [36] ... <u>Since at least 2004</u>, most of the investor money was used to make interest payments and principal repayments to other Base Finance Investors.

The above findings are supported by a numeric analysis of receipts and disbursement going through the Base bank accounts between **August 2004 and September 2015**, on page 11 of the Third Report of the Receiver. During this time period, the only sources of funds for Base were as follows:

Investors	$137,211,801	
Powder River Basin Gas Corp.	1,738,452	(Cash advances from Aug 2004 to Aug 2007)
Renco Energy Inc.	56,500	
	$139,006,753	

In regards to the use of funds, there is no evidence that any of the $139 million deposited into the Base bank accounts was being used for the purpose of earning income, from property or otherwise. Substantially all of these funds was paid to the following:

- as purported imaginary interest and capital returns to Investors
- directly to or for the benefit of Mr. Breitkreutz and Susan Way; and
- as a commission to individuals working for Base.

Payments for the benefit of Mr. Breitkreutz and Susan Way include those made in relation to real estate. As indicated in pages 22 through 32 of the Third Report of the Receiver, **Base did not hold legal title** over any of the real estate noted on page 11 of the Third Report of the Receiver. The real estate was transferred instead to Mr. Breitkreutz and Susan Way for the benefit of their personal use and that of other non-arm's length individuals who occupied the premises on a rent free basis. These properties **were not purchased as income earning properties and were not part of Base's business operations.**

Based on the above, it is clear that Base did not use the funds provided by investors for any type of income earning activity, nor were any of the funds received by Base from August 2004 to September 2015 traced to an income earning activity. Instead, loan by investors to Base were paid back out to other investors to keep the Ponzi scheme going. The contracts Base investors entered into with Base were a fraud from the onset. Therefore, the payments made by Base had no characteristic of interest or income and should be considered a return of capital for tax purposes.

c. **Consent Judgments (2018-3092(IT)I dated April 9, 2019 – AND – 2019-1054(IT)I dated May 29, 2019) granting Base investors their allowable business losses in respect of their investments in Base necessarily imply that Base Finance Ltd. qualified as a small business corporation and had no income from property, interest or otherwise.**

As of the date of this letter, we are aware of two former base investors who have proceeded to court to have their investment losses in Base treated as an allowable business investment loss. In both cases, the taxpayer was granted a Consent to Judgment allowing their business investment loss. This necessarily implies that Base qualified as a small business corporation. The fact that Base qualified as a small business corporation is relevant to our request to have the T5s reversed as it also necessarily implies that Base was not a "specified investment business" and had no income from property, interest or otherwise.

d. **Excess returns may be income**

In *Roszko*[24], Mr. Justice Miller considered the facts as presented in the *Johnson*[25] case, which also involved a Ponzi scheme. Mr. Justice Miller concludes that excess returns may be considered a source of income:

> [11] ... In the *Johnson* case, which also involves a Ponzi scheme, the Federal Court of Appeal concluded there can indeed be a source of income in a Ponzi scheme. It confirms that, where, as in that case, the investor ultimately receives back more than she invested, applying the factors in the *Cranswick* case, there is indeed income from a source." [emphasis mine]
>
> [18] ... It cannot be considered income from property, but rather a return of capital to the extent of the original amounts invested: only excess returns might be considered income. ...

Based on the above, we concur that excess returns received from Base may be considered income.

2. **The CRA's Request for a Court Order/Ruling is unnecessary and unreasonable**

a. **The facts of the Base Ponzi scheme have been established by the ASC Panel, Madam Justice Romaine's findings of fact and the Receiver, which constitute a finding in law.**

The CRA previously stated that:

> ... the Third Report of the Receiver dated May 9, 2016 presented to the Court of Queen's Bench of Alberta ... are not a judge's ruling ...

The CRA failed to note that the comments from the Receiver were accepted into evidence during the ASC Panel hearing as noted in paragraph 61 of the ASC Panel Decision. Canadian jurisprudence has found that a decision by the ASC Panel is, in fact, a "***finding of law***"[26]. While the Receiver Reports are not a judge's ruling, they form part of the ASC Panel finding of law.

The CRA also failed to recognize that this same finding was made by Madam Justice Romaine in paragraph 27 of her Decision[27], which is clearly a judge's ruling:

> [27] ... In fact, no investments were made and no interest was earned, but the payments gave the illusion that the Base corporations were continuing to earn significant returns on investments.

Even if the above was not the case, one would think that fact determinations by a Receiver who was appointed by the Court of Queen's Bench of Alberta would be very persuasive to a reviewer of any fact. I refer you to sections 10.5.3 and 10.5.4 of the CRA's own audit manual:

---

[24] Roszko v. The Queen (2014 TCC 59)
[25] Johnson v. The Queen (2012 FCA 254)
[26] Roszko v. The Queen (2014 TCC 59), para. 14
[27] Easyloan Corporation v. Base Mortgage & Investment Ltd., 2016 ABQB682

10.5.3 *Reliable audit evidence* states:

> The more reliable a piece of audit evidence is, the more weight it deserves. The particular characteristics of the audit evidence that determine its reliability can be broadly categorized as follows:
> - Type – documentary audit evidence is often more reliable than verbal testimony
> - Credibility – if a witness has direct knowledge of a fact, the testimony is more credible
> - Timeliness – timely information relating to the period in dispute is better than that relating to another period
> - Whether positive or negative – positive audit evidence, from which only one explanation or conclusion can be seen as reasonable, is more reliable than negative audit evidence; negative audit evidence usually leads to several possible explanations or conclusions and does not prove a fact but rather disproves the fact in question

Further, 10.5.4 *Type and source of audit evidence* includes:

> **Documentary audit evidence**
> It must be remembered that documentary audit evidence is supported by oral audit evidence. The story told by the documents must be reinforced and presented orally by someone that is knowledgeable as to the situation and the documentation involved. Documentary audit evidence consists of written material such as judicial and other official records, contracts, deeds, and less formal documents such as letters and memos and the regular books and records. An unsigned carbon copy of a document that is offered without any explanation is incompetent audit evidence and will be ignored or excluded by Appeals and the Courts. It is not valid and of no use if the taxpayer's defense is that it was only a proposed transaction that was not intended to be completed.
>
> **Expert opinion evidence**
> Opinions are admissible as evidence only when received from experts in the field under examination such as those of a handwriting expert or a recognized appraiser or business valuator.

Clearly, the evidence provided in these documents should be considered as reliable and corroborating and provide sufficient evidence to the CRA to determine that the money received by the Base investors was a return of capital.

b. "Irrevocable Assignment of Mortgage Interests" and T5s issued by Base from 2006 through 2014 have no economic basis and should be disregarded. There is no need for a court order to void the investment contract.

The CRA has previously advised Base investors that the T5 interest could be considered a return of capital:

> ... when a Court ruling confirmed that the money received by the taxpayer was a return of capital based on the facts related to that taxpayer's personal situation or when the Court voided the taxpayer's investment contract ...

First off, it is settled Canadian law that a contract made on the basis of material misrepresentations results in the contract to be void *ab initio*. There is no need for a court order.

Base investors were induced to enter into the loan agreements based on **material** misrepresentations by Mr. Breitkreutz that the funds we lent to Base would be invested by Base in first mortgages on Alberta real estate.[28] [29] Contrary to what Mr. Breitkreutz represented, since at least 2004, Base did not invest any of the investor funds in real estate or mortgages, Canadian or otherwise. Based on the ASC Panel decision, it is clear that "Irrevocable Assignment of Mortgage Interest" documents were part of the fraud and had no economic or legal substance as **there were no underlying mortgages:**

> [32] Investments in Base Finance were essentially loans, in which investors provided money to Base Finance in exchange for a mortgage assignment (or a portion thereof) held by Base Finance. Investors received a document entitled "Irrevocable Assignment of Mortgage Interest" ...
>
> [35] Investors generally understood that their investments were secured by a mortgage over real estate located in Alberta. However, aside from two exceptions, we received no evidence of any Alberta-based mortgages, or in fact any first mortgages, held by Base Finance for the period in question.

Based on the above, **the loan agreements never existed in law**, making it **unnecessary to obtain a court order** to have the loan arrangements voided.

T5 slips issued by Base had no substance and were part of the fraud. This is pointed out by Madam Justice Romaine[30] in her decision at paragraph 27:

> [27] ... In fact, no investments were made and no interest was earned, but the payments gave the illusion that the Base corporations were continuing to earn significant returns on investments.

For further support, the Third Report of the Receiver, which was placed into evidence during the ASC Panel hearing[31] and covers the Receiver's findings from **August 2004 to September 2015**, states in paragraph 150 that:

> [150] The Receiver has not identified any source of income aside from funds advance by the investors. As a result, the "interest' earned and or paid on the investor's investment should be considered a repayment of principal. ...

In their letter of February 7, 2019, the Receiver confirmed that:

> The Alberta Securities Commission ("ASC") as well as the receiver, determined that virtually no brokering had been done since 2006.
>
> This was also the findings of the ASC decision of March 2, 2018, and the investigations of the RCMP, which found that the Companies conducted a Ponzi scheme which new investor's funds were used to pay principal and returns to earlier investors ...

---

[28] ASC Panel Decision, para. 35, 40, 42, 47
[29] Exhibit 42 of ASC Panel Hearing – audio transcript of telephone conversation between Susanne Young, Robert Young and Arnold Breitkreutz on August 17, 2015, pages 4 - 6
[30] Easyloan Corporation v. Base Mortgage & Investment Ltd., 2016 ABQB682
[31] ASC Panel Decision, para. 61

It is evident that T5 slips and "Irrevocable Assignment of Mortgage interest" documents had no substance and were part of the fraud. The existence of these fabricated documents does not change the economic reality of the payments from Base to investors: **they are a return of capital and not interest.**

Consider *Orman et al v. Marnat Inc. et al (2012 ONSC 549).* In Orman, the taxpayers in victims of a Ponzi scheme, petitioned the court to make a determination that the income is a return of capital and to have the underlying corporate documents rectified. While the judge did not give a rectification of the underlying documents, he concluded that the moneys received by the taxpayers was not income but a return of capital.

Of interest is that the Attorney General for the Minister or National Revenue submitted to Justice Perell that:

> [31] ... that taxpayers like Messrs. Orman and Freed, are free to restate or rectify their income tax returns and corporate financial statements, and they do not need a court order to do so. ... that taxpayers can rectify their documents without a court order and then re-apply under the tax legislation for a re-assessment. ...

On one hand, the CRA is taking the positon that a Court ruling is required to have the interest reassessed as a return of capital, on the other hand, the Minister of National Revenue submitted to the Court that victims of a Ponzi scheme **do not need a Court order** but can simply request a reassessment.

Since the Minister of National Revenue is responsible for the administration of taxation law, tax collection and directing the CRA, it follows that the CRA's position is incorrect and that **a Court order should not be required.**

Consistent with the Minster's comments in *Orman*, in her letter of November 6, 2018, Jill Medhurst, Counsel for the Department of Justice wrote that:

> ... the investor can file an amended tax return pursuant to section 152(4.2) (reassessment with the taxpayer's consent) to remove the T5 income (if it only covers the capital and no interest) if the application is made within 10 years of the year at issue ... rather than burdening the court ...

This leaves Base investors caught between a rock and a hard place: the CRA demanding that Base investors obtain individual court orders, while the Department of Justice taking the position that taxpayers should resolve this matter through the procedures provide for under the ITA rather than wasting court resources.

The facts contained in the ASC Panel Decision, Receiver Reports submitted to the Court of Queen's Bench of Alberta and the determination of facts by Madam Justice Romaine should provide all the support needed to support the Base investors' requests to have the T5 interest reversed and treated as a return of capital. **A Court order should not be required.**

c. **The CRA's position that similar cases tried before the courts (Tax Court of Canada and Federal Court of Appeal) do not represent binding Canadian law is unreasonable and goes against the concept of jurisprudence and the basis of Canadian law.**

The CRA previously advised Base taxpayers that:

> "... the Agency will not issue a reassessment to create a refund or reduce tax payable where the taxpayer's adjustment request is based on the successful appeal to the Courts by another taxpayer."

The CRA's administrative positon as published in IC75-7R3 *Reassessment of a Return of Income* actually states:

> A reassessment to create a refund ordinarily will be made upon receipt of a written request by the taxpayer, even if a notice of objection has not been filed within the prescribed time, provided that ... (e) the application for a refund is not based solely upon a successful appeal to the Courts by a taxpayer.

Clearly, request by Base investors for a reassessment to create a refund is based mainly on the discovery of new facts pertaining to our 2006 – 2014 taxation years and not the successful appeal to the courts by a taxpayer. The new facts are findings by the ASC Panel, the Receiver and the RCMP that Base carried on a Ponzi scheme instead of a commercial mortgage lending business. These new facts have resulted in our revised filing position that the interest reported from 2006 – 2014 is a return of capital. We are only referring to the existence of the successful appeal to the Courts by other taxpayers to illustrate the Court's interpretation of currently applicable tax law.

Clearly, the CRA is clearly not applying its administrative policy as intended and misquoting IC75-7R3.

3. **Other**

a. **Comments from the Receiver regarding the characteristic of investor payments pertain to the entire period under review, being from August 2004 to September 2015**

In their correspondence to Base investors, the CRA has stated that the Receiver's comments taken from paragraph 150 of the Third Report of the Receiver pertain only to the taxation year of 2015 and not the years under review:

> ... 'the interest earned and or paid on the investor's investment should not be considered a repayment of principal and no 2015 tax slips will be issued for "interest income" ...

The CRA is quite clearly taking the comment that "no 2015 tax slips will be issued" out of context and ignores that Base has been carrying out the same Ponzi scheme for over a decade and that the Receiver's Report covers the period of August 2004 through September 2015. The only reason no T5s were issued in 2015 is that the Ponzi scheme was discovered in 2015.

In addition, the CRA failed to recognize that the above finding of the Receiver was also made by Madam Justice Romaine in paragraph 27 of her Decision[32]. The Receiver and Madam Justice Romaine have concluded that the payments made by Base to investors from August 2005 to September as reported in T5s have no characteristic of interest and should be considered as a return of capital for tax purposes.

b. **The CRA's current administrative positon is not law and is not binding on either the taxpayer or CRA. In fact, it does not even reflect current Canadian legal jurisprudence.**

The CRA has previously made reference to the CRA's administrative position in regards to fraudulent investment schemes as set out in Technical Interpretation Document No. 2014-0531171M6 dated July 3, 2014 and Income Tax Folio S3-F9-C1 *Lottery Winnings, Miscellaneous Receipts and Income (and Losses) from Crime.*

Technical Interpretation Document No. 2014-0531171M6 states:

> Taxpayers, who have received a return on amounts invested, should include these amounts in income according to their purported nature. Where taxpayers received amounts and they assumed that the amounts were a return on investment, such amounts should be included in income. Where it is determined that no funds were actually invested on behalf of the taxpayer and the amounts paid to them came from a different taxpayer's capital, this would not change the nature of the transaction for the taxpayer receiving the return.

On November 26, 2015, the CRA published Income Tax Folio S3-F9-C1 to replace IT Bulletin IT-185R *Losses from Theft, Defalcation, or Embezzlement.* Paragraph 1.42 of Income Tax Folio S3-F9-C1 explains that an amount paid to a taxpayer that is a return on investment, such as interest, must be included in the taxpayer's income. The Folio goes on to state that this was affirmed by the Federal Court of Appeal in The Queen v. Johnson, 2012 FCA 253, 2013 DTC 5004. Clearly, this Ruling does not address the subsequent Tax Court of Canada decision in Roszko v. The Queen (2014 TCC 59). In this case, the TCC took the position that where an investment is a fraud from the outset, purported income paid on the fraudulent investment is a return of capital to the extent of the original amounts invested. In *Roszko*, Mr. Justice Miller differentiates between Roszko and the Johnson case referred to in the Folio and concludes that only excess returns be treated on account of income.

> [18] ...This is quite different from Ms. Johnson's situation where there are excess returns, and the court found she entered into a contract and her rights under that contract were respected. No fraud, as such, was found: she got exactly what she contracted for.

The payments investors received from Base Finance Ltd. are clearly a 'return of capital' and do not meet the definition of interest stated in 12(1)(c) of the Canadian Income Tax Act: an amount received on account of payment or satisfaction of interest. The fact that the payments represent a 'return of capital' has been acknowledged in a number of documents that represent findings in law:

- Decision reached by Madam Justice Romaine in Easyloan Corporation v. Base Mortgage & Investment Ltd., 2016 ABQB682;
- Decision reached by the Alberta Securities Commission on March 2, 2018;
- Various Receiver Reports filed with the Court of Queen's Bench of Alberta.

[32] Easyloan Corporation v. Base Mortgage & Investment Ltd., 2016 ABQB682

We have been advised that the Minister's administrative statements are always subordinate to the law, cannot change the law and are not binding on taxpayers or the courts. As there is no legal foundation for the position set out in Paragraph 1.42 of Income Tax Folio S3-F9-C, that position cannot justify denying taxpayers the rights to which they are entitled at law. Generations of case law has established that these statements by the Minister are not authoritative. A recent example reads as follows:

> The Supreme Court of Canada has held that such Interpretation Bulletins are not authoritative sources for the interpretation of taxing statutes. An interpretation is not law until so interpreted by a court of competent jurisdiction, and the Deputy Minister has no power to legislate: *Mattabi Mines v. Min. of Rev.* 1988 CanLII 58 (SCC), [1988] 2 S.C.R. 175, 195-96, [1988] 2 C.T.C. 294, 305, 87 N.R. 300. Administrative policy and interpretation are not determinative: *Harel v. Dep. Min. of Rev.* 1977 CanLII 10 (SCC), [1978] 1 S.C.R. 851, 859, 18 N.R. 92; *Nowegijick v. R.* 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, 37, [1983] C.T.C. 20, 24, 46 N.R. 41. Bulletins are only the opinion of the Department and do not bind the Minister, the taxpayer or the courts: *Vaillancourt v. R.* [1991] 3 F.C. 663, [1991] 2 C.T.C. 42, 58, 132 N.R. 133 (F.C.A.) (para. 14).... [1]

Notwithstanding the above, the Folio on which the CRA has relied was not published until November 26, 2015 and therefore not in force at the time of the payments made by Base. The IT Bulletin on *Losses from Theft, Defalcation, or Embezzlement*, IT-185R, that was in force at the time of the transactions in 2014 and prior, did not contain language similar to paragraph 1.42 of the Folio. To impose the positon set out in the new Folio regarding transactions that took place in 2014 and prior, amounts to retroactive application of the Folio. We refer you to the language which appears at the top of many of those bulletins:

> Subject to the above, an interpretation or position contained in an IT generally applies as of the date it was published, unless otherwise specified. If there is a subsequent change in that interpretation or position and the change is beneficial to taxpayers, it is usually effective for future assessments and reassessments. If, on the other hand, the change is not favourable ot taxpayers, it will normally be effective for the current and subsequent taxation years or for transactions entered into after the date on which the change is published. [emphasis mine]

Technical Interpretation Document No. 2014-0531171M6 and Income Tax Folio S3-F9-C1 reflect the CRA's current administrative positon. These positon **are not law and are not binding on either the taxpayer or CRA. In fact, it does not even reflect current Canadian legal jurisprudence.** We would expect that the CRA rely on current tax law, including jurisprudence, rather than outdated and/or incorrect administrative positions.

c. **Our requests to have the tax returns amended for 2006 to 2014 is relying on subsection 152(4.2) and the CRA's Information Circular IC07-1R1 Taxpayer Relief Provision.**

Base investors first found out about the existence of the Base Ponzi scheme 2015 when the Receiver published the First Report of the Receiver. Therefore, it was not until 2015 that we had cause to question the nature of payments we received from Base from 2006 to 2014, which resulted in the basis for our T1 Adjustment Requests.

In making the requests, we relied on **subsection 152(4.2)** of the Act and paragraphs 12 to 14 of the CRA's Information Circular IC07-1R1.

Conclusion

According to this analysis, we have established that the payments from Base from at least 2006 through 2014 were a return of capital and not interest.

Schedule A
Legal Cases and Other Court Documents

Document 1 - Johnston v. The Queen (2000 TCC 1864), affirmed at Federal Court of Appeal in 2001
Document 2 - Langille v. The Queen (2009 TCC 139)
Document 3 - Roszko v. The Queen (2014 TCC 59)
Document 4 - Hammill v. The Queen (2005 FCA 252)
Document 5 - Easyloan Corporation v. Base Mortgage & Investment Ltd. (2016 ABQB682)
Document 6 - ASC Panel Decision dated March 2, 2018
Document 7 - First Report of the Receiver dated November 5, 2015
Document 8 - Third Report of the Receiver dated May 9, 2016
Document 9 - Seventh Report of the Receiver dated January 14, 2019
Document 10 - Letter from BDO to CRA dated February 7, 2019
Document 11 - Letter from Jill Medhurst, Department of Justice, to Richard Billington, legal counsel for BDO, dated October 26, 2018

EXHIBIT 9

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	Christopher Souster <cmas@riversidelawoffice.ca>
Sent:	May 8, 2019 6:36 PM
To:	Van de Mosselaer, Randal
Subject:	RE: Offer BDO

Thank you.

From: Van de Mosselaer, Randal [mailto:rvandemosselaer@osler.com]
Sent: Wednesday, May 08, 2019 5:59 PM
To: Christopher Souster
Cc: Lewis, David; Paplawski, Emily
Subject: Re: Offer BDO

Subject to these two points, I can advise that we are in agreement.

Randal Van de Mosselaer
M : 403-862-5588

On May 8, 2019, at 5:55 PM, Christopher Souster <cmas@riversidelawoffice.ca> wrote:

> I take no issue on those additional comments. I will confirm with Mike T and get back to you first thing in the morning.
>
> Thanks
>
> C
>
> ---
>
> **From:** Van de Mosselaer, Randal [mailto:rvandemosselaer@osler.com]
> **Sent:** Wednesday, May 08, 2019 4:58 PM
> **To:** Christopher Souster
> **Cc:** Lewis, David; Paplawski, Emily
> **Subject:** RE: Offer BDO
>
> Thanks Chris. It generally looks pretty good. One thing that is missing is the acknowledgement that the fact that these remaining matters in the March 25 application are not withdrawn is not any sort of admission or agreement that BDO is not permitted to oppose those applications, and that the settlement would be without prejudice to BDO's right to raise any and all arguments in opposition to the matters raised in para. 2 and 9 of the March 25 application.
>
> I am seeking instructions from BDO. We will also need to check with Rick Billington to see if he wants a Release (and I would guess he will), in which case we should probably prepared a standard form Release.
>
> I will get back to you asap.
>
> Regards,
>
> <image001.gif>
> **Randal Van de Mosselaer**

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
<image002.gif>

From: Christopher Souster <cmas@riversidelawoffice.ca>
Sent: Wednesday, May 08, 2019 3:13 PM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Subject: FW: Offer BDO

Randall, I am running out of time today and so I am sending you an email that was a cut and paste from Mr. Terrigno, plus my additions in blue for clarity.

Mr. Terrigno (MT) is prepared to settle upon the following terms (if we can agree to these terms, and if necessary, we can draft something more formal):

1. 1. Discontinuance against Richard Billington without costs on the Provincial Court claim of $5000.00. Mr. Terrigno will not revisit the claim (either by way of undertaking or release).
2. 2. $5,000 payment (certified funds or solicitors trust cheque) payable to Osler's, or BDO Canada LLP, or any other party as you may direct, in satisfaction of the cost award against MT for applying to have you removed as counsel for conflict.
3. 3. Discontinue of the appeal of Justice Romaine's order pronounced on April 2 & 5, 2019 on a without cost basis.
4. 4. Mike will abandon and undertake not to appeal Justice Jeffrey's order of May 9, 2019. (the appeal deadline is today).
5. 5. Mike will discontinue and will not re-file an application seeking the same relief as the following provisions set out in his application filed March 25, 2019;

    a. a. An order granting leave to Mike Terrigno, or any creditor of Base Finance Ltd. ("Base Finance") to petition Base Finance into bankruptcy. Alternatively, directing the receiver to petition Base Finance into bankruptcy.

    b. b. An order directing a trial of an issue, or such other procedure, to determine whether the receiver/trustee is statute barred to pursue a fraudulent preference claim on behalf of the estate unwinding certain transaction pursuant to a net/winner loser analysis.

    c. c. An order directing the receiver/trustee to complete the aforesaid net winner/loser analysis with estate funds.

    d. d. An order directing that the receiver shall not use estate funds for purposes of defending the Negligence Claim or its wrongdoing.

    e. e. An order directing the receiver/trustee to assign the fraudulent preference claim to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

f. f. An order directing the receiver/trustee to assign any interest of the estate available against Robert Smyth to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

g. g. An order directing the receiver/trustee to assign the debtor estate claim against 69th Avenue SW property to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

h. h. An order directing the receiver/trustee to disclose to Mike Terrigno, and/or any interested party to these proceedings, the receiver's net winner/loser analysis already completed to 2004 including source material and electronic material but not working papers.

i. i. An order directing the receiver to file amended T5s for Base Finance on such terms and conditions as this Honorable Court deems fit.

j. j. An order winding down and discharging the receiver on such terms and conditions as the Court deems appropriate.

k. k. An order of costs on a fully indemnity basis (or such other basis as this Court deems fit) against legal counsel for the receiver, Randal van De Mossaer.

Sincerely

<image003.jpg
>

CHRISTOPHER M.A. SOUSTER
Barrister & Solicitor
RIVERSIDE LAW OFFICE
4108 Montgomery View NW
Calgary Alberta Canada T3B 0L9

TEL: 1(403) 685 4224 | FAX: 1(403) 685 4225

<image004.png> <image005.png> <image006.png>
Please consider the Environment before printing this e-mail.

The contents of this message may contain confidential and/or privileged subject matter. If you are not the intended recipient then disclosure, copying, distribution and use are prohibited. Please notify Riverside immediately and kindly delete this email from your systems.

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

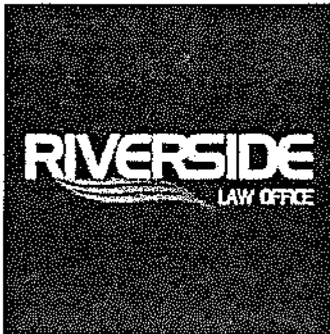
Lewis, David

From:	Christopher Souster <cmas@riversidelawoffice.ca>
Sent:	May 9, 2019 12:01 PM
To:	Van de Mosselaer, Randal
Subject:	TErrigno

Randal, I feel like a broken record, but I am up to my neck in urgent matters so I will be brief. I forwarded your most recent email on the outstanding aspects of the settlement agreement and Mike confirmed it this morning. We have a deal . In reliance, Mike will discontinue his appeals and abandon his appeal of the Jeffrey order, and whatever else he is obligated to do under that agreement. I mention the appeals as I was provided an email from Mike that was authored by Perry Mack addressing the CA. I haven't had a chance to ascertain if he was referring to Mike's appeal(s), but I suspect so. Someone should likely write to the court of appeal to advise that the appeal(s) will not be proceeding. I just don't have the action numbers and want to be sure that I am dealing with the issues in our settlement. I am not aware of any other appeals by Mike (FYI), but I just need to be 100%. Mike states that his appeal deadline on Jeffrey order is today, so its likely easiest to just let that pass. I will see if Mike can attend to the CA matters himself as I don't wish to have to file a notice of change of rep to deal with only a discontinuance/withdrawal at the CA.

Let me know if you think there is anything else outstanding. Thank you for your professionalism and cooperation in resolving these issues. Please thank Richard Billington and Mr. Mack as well if you are speaking to them. I can free myself for a bit if there is anything urgent you require today.

Chris.



CHRISTOPHER M.A. SOUSTER
Barrister & Solicitor
RIVERSIDE LAW OFFICE
4108 Montgomery View NW
Calgary Alberta Canada T3B 0L9

TEL: 1(403) 685 4224 | FAX: 1(403) 685 4225

Please consider the Environment before printing this e-mail

The contents of this message may contain confidential and/or privileged subject matter. If you are not the intended recipient then disclosure, copying, distribution and use are prohibited. Please notify Riverside immediately and kindly delete this email from your systems.

EXHIBIT 10

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Sent:	August 12, 2019 11:06 AM
To:	Mike Terrigno
Cc:	Lewis, David; Paplawski, Emily; Christopher Souster
Subject:	RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al
Attachments:	RE: Offer BDO; TErrigno

Mike,

To be clear, by email exchange on May 8 and 9 (attached) we agreed that we would accept payment of $5,000 by "certified funds or solicitors trust cheque . . . in satisfaction of the cost award against [you] for applying to have [Osler] removed as counsel for conflict."

We have been waiting for three months for this agreed payment. You first tried to change the agreement (by suggesting that you would only pay the lesser of $5,000 or the amount actually awarded by Justice Romaine), and have now (in your email below) clearly indicated your intention not to make this agreed payment, but instead to provide us only with a consent judgment for $5,000.

This is clearly not what was agreed. Your failure to make the payment as agreed, combined with your email below, constitutes a clear breach by you of the agreement to pay the $5,000 by certified funds or solicitor's trust cheque. Such a breach constitutes a repudiation by you of the settlement agreement concerning payment of the costs awarded by Justice Romaine arising out of your conflict application. The Receiver does hereby put you on notice that unless this $5,000 payment is made by close of business on August 20 (by certified funds or solicitor's trust cheque, as agreed), the Receiver intends to accept (without further notice to you) your repudiation of this settlement of the costs award, thereby put the settlement agreement in respect of these costs to an end. We will then proceed to enforce the full amount of the costs award against you in the amount of $16,136 (plus post-judgment interest and additional costs of enforcement).

Moreover, we can advise that it would be our intention, in the absence of receipt of the agreed $5,000 payment, to bring this matter to the attention of Justice Romaine in the context of an application to have you declared a vexatious litigant. The history of this matter, including your emails below, will be brought to the Court's attention in support of such application, and in order to demonstrate your inability to live up to your obligations under settlement agreements which have been negotiated with you. We will be providing you with notice of our application in this regard if we are not in receipt of the agreed payment by close of business on August 20.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Sunday, August 11, 2019 10:16 AM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al
Importance: High

Randal,

We settled on fixed costs at $5k. There was no agreement that if I didn't pay the $5k fixed costs then the amount owed would revert to full costs. The estate and the receiver owe me significant sums! I will give you a consent judgment for the $5k in accordance with the settlement agreement and I will take a set off. If you try to enforce anything more than $5k then you will have further legal proceedings to deal with from me because I can tell you that I will oppose any action that is against our settlement agreement and any further dissipation of the estate. Just remember I gave the receiver a $1.6m file and you all got fat on my dime. So don't waste my time, yours and estate resources that you desperately needs because you still have the following to deal with and you likely don't have enough money:

1) Arnold Appeal.

2) Discharge proceedings that will be very lengthy and costly as I will seeking many thing before the receiver is discharged.

3) Opposing me taking the estate's assignment of the claim against the receiver.

4) Defending the claim against the receiver.

5) I am re-activating my 140 claims this Fall to claw back my funds so I suspect you may hear from investors on this issue and will need to respond.

6) Providing further estate assignments to the group of investors i.e. the claim against base finance accountant - Ron King.

7) I ordered the transcripts of the recent hearing before J. Romaine in which you misrepresented facts surrounding the assignment and our written correspondence so I will be appealing any adverse decision.

8) I need to interview the receiver for purposes of gaining further and better information on various issues. i.e. limitation defences raised by the assignment Defendants.

9) Speak to an appeal of any decision that adversely affects my interests in any of the foregoing issues and other issues that arise.

If you still want to play games with estate funds by chasing the $5k cost issue then send me notice of any proceeding you wish to take against me to this email address with a copy to Riverside Law Office because I'm overseas and do not have access to my Canadian mail.

Otherwise, have a nice summer I will see you in the Fall when I get back from Italy. My father sends his regards and looks forward to seeing you as much as I do.

Sincerely yours,
Mike Terrigno [MBA, LL.B/J.D., REM(harvard), CICA (tax)]

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the noted recipient herein us unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you cannot use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As the sender cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the sender unless otherwise indicated by an authorized representative independent of this message.

From: Mike Terrigno
Sent: Saturday, August 10, 2019 11:02 AM
To: Van de Mosselaer, Randal
Cc: Lewis, David; Paplawski, Emily
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

What did I tell you about writing me tomorrow..

.

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations

expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Date: 2019-08-10 7:00 p.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Lewis, David" <dlewis@bdo.ca>, "Paplawski, Emily" <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

You will not be surprised to hear that I am not agreeable to your suggestion, nor am I prepared to wait until fall to be paid. If we do not receive payment of $5,000 within 10 days we will simply proceed to enforce the full amount of the award.

Randal Van de Mosselaer
M : 403-862-5588

On Aug 10, 2019, at 9:57 AM, Mike Terrigno <mike@terrigno.ca> wrote:

> Randal... Yes I saw that and luckily I was on the toilet so the addidtion to my excresion when reading the decision was manageable.. I was thinking to myself while I was on the toilet reading the decision how lucky i was that I settled otherwise I would have easily had an excresion 3-4 times larger.. so I thank you for saving me from a larger excresion that could have ended up uncomfortable... I actually keep the decison in my washroom for others in case they need help excreting.. it works so good I'm actually thinking about branding the decision for the excretion market.. it would be downloadable, pay per use, so if anyone in the world had a problem with their bowel movements they would just download the decison for 1cent, read it while on the toilet (because it works that fast) and presto they are excreting in seconds... i bet I make millions with the product... We can be partners on it since you helped in the product development...
>
> I have no issue whatsover with making payment but I'm in Italy till the Fall and want to speak with my team about it because the way I see it the receiver owes me significant sums vis-a-vis my law suit... so I'm looking at this in terms of set off... you okay with set off??
>
> Please write me back tomorrow as I want to read your response while on the toilet as I'm already empty today due to my reading of the decision earlier today..
>
> Thanx.. chat soon..
>
> Sincerely yours,
>
> Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*
>
> (Sent from my smartphone)
>
> Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or

take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Date: 2019-08-10 6:10 p.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Lewis, David" <dlewis@bdo.ca>, "Paplawski, Emily" <EPaplawski@osler.com>, Christopher Souster <cmas@riversidelawoffice.ca>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Mike,

I presume you have also received and reviewed the attached letter from Justice Romaine in which she agrees with our submissions that the appropriate quantum of solicitor-client costs which she had awarded against you following the dismissal of your application to have me removed from the file on the basis of an alleged conflict is $16,136.

As you will recall, as part of the settlement we reached in May, we had agreed to accept and you had agreed to pay $5,000 for these costs. See the attached email exchange in this regard. You had taken the position (with which we disagreed) that as part of the settlement you were to pay the lessor of $5,000 or the amount of Justice Romaine's award. In view of this decision, our disagreement on this point is now moot.

Please forward payment of this $5,000 (by certified cheque, solicitor's trust cheque, or wire transfer) immediately, and in any event within 10 days of today's date. Please advise by return when we can expect to receive this payment and if you have a preference for how you wish to make it.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

****

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

Le contenu du présent courriel est privilégié, confidentiel et soumis à des droits d'auteur. Il est interdit de l'utiliser ou de le divulguer sans autorisation.

****

<Romaine Letter re_ costs decision.PDF>

EXHIBIT 11

To the Receiver's Ninth Report to Court
Dated January 17, 2020

TERRIGNO

August 19, 2019

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta T2P 5H1

Attn: Randal Van de Mosselaer

Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al. – Payment on Settlement Agreement –Justice Romaine Cost Decision

Enclosed please find a bank draft in the amount of $5,000 for payment under the captioned settlement agreement. Consider this payment as fulfillment of the settlement agreement.

The payment is made on the express undertaking that you will not release the funds until further order of the court (i.e. resolution of the set-off issue) or my consent.

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

Email: mike@terrigno.ca

THIS DOCUMENT CONTAINS SECURITY FEATURES / SEE REVERSE

Scotiabank

CANADIAN DOLLAR DRAFT

789881

SUITE 1700, 225 6 AVE SW, BROOKFIELD PLACE
CALGARY AB T2P 1N2

DATE 2019 08 19

PAY TO ORDER OF OSLER, HOSKIN & HARCOURT LLP $ 5,000.00

SUM OF EXACTLY 5,000 DOLLARS ******************** 00/100 CANADIAN FUNDS

TO:
ANY BRANCH OF
THE BANK OF NOVA SCOTIA

AUTH NO. A0718 THE BANK OF NOVA SCOTIA AUTHORIZED OFFICER

AUTH NO. U0008 AUTHORIZED OFFICER

Reference : IN TRUST

⑈789881⑈ ⑆38562⑉002⑆ 00000⑉43 62299⑈

® Registered trademark of The Bank of Nova Scotia 1500414 0010

EXHIBIT 12

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	Paplawski, Emily <EPaplawski@osler.com>
Sent:	August 28, 2019 2:24 PM
To:	Mike Terrigno; Van de Mosselaer, Randal
Cc:	Lewis, David
Subject:	[EXT] RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al
Attachments:	Set-Off Cases.zip

Mike,

Further to the email exchange below, we provide herewith the authority which makes clear that you have no right of set-off in a receivership of post-receivership debts (such as the agreed costs which are payable by you to the Receiver) against pre-receivership debts (such as the amount of your claim against the Base estate).

We provide this to you in the hope that you might agree to release the funds which we are holding in our trust account, and without prejudice to our primary argument that the settlement precludes any right of set-off since it expressly required a "$5,000 payment (certified funds or solicitors trust cheque) payable to Osler's, or BDO Canada LLP".

The authorities are as follows:

<u>**Air Canada**</u>

We begin with the case that you are relying on, namely, ***Re Air Canada*, (2003) 45 CBR (4th) 13 (Ont. S. C.) ("Air Canada")**. This was a *CCAA* case (not a receivership case) in which a creditor brought an application to amend the initial order to be allowed to set off debts. Justice Farley allowed the application, but importantly in doing so he distinguished a *CCAA* case from a bankruptcy or a receivership case. Citing ***Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 ("Husky")**, Justice Farley stated that the insertion of a trustee into bankruptcy proceedings breaks the mutuality of parties, precluding set-off between debts incurred pre and post-bankruptcy. Both the SCC in *Husky* and Farley J quote the following passage from The Law of Setoff in Canada:

> "This case, as in receivership is fairly straight forward. The assignment of the bankrupt's property to the trustee results in a change of mutuality. Accordingly, any claim which arises after the assignment will be between the claimant and the trustee and not the claimant and the bankrupt. Mutual debts will not be present and set-off not allowed" **[Kelly R. Palmer, The Law of Setoff in Canada (1993: Aurora, Ontario) at 164]**

The application of Justice Farley's reasoning in Air Canada is controversial and has not been followed in several CCAA cases. However, it is important to note that the *Air Canada* case has never been followed in a receivership case (and Justice Farley himself acknowledged that his reasoning would not apply in a receivership case). Of course, Base is a receivership case, not a *CCAA* case.

<u>**Legal Set-Off in Receivership**</u>

As noted by Farley J in *Air Canada*, once a company has entered receivership the appointment of the receiver destroys the mutuality required for legal set-off.

The leading Canadian case on this point is ***Canadian Imperial Bank of Commerce v Tuckerr Industries Inc.*, *[1983] 5 WWR 602* (BCCA) ("Tuckerr")**. In this case the applicant was denied the ability to set-off debts incurred to the receiver

against amounts owing to the claimant predating the appointment of the receiver. At paragraph 8 Lambert JA points out that the second debt did not arise until after the appointment of a receiver therefore no mutuality of obligation existed between the debts. Without mutuality, there could be no legal set-off.

Tuckerr has been referred to in over 50 cases, most notably by the Supreme Court in ***Telford v Holt, [1987] 2 SCR 193*** **("Telford")** and Husky. It is referenced in both *The Law of Setoff* (cited by Farley J in Air Canada) and in *Bennett on Receiverships*. The law on this point is well established and universally accepted.

Tuckerr has been applied repeatedly by the Alberta Court of Queen's Bench, most recently in a receivership context in ***Montreal Trust Co of Canada v Smoky River Coal Ltd.* 2001 ABQB 587**, in which a creditor was not permitted to set-off debts which it owed to the receiver against its outstanding pre-receivership claim.

Accordingly, because your claim against Base is a pre-receivership claim, whereas the costs you owe to the Receiver is a post-receivership payable, you clearly have no right of legal set-off.

Equitable Set-Off in Receivership

The only remaining question is whether you have any claim to equitable set-off. The answer is clearly "no".

Equitable setoff may apply when mutuality is lost or never existed, and when debts are not liquidated.

Telford is the leading Canadian case on the availability of equitable setoff. It states that equitable set-off is available only where the debts arose from the same contracts or interrelated chain of events. A close relationship between the two debts must be established to engage equitable setoff. Cases applying Telford have turned on the question of whether it would manifestly unfair to deny setoff given the interrelated nature of the debts in question.

Telford was recently applied in Alberta in the case of ***Spyglass Resource Corp v Bonavista Energy Corporation*, 2018 ABQB 504.**

Your claim against Base (i.e., the amount that Base Mortgage/Finance owes you), and the amount you owe to the Receiver (i.e. the $5,000 for costs arising out of the settlement of the costs award arising out of your dismissed conflict application) do not arise out of the same contract and are not "interrelated".

Accordingly, you have no right to either legal or equitable set-off.

Please confirm by return that we may release the $5,000 we are holding in our trust account to the Receiver.

OSLER

Emily Paplawski
Associate
403.260.7071 | EPaplawski@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Tuesday, August 20, 2019 3:43 AM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Okie dokie.. rather than make the application why dont you just send the law and set out your position. If it solid then I have no issue conseting to release funds.. just keep in mind my position and try not to pull a fast one and we should be able to handle this efficiently...

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Date: 2019-08-20 12:35 a.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Lewis, David" <dlewis@bdo.ca>, "Paplawski, Emily" <EPaplawski@osler.com>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Having now received the agreed funds we do not intend to proceed with the vexatious litigant application. We will just seek the release of the funds – unless in light of this you simply consent to their release.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Monday, August 19, 2019 4:33 PM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

EXHIBIT 13

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From:	Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Sent:	August 30, 2019 12:31 PM
To:	Mike Terrigno; Paplawski, Emily
Cc:	Lewis, David
Subject:	RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

We will be seeking to recoup those costs from you in light of your blatant violation of your settlement agreement.

We look forward to receiving your position with respect to your unmeritorious set-off claim failing which we will bring the matter before Justice Romaine and seek appropriate costs.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Friday, August 30, 2019 12:28 PM
To: Paplawski, Emily <EPaplawski@osler.com>
Cc: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Just want to know how much is being expended in receiver's attempt to recapture $5k in disputed costs.... I will see your time reocrds when your records are produced for purposes of court approval for payment of your fees so your cooperation now would be appreciated and will alleviate issue later.. thanx

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Paplawski, Emily" <EPaplawski@osler.com>
Date: 2019-08-30 6:32 p.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Mike,

Can you please advise why you are requesting this information? Typically such matters are between counsel, their clients and the Court.

OSLER

Emily Paplawski
Associate
403.260.7071 | EPaplawski@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Wednesday, August 28, 2019 2:51 PM
To: Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Emaily thank you for your analysis.. how much time has the firm recorded in pursuing this issue... Just a rough figure please. Thanx..

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to

anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Paplawski, Emily" <EPaplawski@osler.com>
Date: 2019-08-28 10:26 p.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>, "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Cc: "Lewis, David" <dlewis@bdo.ca>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Mike,

Further to the email exchange below, we provide herewith the authority which makes clear that you have no right of set-off in a receivership of post-receivership debts (such as the agreed costs which are payable by you to the Receiver) against pre-receivership debts (such as the amount of your claim against the Base estate).

We provide this to you in the hope that you might agree to release the funds which we are holding in our trust account, and without prejudice to our primary argument that the settlement precludes any right of set-off since it expressly required a "$5,000 payment (certified funds or solicitors trust cheque) payable to Osler's, or BDO Canada LLP".

The authorities are as follows:

<u>Air Canada</u>

We begin with the case that you are relying on, namely, ***Re Air Canada*, (2003) 45 CBR (4th) 13 (Ont. S. C.) ("Air Canada")**. This was a *CCAA* case (not a receivership case) in which a creditor brought an application to amend the initial order to be allowed to set off debts. Justice Farley allowed the application, but importantly in doing so he distinguished a *CCAA* case from a bankruptcy or a receivership case. Citing ***Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 ("Husky")**, Justice Farley stated that the insertion of a trustee into bankruptcy proceedings breaks the mutuality of parties, precluding set-off between debts incurred pre and post-bankruptcy. Both the SCC in *Husky* and Farley J quote the following passage from The Law of Setoff in Canada:

> "This case, as in receivership is fairly straight forward. The assignment of the bankrupt's property to the trustee results in a change of mutuality. Accordingly, any claim which arises after the assignment will be between the claimant and the trustee and not the claimant and the bankrupt. Mutual debts will not be present and set-off not allowed" **[Kelly R. Palmer, The Law of Setoff in Canada (1993: Aurora, Ontario) at 164]**

The application of Justice Farley's reasoning in Air Canada is controversial and has not been followed in several CCAA cases. However, it is important to note that the *Air Canada* case has never been followed in a receivership case (and Justice Farley himself acknowledged that his reasoning would not apply in a receivership case). Of course, Base is a receivership case, not a *CCAA* case.

Legal Set-Off in Receivership

As noted by Farley J in *Air Canada*, once a company has entered receivership the appointment of the receiver destroys the mutuality required for legal set-off.

The leading Canadian case on this point is ***Canadian Imperial Bank of Commerce v Tuckerr Industries Inc. , [1983] 5 WWR 602*** **(BCCA) ("Tuckerr").** In this case the applicant was denied the ability to set-off debts incurred to the receiver against amounts owing to the claimant predating the appointment of the receiver. At paragraph 8 Lambert JA points out that the second debt did not arise until after the appointment of a receiver therefore no mutuality of obligation existed between the debts. Without mutuality, there could be no legal set-off.

Tuckerr has been referred to in over 50 cases, most notably by the Supreme Court in ***Telford v Holt, [1987] 2 SCR 193*** **("Telford")** and Husky. It is referenced in both *The Law of Setoff* (cited by Farley J in Air Canada) and in *Bennett on Receiverships*. The law on this point is well established and universally accepted.

Tuckerr has been applied repeatedly by the Alberta Court of Queen's Bench, most recently in a receivership context in ***Montreal Trust Co of Canada v Smoky River Coal Ltd.*** **2001 ABQB 587**, in which a creditor was not permitted to set-off debts which it owed to the receiver against its outstanding pre-receivership claim.

Accordingly, because your claim against Base is a pre-receivership claim, whereas the costs you owe to the Receiver is a post-receivership payable, you clearly have no right of legal set-off.

Equitable Set-Off in Receivership

The only remaining question is whether you have any claim to equitable set-off. The answer is clearly "no".

Equitable setoff may apply when mutuality is lost or never existed, and when debts are not liquidated.

Telford is the leading Canadian case on the availability of equitable setoff. It states that equitable set-off is available only where the debts arose from the same contracts or interrelated chain of events. A close relationship between the two debts must be established to engage equitable setoff. Cases applying Telford have turned on the question of whether it would manifestly unfair to deny setoff given the interrelated nature of the debts in question.

Telford was recently applied in Alberta in the case of ***Spyglass Resource Corp v Bonavista Energy Corporation*****, 2018 ABQB 504.**

Your claim against Base (i.e., the amount that Base Mortgage/Finance owes you), and the amount you owe to the Receiver (i.e. the $5,000 for costs arising out of the settlement of the costs award arising out of your dismissed conflict application) do not arise out of the same contract and are not "interrelated".

Accordingly, you have no right to either legal or equitable set-off.

Please confirm by return that we may release the $5,000 we are holding in our trust account to the Receiver.

OSLER

Emily Paplawski
Associate
403.260.7071 | EPaplawski@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Tuesday, August 20, 2019 3:43 AM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>

Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Okie dokie.. rather than make the application why dont you just send the law and set out your position. If it solid then I have no issue conseting to release funds.. just keep in mind my position and try not to pull a fast one and we should be able to handle this efficiently...

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Date: 2019-08-20 12:35 a.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Lewis, David" <dlewis@bdo.ca>, "Paplawski, Emily" <EPaplawski@osler.com>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Having now received the agreed funds we do not intend to proceed with the vexatious litigant application. We will just seek the release of the funds – unless in light of this you simply consent to their release.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Monday, August 19, 2019 4:33 PM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>; Paplawski, Emily <EPaplawski@osler.com>
Subject: Re: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Randal if ur application is just to deal with releasing funds then you don't have to wait and can proceed because my position is straightforward as I advised... but if you are throwing in the vexactious litigant then that is a different beast altogther and we need substantially more time becuase I have to get my team behind it and recordings transcribed etc.... so please let me know how do you propose to proceed?

Sincerely yours,

Mike Terrigno *(MBA, LL.B/J.D., REM (Harvard), CICA (tax)*

(Sent from my smartphone)
Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the intended is unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you may not use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As our company cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the company unless otherwise indicated by an authorized representative independent of this message.

-------- Original message --------
From: "Van de Mosselaer, Randal" <rvandemosselaer@osler.com>
Date: 2019-08-19 11:35 p.m. (GMT+01:00)
To: Mike Terrigno <mike@terrigno.ca>
Cc: "Lewis, David" <dlewis@bdo.ca>, "Paplawski, Emily" <EPaplawski@osler.com>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Thanks for your email. I had actually already received the letter and the cheque by the time I received your email.

As per the undertaking set out in your letter, we will deposit the funds into our trust account and hold them pending further Court Order or your consent. In due course we will bring an application for an Order directing that the funds be released in accordance with the settlement agreement.

We trust this is satisfactory.

Regards,

OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT
403.260.7024 FACSIMILE
rvandemosselaer@osler.com

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1

osler.com

From: Mike Terrigno <mike@terrigno.ca>
Sent: Monday, August 19, 2019 3:13 PM
To: Van de Mosselaer, Randal <rvandemosselaer@osler.com>
Cc: Lewis, David <dlewis@bdo.ca>
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al
Importance: High

Randal, you will have funds today or tomorrow for payment under the settlement agremeent. Attached is my letter that will accompany the payment and copy of bank draft.

The settlement funds are provided by a 3rd party for the sole and exlcusive purpose of making payment under the settlement agreement and for no other purpose. Those funds are otherwise not my property and are imposed with a trust for the sole and exclusive benefit of the 3rd pary.

This is my position: The cost judgment has been replaced with the settlement agreement. Under the settlement agreement there is an obligation to pay the estate $5k. I have made payment of $5k that is held pending the determination of the set-off issue. The obligations between the estate and I are in common and should be set-off.

You seek recession of the settlement agreement. Your position is weak because I have satisfied the applicable term of the settlement agreement by making payment. Furthermore, there were many terms in the settlement agreement all of which I have satisfied.

You advised that you would file an application to deal with this matter including to declare me a vexatious litigant. Before you rush off to file know that I am trying to organize a process with my team to allow you to hear parts of recordings of which i advised you. Give me until August 31 to work out the details.

Let me know how you wish to proceed.

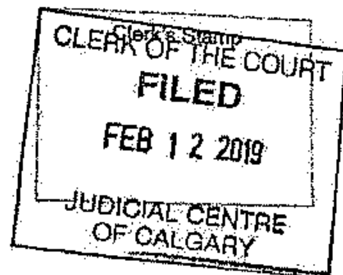
Sincerely yours,
Mike Terrigno [MBA, LL.B/J.D., REM(harvard), CICA (tax)]

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the noted recipient herein us unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you cannot use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone

EXHIBIT 14

To the Receiver's Ninth Report to Court
Dated January 17, 2020

COURT FILE NUMBER	1901-01990
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	MIKE TERRIGNO, EASY LOAN CORPORATION, BARILE INVESTMENTS INC., AND DARRELL WINCH
DEFENDANTS	BDO CANADA LLP
DOCUMENT	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	RIVERSIDE LAW OFFICE c/o CHRISTOPHER M.A. SOUSTER 4108 MONTGOMERY VIEW NW CALGARY, ALBERTA T3B 0L9 Phone: (403) 685-4224 Fax: (403) 685-4225 Email: cmas@riversidelawoffice.ca



NOTICE TO DEFENDANTS

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. The individual Plaintiffs are individuals that reside in Calgary, Alberta.

2. The corporate Plaintiffs are corporations duly registered in Alberta and operating in Calgary, Alberta.

Scanned by CamScanner

3. The Defendant is a corporation duly registered to conduct business in Alberta and operates in Calgary, Alberta. The Defendant was at all material times hereto the Court appointed receiver over the affairs of Base Finance Ltd. (**"Base Finance"**) that operated a Ponzi scheme.

INTRODUCTION

4. Base Finance was incorporated in 1984 and registered to carry on business in the Province of Alberta. Arnold Breitkreutz (the "Fraudster") is the sole director and shareholder of Base Finance. The stated intent of the business was to act as the investment company where the investor funds were deposited and distributed. Base Finance operated out of 724- 55th Avenue SW, Calgary.

5. On September 29, 2015, the Alberta Security Commission ("ASC") froze the operating bank account of Base Finance.

6. On October 15th, 2015, Mike Terrigno ("Mike"), (pursuant to an Ex-Parte Order (the "Order") filed with the Court of Queen's Bench of Alberta (the "Court") in QB ACTION 1501-11817 (the "QB Action")), obtained from Justice K. Yamauchi, (pursuant the Judicature Act, R.S.A. 2000, c.J-2 and The Business Corporations Act, R.S.A. 2000, c.B-9), the appointment of BDO Canada Limited (hereinafter referred to as "BDO" or the "Receiver") as Receiver of all current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated, including without limitation the "Property" of Base Finance.

7. According to the Receiver's review of evidence filed in the QB Action and its own investigation, the investors of the Base Finance believed that they were investing in first charge security against Alberta based mortgages.

8. The Plaintiffs were Base Finance investors and they each were told by Arnold that they were investing in a first charge security against Alberta based mortgages.

9. On or about March 2, 2018 after roughly a two (2) week hearing, the ASC declared that Base Finance operated as a Ponzi scheme.

10. On or about May 28, 2018, the RCMP charged Arnold Breitkreutz and Susan Way for their involvement in operating the Base Finance Ponzi scheme.

11. Approximately 240 investors invested approximately $122 Million in the Base Finance Ponzi scheme.

12. The Plaintiffs claim that they incurred damages as a result of the Receiver's negligence in administrating the estate of Base Finance as a result of 3 specific matters as follows:

    a. Failing to appeal the Yamauchi Decision (as defined herein and below);

    b. Failing to commence proceedings or take legal action as against Robert Smyth; and

    c. Failing to undertake a claw back of the Base Finance bank account within the limitation period.

FACTUAL BACKGROUND

13. Base Finance maintained a bank account at the Royal Bank of Canada, Britannia Branch, transit number 1004050, account number 2649003 (the "Bank Account"). On September 29, 2015 as a result of the fraudulent activities undertaken by the Base Finance, the Executive Director of the ASC issued an order pursuant to section 47 of the Securities Act, RSA 2000, c S-4, freezing the Bank Account. The amount in the Bank Account at that time was approximately $1,085,000.

14. On October 6, 2015, Mike was interviewed by ASC as a creditor of the Base Finance Ponzi scheme.

15. On or about October 6, 2015, Mike spoke with Richard Billington ("Richard") about the QB Action and the investigation of the ASC. As a result of that discussion, an ex-parte application against Base Finance was prepared on or about October 6, 2015.

16. On October 6, 2015, and after the meeting with the ASC, Mike swore his 1st affidavit filed in the QB Action in support of the aforesaid *ex-parte* application that requested an order to compel production of the Base Finance mortgage records and to obtain the receivership order.

17. On October 7, 2015, Mike obtained an order directing Base Finance to produce its mortgage records within 24 hours after service of that order upon Base Finance and Phillipe Lalonde ("Phillipe ") who was acting for the Fraudster regarding the ASC investigation.

18. On October 9, 2015, Chris, Richard and Mike were advised by Phillipe that Base Finance did not have any Alberta residential mortgages.

19. At this point, it was clear to Richard, Chris and Mike that they were dealing with a significant fraud/Ponzi scheme. As a result, and on October 9, 2015, Richard provided a verbal opinion that Mike should apply for a court-appointed receiver.

20. Richard's legal opinion, reduced to writing on October 13, 2015, was a culmination of various meetings and fact gathering initiatives over the preceding days with the ASC, Chris, BDO principals Sarah Hawco ("Sarah") and Craig Fryzuk ("Craig") and Phillipe.

21. On October 9, 2015, Mike accepted Richard's opinion and recognized that Richard would act as the receiver's lawyer. By that time, Mike had already interviewed various accounting firms including BDO to act as the court-appointed receiver and who agreed to retain Richard as its legal counsel.

22. In those interviews with various accounting firms, Mike's principal question was whether they had experience in conducting bank account unwinding proceedings more commonly known as fraudulent preference proceedings, or net winner/loser proceedings (the "Titan Proceeding").

23. In meetings with Craig and Sarah, Mike understood that BDO had experience with Titan type proceedings. Furthermore, BDO had a forensic accounting department that could handle such an initiative and they were well-versed on fraudulent schemes.

24. Mike was advised by Sarah, Craig and Richard that, if they were handling the receivership of Base Finance, they would conduct a Titan type proceeding.

25. On October 10, 2015, BDO was cleared of conflicts and agreed to act with Richard as legal counsel for BDO. At this point Richard began providing legal advice to BDO.

26. On October 12, 2015, after much debate about taking on the receivership (as they were aware that they were taking on a fraud/Ponzi scheme file), Richard and Craig agreed to a fee postponement arrangement. The understanding was that Mike would not pay their fees, but rather they would be compensated through the recovery proceedings, whether it was a Titan Proceeding or asset sale through tracing fraudulent transactions.

27. By October 12, 2015, Mike had identified residential properties that were shown to Richard, Craig, Chris and Sarah, and for which they all agreed could be targets for recovery as they were likely part of the Base Finance fraud. As a result, a fee postpone agreement was entered into on October 12, 2015. For clarity, the aforesaid properties that Mike found have been the only properties realized on by the Receiver in the Base Finance receivership. Said differently, regarding the QB Action, there have been no other assets found other than the ones Mike located.

28. As part of the fee postponement agreement made on October 12, 2015, Richard, Craig and Sarah assured Mike that the fee postpone arrangement would not affect their services and thus Mike agreed to bring the application for a court-appointed receiver with BDO and Richard at the helm.

29. On October 15, 2015, with support from Mike's affidavits of October 6, 2015, October 13, 2015 and October 15, 2015, and the affidavit of Robert Comtois sworn on October 13, 2015, (each referencing Base Finance's deceptive and fraudulent activities), Richard and Chris attended court and obtained the receivership order in the QB Action. The aforesaid affidavits were prepared with the assistance of Craig, Sarah, and Richard.

30. On October 16, 2015, with the assistance of law enforcement officers, Craig attended at the Base Finance office located at 724-55th Avenue SW Calgary, Alberta and confiscated records. At that time, the Base Finance office locks were changed and the office was under BDO control.

31. On or about October 26, 2015, roughly 10 days after BDO obtained the Base Finance records, including specific financial records that went as far back as the mid-1990s, Mike discussed the situation with Craig and was again reassured that a Titan type proceeding would form part of the Receiver's initiative.

32. On November 6, 2015, the Receiver brought an application (the "November 6th Application") for an order, *inter alia*, directing that the funds in the Bank Account be remitted to the Receiver to fund ongoing receivership fees and expenses.

33. Some of Base Finance's investors attended at the November 6th Application objecting to the release of funds from the Bank Account without first being able to assert a possible trust claim against those funds. On November 6, 2015, this Court directed that the funds in the Bank Account remain frozen and that a court hearing should be scheduled before a presiding Commercial List Justice to hear applications concerning entitlement to funds in the Bank Account. Ultimately, a full-day hearing before this Court was scheduled and was heard on January 21, 2016 with the decision issued on February 8, 2016 (the "Yamauchi Decision").

34. At this hearing, the Receiver asked that the Court direct RBC to provide the funds to the Receiver to continue preserving and investigating the affairs of Base Finance and its various related parties with a view to maximizing recoveries for "all known investors in a fair and equitable manner."

35. However, at paragraph 38 of his decision, Justice K. Yamauchi declared:

> this Court imposes a trust over funds in the Bank Account for the benefit of the Applicants, and other investors who were defrauded by Base Finance, through Mr. Breitkreutz's various fraudulent misrepresentations. A trust over the RBC frozen funds for the benefit of all investors to be distributed on the basis of the lowest intermediate balance rule.

36. As a result of the decision, Mike requested that the Receiver file an appeal however, the Receiver refused to do so on the following basis:

    a. The Receiver did not have money to pursue the appeal.

    b. The Receiver opined that it had to stay neutral amongst the investors.

37. Mike took exception to the Receiver's position as the agreement retaining the Receiver was based on a fee postponement arrangement as aforesaid. However, as the appeal filing deadline was fact approaching, and on direction from the Receiver, the Plaintiffs Mike Terrigno and Easy Loan Corporation (the "Appellants") filed the appeal for the benefit of all investors seeking to overturn Justice K. Yamauchi decision to disburse the frozen funds in the Bank Account using LIBR instead of the *pro rata ex-post facto* approach.

38. The Appeal was denied, however, the Court of Appeal opined that, had the Receiver filed the appeal on the basis that Justice K. Yamauchi errored by finding a constructive trust as there was Receiver in place and thereby failing to satisfy the 4th part of the *Solous* test, the appeal would have been allowed. The result would have been roughly $1,085,000 remaining with the Receiver for the benefit of the general body of creditors.

39. The Appellants incurred the following expenses in pursuing the said appeal:

    i. Legal fees $71,727
    ii. filing fee of $650
    iii. Transcript fees $1,080
    iv. Costs awarded $8,500

40. On September 22, 2016, after various meetings with Craig and Richard, and Clint Docken QC and Patrick Higgerty QC who were retained by Mike to advise in taking the Titan Proceeding, BDO completed a net winner/loser analysis.

41. The BDO net winner/loser analysis spanned from 2004 to September 2015 ("BDO Titan Analysis") when the Base Finance bank account was frozen by ASC.

42. The BDO Titan Analysis was created not only for purposes of the Titan Proceeding, but also for the appeal of the decision of the Justice Yamauchi.

43. The BDO Titan Analysis was referenced by Richard and the Appellants' legal team during the appeal and it was heavily relied upon in the appeal Yamauchi Decision. The BDO Titan Analysis was sufficiently complete and ready to be used by BDO subject to an investors' claim process.

44. The BDO Titan Analysis was a key feature of the appeal because the appeal of the Yamauchi Decision was filed on the basis that the frozen funds in the Bank Account were sought to be dispersed to all investors on a *pro rata* basis. The BDO Titan Analysis was relied upon as the basis for the appeal as the grounds for the calculation of the *pro rata* distribution.

ROBERT SMYTH

45. The Plaintiffs assert that there was a chose in action against Robert Smyth ("Robert"), legal counsel for the Fraudster by the estate. The chose in action arose from a hearing in the QB Action held before the Honorable Madam Justice Romaine B.E. on August 17, 2016, wherein Robert, stated the following:

> The $192,000 through my trust account... $82,000 came from the line of credit of Mr. Breitkruets and $110,000 came from the savings Mr. and Mrs. Breitkruets.... they deposited in my trust account and it was, according to the direction, given back to them in various amounts and money was retained for fees.

46. Robert has been the lawyer of the Fraudster and Base Finance for over 20 years. He was the Fraudster's lawyer when the receivership order was granted, he was served with the receivership order, he disputed the receivership order and was well aware of its terms prior to redirecting the ill-gotten investors funds through his trust account for the Fraudster's use and benefit.

47. In learning about the aforesaid, Mike contacted the receiver to find out what they were going to do about Robert's misconduct and was advised by the Receiver that it would be taking action against Robert. However, no an action was filed against Robert despite numerous discussions between Mike and the Receiver such that Mike understood that the Receiver would be commencing an action.

48. Mike offered to take the assignment of the claim for good and valuable consideration on numerous occasions and it was not until November 2, 2018 when the Receiver advised Mike that it was not in a position to proceed against Robert, but that Mike could proceed with the claim and provided him with an assignment of the claim. Mike's legal team commenced drafting a claim against Robert wherein it became evident that the claim was statute barred as the Receiver discovered the loss/damages at the aforesaid hearing on August 17, 2016. This meant that a good claim became worthless and the estate was unnecessarily dissipated in the amount of $192,000.

49. In addition to missing the limitation period to file a claim against Robert, the Receiver neglected to take the Titan Proceeding within the limitation period. In the result, although the Titan Proceeding was to be conducted by the Receiver for the benefit of the general body of creditors, the Titan Proceeding cannot now be done resulting in a significant dissipation to the estate and damages to the general body of creditors of the estate.

50. The facts specifically related to the botched Titan Proceeding are as follows:

a. Discoverability of the Titan Proceeding occurred before October 13, 2015.

b. On September 27, 2017, the Plaintiffs filed actions against 140 investors seeking an unwinding of the Base Finance bank account.

c. On October 13, 2017, the Receiver filed an application to establish the Titan Proceeding.

d. The aforesaid application was not served on anyone and was adjourned sine die. In an email from Richard, he advised that he had filed and adjourned the application to preserve the limitation period. However, by that time the limitation period had already lapsed.

e. In September and October 2018, as the receiver failed to take the Titan Proceeding within the limitation period, the Plaintiffs (as an act of mitigation), served their claims upon the roughly 140 investors to whom the Plaintiffs funds were traced through the Base Finance bank account.

f. On October 31, 2018, Richard re-scheduled the October 13, 2017 Titan application for December 15, 2018. However, Richard only served the re-scheduled application to a limited group of about 5 investors' lawyers who represent only about 20 investors.

g. Sometime between November 2 and November 28, 2018, Richard and Craig were not longer acting for the Receiver.

h. On November 28, 2018, the receiver's new lawyer, Randal Van de Mosselaer ("Randal"), cancelled the Titan Proceeding that Richard set for December 14, 2018.

i. Mike advised Randal of the limitation issue. In turn, Randal advised Mike that the Receiver did not take a position with the Plaintiffs recovery claims and that they were clear to proceed.

NEGLIGENCE CLAIM

51. As a result of the Receiver's actions as set out herein above and summarized as follows:

    a. Failing to appeal the Yamauchi Decision,

    b. Failing to the take legal action against Robert, and

    c. Failing to take a Titan Proceeding within the limitation period,

    the Plaintiffs claim that the Receiver demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

52. The Plaintiffs claim that the Defendant breached a fiduciary duty of care owed to them, the damage of which falls within recognizable limits of remoteness and causation.

53. Paragraph 38 of the Receivership order states:

> The Receiver shall incur no personal or corporate liability or obligation as a result of its appointment or the fulfillment of its duties in carrying out the provisions of this Order, save and except for instances of any gross negligence or wilful misconduct on its part.

54. The Plaintiffs claim that the receiver was grossly negligence or acted with wilful misconduct that caused damage to them.

55. Paragraph 3(b) & 3(j) of the Receivership order empowers the Receiver to preserve the Property of the estate, to appeal the Yamauchi Decision, and to take legal action against Robert. The said paragraph states:

> 3) The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> > b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof...
> >
> > j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court.

TITAN PROCEEDING

56. Regarding the obligation of the Receiver to take the Titan Proceeding, the Plaintiffs claim that the Receiver agreed, as part of its initial retainer, to take the proceeding. Furthermore, as part of its fiduciary obligations, the Receiver is to consider the interests of all creditors and then act for the benefit of the general body of creditors. The Titan Proceeding benefited the general body of creditors and ought to have been pursued, and was at all times pursued by the Receiver until the limitation issue arose.

57. The Plaintiffs claim that the Titan Proceeding seeks a remedial order as the term is defined under the Limitations Act, RSA 2000, c. L-12 ("Limitations Act").

58. The Plaintiffs state that the Receiver discovered the claim prior to October 13, 2015, and that the Titan Proceeding application filed on October 13, 2017 did not satisfy the filing deadline under the Limitations Act.

59. The Plaintiffs claim damages for their *pro rata* share of the RBC frozen funds regarding the Yamauchi Decision in the estimated amount as follows:

Easy Loan Corporation $18,000

Mike Terrigno: $4,000

Barile Investments Inc: 9,000

Darrell Winch: $4,000

or such further and other amounts as the Plaintiffs may have by obtaining assignments of claims from the general body of creditors of Base Finance or as may be proven at the trial of this action.

60. Regarding the damages incurred due to the missed action against Robert and the subsequent assignment thereof to Mike, Mike claims damages in the amount of $192,000 or such further and other amounts as may be proven at the trial of this action.

61. Alternatively, the Plaintiffs claim their *pro rata* portion of the aforesaid dissipated amount of $192,000 as may be proven at the trial of this action.

62. Regarding the Receiver's neglect to file the Titan Proceeding within the timeline imposed under the Limitations Act, the Plaintiffs claims damages as follows

    a. Easy Loan Corporation $2,500,000

    b. Barile Investments Inc. - $150,000

    c. Darrell Winch - $93,000

    d. Mike Terrigno- $200,000

BREACH OF CONTRACT

63. Mike and his legal team took steps to assist the receivership for the benefits of the estate and/or the general body of creditors upon the request and/or instruction of the Receiver. The Receiver supported reimbursement for those fees from the estate and acknowledged the assistance of Mike and his counsel in the Receiver's 6th Report (the "Representations"). However, since Craig left the employ of the receiver, the Receiver repudiated this agreement and, in the result, Mike has incurred damages in the approximate amount of $200,000 due to legal expense incurred for the benefit of the estate and/or the general body of creditors.

MISREPRESENTATION

64. Alternatively, as a result of the Representations of the Receiver to Mike and/or Chris, or other legal representatives of Mike, various steps were taken that benefited the estate and the general body of creditors. This was done at Mike's expense as he incurred significant professional and legal expense that were to be recovered from the estate once funds were deposited into the account of the estate. However,

the Receiver is now denying that it may reimburse these fees and/or is disputing whether they authorized the work and/or whether it was work for the benefit of the estate.

COSTS - CONSEQUENCES FLOWING FROM CONDUCT

65. In addition to the legal and professional fees and expenses incurred by the Plaintiffs, the Plaintiffs continue to incur legal and professional fees to seek redress from the Defendant's actions as hereinabove set out.

66. But for the actions of the Defendant and, in particular the gross negligence, breach of fiduciary duties owed to the Plaintiffs, and breach of contract, none of these proceedings would have been commenced and the Plaintiffs would not have incurred the damages, costs and expenses associated with these proceedings. As a result, the Plaintiffs claims costs on a full indemnity basis, or solicitor client basis or such other basis as this Honorable Court deems fit to grant.

PUNITIVE, EXEMPLARY AND AGGRAVATED DAMAGES

67. As described herein, the conduct of the Defendants is egregious, high-handed, reprehensible and warrants the condemnation of this Court. The Defendant deliberately disregarded its fiduciary obligations to the Plaintiffs and to the general body of creditors, and has done so by focusing on its financial interest instead of its fiduciary duties at the direct expense of the Plaintiffs, the general body of creditors of Base Finance, and the estate.

68. In the circumstances, the misconduct of the Defendant warrants an award of punitive, aggravated or exemplary damages in the amount of $100,000 or such other amount as this Honorable Court deems fit to grant.

LEGISLATION RELIED UPON

69. The Plaintiffs plead relief under the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, Judicature Act, RSA 2000, c. J-2, Fraudulent Preferences Act, R.S.A. 2000, c. F-24, Civil Enforcement Act, RSA 2000, c. C-15, Business Corporations Act, R.S.A. 2000, c.B-9, Limitations Act, RSA 2000, c L-12 and regulations related thereto.

TIME AND PLACE OF TRIAL

70. The Plaintiffs propose that the trial of this action take place at the Court House in the City of Calgary in the Province of Alberta and that it should not exceed 25days.

REMEDY SOUGHT:

71. Damages for breach of fiduciary duty and gross negligence in the following estimated amounts:

Easy Loan Corporation - $2,500,000 for failing to take the Titan Proceeding

$18,000 for failing to file and conduct the appeal of the Yamauchi Decision

$30,000 for failing to take action against Robert or for failing to provide a valid assignment of the claim.

$200,000 for breach of contract or misrepresentation regarding professional and legal fees incurred that benefited the debtor estate on instruction from the Receiver.

Mike Terrigno - $200,000 for failing to take the Titan Proceeding

$192,000 for failing to take action against Robert or for failing to provide a valid assignment of the claim.

$3,000 for failing to file and conduct the appeal of the Yamauchi Decision

Darrell Winch - $93,000 for failing to take the Titan Proceeding

$5,000 for failing to take action against Robert or for failing to make a valid assignment of the claim.

$3,000 for failing to file and conduct the appeal of the Yamauchi Decision

or such further and other amounts as may be proven at the trial of this Action.

72. An interim and interlocutory injunction extending until trial or other disposition of this action prohibiting the Defendant, their agents, officers, directors, employees from destroying, altering, or defacing documents relevant to the proceedings herein on such terms and conditions that this Honorable Court permits.

73. As deemed fit by this Honorable Court, relief under the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, Judicature Act, RSA 2000, c. J-2, Fraudulent Preferences Act, R.S.A. 2000, c. F-24, Civil Enforcement Act, RSA 2000, c. C-15, Business Corporations Act, R.S.A. 2000, c.B-9, Limitations Act, RSA 2000, c. L-12 and regulations related thereto.

74. An Order of aggravated, exemplary or punitive damages in the amount of $100,000 or in such amount as this Honorable Court deems just.

75. Pre and post judgement Interest on all damages pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 as amended.

76. Costs on a full indemnity basis, solicitor-client basis or such other basis as this Honorable Court deems fit to grant.

77. Such further and other relief as this Honorable Court deems fit to grant.

NOTICE TO THE DEFENDANT

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff against you.

EXHIBIT 15

To the Receiver's Ninth Report to Court
Dated January 17, 2020

In the Court of Appeal of Alberta

Citation: Easy Loan Corporation v Wiseman, 2017 ABCA 58

Date: 20170213
Docket: 1601-0044-AC
Registry: Calgary

2017 ABCA 58 (CanLII)

Between:

Easy Loan Corporation

Appellant
(Plaintiff/ Respondent)

- and -

Mike Terrigno

Not a Party to the Appeal
(Plaintiff)

- and -

Thomas Wiseman, Sandra Unger, Ken Unger, Larry Revitt, Shirley Revitt, Raymond Sampert, Margaret Sampert, Aggregate Recycling Ltd., John Davies, Fred Dowe, Carol Dowe, Resch Construction Ltd.

Respondents
(Applicants)

- and -

Base Mortgage & Investments Ltd., Base Finance Ltd., Arnold Breitkreutz, Susan Breitkreutz, Susan Way and GP Energy Inc.

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice J.D. Bruce McDonald

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 8th day of February, 2016
Filed the 12th day of October, 2016
(2016 ABQB 77, Docket: 1501 11817)

2017 ABCA 58 (CanLII)

Memorandum of Judgment

The Court:

[1] Base Mortgage & Investments Ltd., Base Finance Ltd., (collectively Base Finance) Arnold Breitkreutz, Susan Breitkreutz, Susan Way and GP Energy Ltd. are alleged to have operated a Ponzi scheme. Following an investigation by the Alberta Securities Commission, a bank account was frozen and a receiver appointed over the assets of Base Finance Ltd. The appellant and the respondents to this appeal were investors in the scheme. A chambers judge directed that the funds in the bank account be distributed according to a specific tracing scheme: *Easy Loan Corporation v Base Mortgage & Investments Ltd*, 2016 ABQB 77, 613 AR 384, (Order). The appellant appeals, contending that a different method of distribution ought to have been imposed.

[2] We dismiss the appeal.

I. Background

[3] The sole director and shareholder of Base Mortgage & Investments Ltd. and Base Finance Ltd is Arnold Breitkreutz. Base Mortgage & Investments Ltd. was incorporated in 1978 to carry on business as a mortgage broker. Base Finance Ltd. was incorporated in 1984 to carry on business as an investment company into which investor funds were deposited and distributed. Base Finance obtained money from investors, which it pooled. The investors were told that the monies would be loaned to borrowers who would provide Base Finance with mortgages on land in Alberta. The investors were to be the beneficial holders of the mortgages held in Base Finance's name. In most cases Base Finance would provide the investors with a document titled, "Irrevocable Assignment of Mortgage Interest". It named the investor, showed the amount that the investor provided to Base Finance, and itemized the terms of the mortgage into which the borrower was entering. It also indicated that the funds were pooled. The Irrevocable Assignment of Mortgage did not identify the mortgagor or the lands upon which the mortgage was placed.

[4] On September 24, 2015, after receiving a telephone call from the Royal Bank raising a concern about an account held by Base Finance, the Alberta Securities Commission commenced an investigation into an alleged $83.5M Ponzi scheme. Ponzi schemes were described in *R v Mazzucco*, 2012 ONCJ 333 at para 9, 101 WCB (2d) 651 as follows (with emphasis added):

> The hallmark of such a fraudulent scheme (named after the infamous speculator Charles Ponzi) is that investments claimed by the fraudster to have been made on behalf of investors are not in fact made. Instead... investors are given forged documents as evidence of non-existent security. The monies supposedly invested are not invested at all, but instead, in the typical Ponzi scheme, the swindled monies are siphoned off by the fraudster(s) for their purposes. Such schemes are kept afloat by making interest payments and returning principle upon request so that there is the appearance of legitimacy. Early investors are paid off with funds fraudulently raised from later investors.

2017 ABCA 58 (CanLII)

2017 ABCA 58 (CanLII)

[5] In addition to the investigation by the Securities Commission, there are other proceedings underway. On application by the appellant, Easy Loan Corporation, the court appointed a receiver (BDO Canada Ltd) over Base Finance's assets. The receiver reports that there were no underlying Alberta mortgages. The bulk of investor funds (over $80M) were invested in a U.S. company, Powder River Petroleum International Inc. which had filed for bankruptcy protection under Chapter 7 (Liquidation) of the United States Bankruptcy Code, 11 USC. In an effort to recover the loss, Arnold Breitkreutz continued to solicit investments from the Base Finance investor group in order to maintain the interest payments and principal redemption requirements of the investor group.

[6] One of the assets of Base Finance is an account at the Royal Bank. The account was opened on May 16, 2014 after the Bank of Montreal advised that it would not continue to accept funds into two accounts held by Base Finance. The account at the Royal Bank was frozen on September 25, 2015 with about $1.085M on deposit ("Frozen Funds"). When the receiver applied for the Frozen Funds to fund the receivership, some investors objected. Only as regards the Frozen Funds, the court directed that those investors claiming an entitlement should apply to the court to determine whether they were entitled to funds in the Frozen Account.

[7] The investors, Easy Loan and the respondents (about 20 of the approximately 240 Base Finance investors) argued that Base Mortgage held their invested "funds in trust for them": Reasons at para 1. The receiver opposed the applications and wanted those funds to cover the cost of the receivership: para 2. Before the chambers judge, the receiver took the position that a constructive trust was not appropriate because it would have the effect of elevating the position of some investors over others, and over other (non-investor) creditors. In its first report the receiver wrote that following the receiver's investigation into Base Finance, "at some point in the future, a claims process to determine the priorities of each creditor will be established ... and funds will be systematically distributed".

[8] The receivership is still in progress. The appellant applied to have the receiver's third report dated May 9, 2016 admitted as new evidence on appeal. The respondents did not object and we have admitted and reviewed the new evidence.

II. Chambers Decision

[9] The chambers judge impressed the Frozen Funds with a constructive trust. He cited *Soulos v Korkontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214 and held that the applicants met the *Soulos* conditions: para 51. As some of the chambers judge's findings of fact are relevant to the issue of tracing, we reproduce them here (with emphasis added):

> (a) They provided their investments to Base Finance based on representations that Base Finance made through Mr. Breitkreutz, that their investments would be used to fund mortgages and that their investments would be protected through security in the form of first mortgages on the properties that their investments were funding.

Base Finance was not only under a legal obligation, but it was under an equitable obligation, to use (and secure) those funds in that manner. This meets condition 1 of the *Soulos* test.

(b) The Applicants provided their investments to Base Finance on the understanding that Base Finance was the conduit through which the investments would flow through to the mortgagors. ... This Court finds that Base Finance held itself out as the investors' agent in using their invested funds for loans that were to be secured by a mortgage for their benefit. In this way, Base was representing them in such a way as to be able to affect their legal position in respect of the various mortgagors. This meets condition 2 of the *Soulos* test.

(c) Base Finance did not obtain any mortgages using the investors' money. **The investors' monies as they relate to the September RBC Statement, can be easily and clearly traced to the Bank Account.** Base Finance's banking records of the Bank Account, including the cancelled cheques, point to the individual investment amounts, and the timing of the deposits. As well, the parties and Ms. Pickering have produced the cancelled cheques for those deposits that show the date of the deposit into the Bank Account. Accordingly, this Court finds that the Applicants have a legitimate reason for seeking a proprietary remedy. The Receiver does not challenge this. This meets condition 3 of the *Soulos* test. (emphasis added)

(d) The Receiver argues that the imposition of a constructive trust, as it relates to the September 2015 advances that the Applicants made would be unjust inasmuch as this elevates their claims over those of previous investors. This is a timing issue, which this Court will discuss later in these reasons. If this Court were to accede to the Receiver's argument, the funds in the Bank Account could be used by the Receiver for purposes other than the payment to the investors. This would be unjust. This Court finds that there are no factors that would render the imposition of a constructive trust of the Applicants' investments unjust, as the whereabouts of those investments are contained in the Bank Account, and their respective deposits can be readily identified. This meets condition 4 of the *Soulos* test.

[10] Next, the chambers judge determined the method to distribute the Frozen Funds. He considered three possible tracing schemes. He quickly rejected the first (the rule in *Clayton's Case*) and no complaint arises in that regard.

[11] Easy Loan and the receiver contended the Frozen Funds should benefit all those wronged by the unlawful scheme in proportion to their investment with set-off for amounts already recouped, whereas the respondents said method three (see below) should apply.

[12] The chambers judge explained the second two methods at para 55:

2017 ABCA 58 (CanLII)

2017 ABCA 58 (CanLII)

> (2) *Pro rata* or *pro rata ex post facto* sharing based on the original contribution that the various claimants made, regardless of the time they made their contributions. If there is a shortfall, between the amount the claimant's claim and the amount remaining in the account, the claimants share proportionately, based on the amount of their original contribution;
>
> (3) *Pro rata* sharing based on tracing or the lowest intermediate balance rule ("LIBR") which says that a claimant cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment but before the next claimant makes its investment.

[13] The chambers judge held that the third method was the "general rule", if workable. He held that "calculating entitlement to the Bank Account might be considered by some to be inconvenient and moderately complex. It is not, however, impossible to do the calculations. Inconvenience should not stand in the way of fairness": para 71. The chambers judge concluded set-off was not appropriate.

[14] One of the respondent's lawyers calculated each claimant's entitlement. The entitlements ranged from $480,832.89 (paid to the investor who deposited $500,000, the final deposit in September the day before the account was frozen) to $46.20 paid to an investor who made his deposit of $100,000 three months earlier, in June. As is apparent, the distribution method chosen does not reflect a simple proportional approach: the late September investor recovered significantly more (proportionately) than the June investor. Because all of Easy Loan's investments were made prior to June, 2015, it received $309.95 of the $5.7 million it had invested.

[15] The Order also includes a distribution to Base Finance because it contributed to the Frozen Funds. Those funds were paid into court pending further direction.

[16] The calculations were incorporated into the Order, which also included the following: "The Application by the Receiver for an Order directing that the [Frozen Funds] be vested in the Receiver is hereby denied:" para 2. We draw attention to this paragraph because it puts to rest the receiver's contention that its application had yet to be heard.

III. Grounds of Appeal and Standard of Review

[17] It is important to emphasize that there is no appeal of the chambers judge's imposition of the constructive trust. No notice of appeal was filed by the receiver and counsel for the receiver confirmed at the hearing of the appeal that there was no appeal of that finding.

[18] The benefit of the proprietary remedy of a constructive trust is best illustrated by its impact on the assets available for distribution in the bankruptcy context. Although this is a receivership, similar considerations may apply. Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 states: "The property of a bankrupt divisible among his creditors shall not comprise

2017 ABCA 58 (CanLII)

property held by the bankrupt in trust for any other person". And, when property subject to a constructive trust is removed from the estate of the bankrupt, it is "effectively trumping the priority scheme under the bankruptcy legislation": *306440 Ontario Ltd. v 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548 at para 24.

[19] Accordingly, and despite the fact that the receivership was at an early stage when the Order was made, the Frozen Funds are now outside the receivership.

[20] The sole ground of appeal is in relation to the methodology used to trace the Frozen Funds. The appellant submits the chambers judge erred in law by holding that a *pro rata* sharing on the basis of tracing to the lowest intermediate balance in the account is the 'general rule' unless it is practically impossible, and that the chambers judge failed to consider the intention of the beneficiaries to hold commingled funds as co-owners in the mortgage investment.

[21] A careful reading of *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*, 2013 ONCA 26 leads to the conclusion that determining the proper tracing method is a question of law and therefore the correctness standard of review applies (paras 7-9), whereas the palpable and overriding error standard applies to calculations, which are questions of fact: paras 10-11.

IV. Analysis

Preliminary Matters

[22] To minimize confusion, these reasons use the term "mixed fund" to mean an account that contains both trust funds (i.e., funds impressed with an express or a constructive trust) and non-trust funds: see generally, *Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd.*, 2009 ABCA 99 at paras 11, 13 and 15, 454 AR 162. Non trust funds include the wrongdoing fiduciary's own funds and those of other non-beneficiaries, for example, creditors. Commingled means the assets subject to the trust are indistinguishable.

Tracing Rules

[23] On the findings of the chambers judge, Base Mortgage was under an equitable obligation in relation to the activities that gave rise to the Frozen Funds, and the Frozen Funds resulted from its breach of those equitable obligations. Equitable tracing principles govern the distribution of the Frozen Funds.

Mixed Fund

[24] The Order reflects a distribution to Base Mortgage associated with its contribution to the Frozen Funds: paras 8-9. Ordinarily this would engage different tracing principles (including the

rule from *Re Hallett's Estate* (1879), 13 Ch D 696 (see *Brookfield* at para 13) because other considerations apply to so-called "mixed" funds.

[25] *Brookfield* states at para 15 (citations omitted, square brackets in original):

> A trustee mixes his own money with trust money; he withdraws money from the mixed fund, dissipates some of it and then deposits more money into the mixed fund. Subsequent deposits of the fiduciary into the mixed fund are not presumed to be impressed with the trusts in favour of the beneficiary. ... Consequently if the trustee is insolvent, that part of the mixed fund, equal to the amount paid in, will normally pass to the trustee's general creditors. The beneficiary will be entitled to additions to the mixed fund only if he can prove that thereby the trustee intended to make restitution to the trust. It follows that the trust is entitled only to the lowest intermediate balance of the mixed fund. So, if the fund is wholly dissipated before any additions are made to it, the interest of the trust in the mixed fund is extinguished. Professor Scott has justified this result on the ground that "the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; but there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant. ...

[26] The chambers judge made no mention of the fact that the fund was "mixed", and he did not apply the applicable tracing rules that originated with *Re Hallet's Estate*.

[27] Notwithstanding that and paragraphs 8 and 9 of the Order, no appeal is taken on that issue. When counsel was questioned at the hearing, we were advised that all the Frozen Funds were from investors for whose benefit the constructive trust was declared, not from others (including creditors). We therefore proceed as though no non-trust assets were mixed with those of the beneficiaries of the constructive trust.

Tracing Rules and Principles

[28] Three methods are available to trace commingled trust assets on deposit in a bank account. They are: (i) the rule in *Clayton's Case*; (ii) the lowest intermediate balance rule, also referred to as "*pro rata* on the basis of tracing", the "North American method", "rolling charge method" or "LIBR" ("LIBR"); and (iii) the *pro rata* approach, also referred to as the "basic *pro rata* approach", "*pro rata ex post facto*" or "*pari passu ex post facto*" ("Proportionate Distribution").

[29] The following general equitable principles apply.

2017 ABCA 58 (CanLII)

2017 ABCA 58 (CanLII)

[30] First, "modern [tracing] rules ... have been ... altered, improved, and refined from time to time": *Re Hallett's Estate* at 710 *per* Jessel MR. And, "equity's ... flexible remedies such as constructive trusts, ..., tracing ... must continue to be moulded to meet the requirements of fairness and justice in specific situations": *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534, 85 DLR (4th) 129 at 538. The significance of this principle will be apparent shortly, in the context of the applicability of the rule in *Clayton's Case*.

[31] Second, the overarching goal of equity is "to serve the ends of fairness and justice": *Canson* at 586 *per* LaForest J. When tracing into a commingled bank account that contains only trust funds, fairness of distribution is paramount. Balanced against fairness is a more pragmatic consideration: practicality and workability. "A rule that is in accord with abstract justice but which, for one or more reasons, is not capable of practical application, may not, when larger considerations of judicial administration are taken into account, be a suitable rule to adopt": *Ontario (Securities Commission) v Greymac Credit Corp* (1986), 55 OR (2d) 673, 17 OAC 88 at para 48, affirmed [1988] 2 SCR 172.

The Rule in *Clayton's Case*

[32] The Rule in *Clayton's* Case, also known as the "first in, first out" rule deems that funds deposited first into a commingled account are also the first funds withdrawn. The rule has been called "unfair, arbitrary, and based on a fiction": *Boughner* at para 81; see also *Greymac*.

[33] In Alberta, *Re Elliott (Legal Profession Act)*, 2002 ABQB 1122, 333 AR 39 rejected the rule in *Clayton's Case*. Case law from this court states that the rule in *Clayton's Case* is the "general" rule: *Sawchuk v Bourne*, 2005 ABCA 382, 144 ACWS (3d) 12; *Kretschmer v Terrigno*, 2012 ABCA 345, 539 AR 212 at para 93 *per* Slatter JA in dissent but not on that point.

[34] However, given the equitable tracing principles set out above and the parties' agreement that the rule in *Clayton's Case* did not apply in the present circumstances, we proceed on the basis that the rule in *Clayton's Case* has no application here. This leaves two other distribution methods.

Proportionate Distribution

[35] Proportionate Distribution divides the final balance in the commingled account in proportion to each claimant's original contribution to the fund. In other words, contributors share the shortfall in the account. An open question is whether set-off should apply against an investor's contribution as a result of funds the investor received from a return on capital, dividends, bonuses, etc. Given our conclusion that this is not the tracing method to use in these circumstances, there is no need to address set-off.

[36] Intermediate balances (see below) are not taken into account. See generally, Christian Chamorro-Courtland, "Demystifying the Lowest Intermediate Balance Rule: The Legal Principles

Governing the Distribution of Funds to Beneficiaries of a Commingled Trust Account for Which a Shortfall Exists", 30 BFLR 39 (Nov 2014) at 42.

2017 ABCA 53 (CanLII)

LIBR

[37] LIBR considers each beneficiary's contribution to the commingled account and the lowest balance in the account after each beneficiary's contribution. Simply put each beneficiary loses the ability to trace (and therefore claim) its contribution once the funds in the account drop below the amount of the beneficiary's contribution (deposit).

[38] A simple example: if X deposits $100 to a commingled account and the balance in the account later drops to $5, the most X can claim is $5, the lowest balance in the account; the ability to trace to anything more than $5 is lost because anything more comes from a funding source other than X. "Intermediate" refers to the period between X's contribution and when X makes the claim against the account. Once the lowest intermediate balance is determined for each beneficiary, each beneficiary is entitled to claim only the lowest balance's proportional share of the final balance of the account.

[39] *Law Society of Upper Canada v Toronto-Dominion Bank* (1998), 42 OR (3d) 257, 116 OAC 24 ("*LSUC*") at para 14 explains:

> a claimant to a mixed fund cannot assert a proprietary interest in that fund in excess of the smallest balance in the fund during the interval between the original contribution and the time when a claim with respect to that contribution is being made against the fund.

[40] It is self-evident that calculating the lowest balance in the account for each beneficiary's contribution is not workable or practical if the commingled account has many contributors, supporting records are unavailable or incomplete or the timeframe in question is lengthy. These problems do not arise in this case.

[41] Indeed, the proof is in the pudding. Counsel for one of the respondents calculated the lowest intermediate balance for each beneficiary and the proportion that each balance comprised of the Frozen Funds, all to the satisfaction of the chambers judge who personally signed the Order. No respondent disputes the amount.

Tracing Cases

[42] The leading tracing cases involving shortfalls in a commingled account are from Ontario. The first in time is *Greymac*, followed by *LSUC*, *Re Graphicshoppe* and finally, *Boughner*. The Supreme Court approved *Greymac*. In *Greymac* all the funds were trust funds although there were at least two trusts. In *LSUC* the fund was mixed and included the lawyer's clients' funds (trust funds) and a creditor's funds (Toronto Dominion Bank). In *Graphicshoppe* the account included

what were once trust funds (pension plan contributions) but their trust fund characterization was lost when the account to which they were paid became overdrawn, and therefore the trust funds could no longer be traced.

[43] Only *Boughner* involved a Ponzi scheme and an account that was not mixed, i.e., 100% trust funds.

[44] The court in each case rejected the rule in *Clayton's Case* so the central issue became whether Proportionate Division or LIBR should be used to distribute the funds.

[45] Much has been written (in support and otherwise, academically and by judges in subsequent cases) about all these cases but for present purposes it is only necessary to discuss their legal propositions. By way of preview, the guiding principle is that courts should "apply the method which is the more just, convenient and equitable in the circumstances": *LSUC*. And, there appears to be little doubt that LIBR (even if not applied) is the fairest rule but also the most difficult to apply in practice because of the detailed calculations it requires.

<u>Greymac</u>

[46] In reasons later adopted by the Supreme Court, Morden J.A. held that LIBR was the "general" rule: para 45. He accepted that it might be unworkable in some situations because of the complexities associated with calculating the lowest balance applicable to each contributor: paras 45-48. Morden JA also acknowledged another exception: if the claimants expressly or by implication intended to distribute on some other basis, including Proportionate Distribution: paras 48-50.

[47] This Court recognized *Greymac* as authority for a general rule of LIBR. *Brookfield* at para 13 held that the "claim of the beneficiaries is *prima facie* limited to the lowest intermediate balance in the account":

<u>LSUC</u>

[48] The court should "seek to apply the method which is the more just, convenient and equitable in the circumstances": para 31. The *LSUC* court agreed that LIBR was "manifestly fairer" but also recognized the complexity of calculating it: para 32.

[49] The court held that LIBR was too complex and impractical to adopt as a general rule "for dealing with cases such as this" (over 100 claimants and multiple withdrawals and contributions). Instead, the basic *pro rata* approach (i.e., Proportionate Distribution) was preferable because of its relative simplicity.

[50] The court also held that it "is always open to a trust contributor to gain protection from having to share a shortfall with others by insisting upon the funds being placed in a separate trust

2017 ABCA 58 (CanLII)

2017 ABCA 58 (CanLII)

account": para 27. In short, there was agreement with *Greymac* that beneficiaries could contract out of the general rule or other tracing rules.

[51] *Re Elliott* followed *LSUC* and ordered a Proportionate Distribution of funds from a lawyer's trust account which had a shortfall: para 47.

<u>Re Graphicshoppe</u>

[52] Unlike *Greymac* and *LSUC*, the impugned account included deposits other than those made by innocent beneficiaries. And, after the beneficiaries made their final contributions, the lowest balance of the account was (at one point) negative. This meant the beneficiaries lost their ability to trace their funds: para 120. "While this may seem harsh, it must be remembered that in the commercial context and particularly in the realm of bankruptcy, innocent beneficiaries may well be competing with innocent unsecured creditors for the same dollars. This raises policy considerations which the courts in *Greymac* and *LSUC* did not have to face": para 130.

[53] Moldaver J.A. (for the majority) also distinguished *LSUC* and *Greymac* on other grounds: para 124. He noted that "in the present case" it was still necessary to determine "if any or all of the funds in the bankrupt's bank account at the date of bankruptcy were trust funds". And, at para 126:

> At this preliminary stage, we are not concerned about calculating the amount each beneficiary may claim from the trust funds, if it turns out that some such funds do in fact exist. Instead, we are simply trying to determine what, if any, of the money in the Graphicshoppe's bank account at the date of bankruptcy was trust money and therefore did not belong to it.

[54] Here the chambers judge did impose a constructive trust over the Frozen Funds despite the fact that the receivership was still (as in *Graphicshoppe*) at a preliminary stage.

<u>Boughner</u>

[55] *Boughner* involved a Ponzi scheme; the question at trial was which distribution method (Proportionate Distribution or LIBR) should be used. A sub-issue was whether the case law dictated a "general" rule. The Court held that LIBR was the general rule, and *LSUC* could be explained by the complexity of the LIBR calculations in that case: paras 7-9.

[56] Neither the trial decision nor the Court of Appeal make reference to whether set-off is appropriate for interest and return of capital.

Conclusion on Tracing Rules

[57] LIBR is the general rule for allocating funds among innocent beneficiaries when there is a shortfall in a trust account or in an account that has been impressed with a constructive trust by

2017 ABCA 58 (CanLII)

operation of law. There are two exceptions: LIBR is unworkable or the beneficiaries expressly or impliedly intended another method of distribution.

[58] As already concluded, the "unworkable" exception does not apply because the Order demonstrates that LIBR is, in fact, workable. That leaves discussion of the investors' intentions.

Intention of the Parties

[59] Was there evidence of any intention by the beneficiaries about how the funds were to be distributed in the event of a shortfall? *Greymac* states at para 53: "Another exception, an obvious and necessary one ... would be the case where the court finds that the claimants have, either expressly or by implication, agreed among themselves to a distribution based otherwise than on a *pro rata* division following equitable tracing of contributions.". Blair J. also noted that it "is always open to a trust contributor to gain protection from having to share a shortfall with others by insisting upon the funds being placed in a separate trust account.": *LSUC* at para 27 . Finally, in *Demystifying the Lowest Intermediate Balance Rule*, *supra*, Chamorro-Courtland wrote at 66-67 (emphasis in original):

> In summary, consideration must first be given to the express or implied contractual *intention* of the beneficiaries in the case of a shortfall in a commingled trust fund; the beneficiaries may opt for any distribution method that satisfies their business needs.
>
> If the contract is silent as to the method of distribution, the presumed intention, as the general rule, should be that the beneficiaries intended to segregate their funds and use LIBR. This is the presumption even in cases where the parties have opted to commingle their funds in an omnibus account, as it is possible to legally segregate the funds...

[60] In summary, nothing in the evidence suggests that the investors intended there be any particular distribution method, therefore absent anything more, LIBR applies.

Funds Commingled

[61] It appears from the investors' affidavits that they knew their investments would be pooled or commingled. For example, one affiant deposed he "understood ... [that] Base would obtain investments from individuals like myself that <u>would be pooled</u> by Base, and then loaned by Base to borrowers who would provide Base with mortgages on real estate": Wiseman Affidavit (with emphasis). Another stated: "My wife and I understood that Base Mortgage was merely acting as an intermediary in the proposed transaction, in order to pass the <u>accumulated pool of mortgage funds</u> through to the mortgager": Revitt Affidavit (with emphasis).

[62] However, the parties' contract also specified that:

> 2. … Should the lender request any portion or the entire amount of the investment back prior to the due date without proper written notice, the assigned bonus, if any, and/or the interest shall not be due or payable… by the borrowers and the assignment may be renewed at the borrower's option.

2017 ABCA 58 (CanLII)

[63] In other words, the contract appears to contemplate something less than full pooling or commingling because the investor beneficiaries are entitled to request a return of their capital at a time of their choosing or, in any event, at the maturity date of their investment. This suggests an element of segregation.

[64] The only document from which the court might discover the intention of the investors is the Irrevocable Assignment of Mortgage Interest. It is a contract between Base Mortgage and the investor, defined as "lender". There is also reference to an undefined and unnamed "borrower" who is obviously not a party to the contract. Also undefined and unnamed are the "demised premises" referred to in clause 3. Of interest are clauses 3 and 4 (with emphasis):

> 3. It is further agreed that the lender shall indemnify and save harmless Base from any and all claims and demands against Base with respect to the assigned portion of the mortgage. <u>The lender agrees that its sole remedies with respect to default by the borrowers shall be against the demised premises and the borrowers.</u>
>
> 4. It is understood that Base and the lender are not partners or joint venturers … and nothing contained herein shall be construed so as to make them partners or joint venturers <u>or impose any liability as such on either of them.</u>

[65] Nothing can be gleaned from this document about the investors' intentions as to which distribution method to use.

[66] In summary, there is nothing to suggest that the investors considered the question of how a shortfall in the commingled funds would be distributed among the investors, and therefore the general rule, LIBR, is not displaced.

V. Conclusion

[67] The chambers justice applied LIBR. The cases say this is the fairest rule absent two exceptions (unworkability or the contrary intention of the beneficiaries) which we have concluded do not apply.

[68] We leave the question of whether set-off should apply in the context of a Ponzi scheme for another time. The issue in this appeal is narrow given the imposition of the constructive trust which, as noted, is not appealed. However, had all the assets of Base Mortgage formed part of the traceable pool of assets, set-off may have been an appropriate consideration.

[69] The appeal is dismissed.

Appeal heard on December 6, 2016

Memorandum filed at Calgary, Alberta
this 13th day of February, 2017

As authorized to sign for: Berger J.A.

Rowbotham J.A.

McDonald J.A.

2017 ABCA 58 (CanLII)

Appearances:

C.M.A. Souster and P. Higgerty, Q.C.
for the Appellant

R.N. Billington, Q.C.
for the Respondent BDO Canada LTD

P. Mahoney
for the Respondent Larry Revitt and others

D. Hutchison and M. Kheong
for the Respondent Thomas Wiseman and others

2017 ABCA 58 (CanLII)

EXHIBIT 16

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Action No.: 1601-0044A
E-File No.: CVA19EASYLOAN
Appeal No.: ____________________

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN

EASY LOAN CORPORATION and MIKE TERRIGNO

Appellants

and

BASE MORTGAGE & INVESTMENTS LTD.,
BASE FINANCE LTD.,
ARNOLD BREITKREUTZ,
SUSAN BREITKREUTZ,
SUSAN WAY, and
GP ENERGY INC.

Respondents

PROCEEDINGS

Calgary, Alberta
December 6, 2016

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Description		Page
March 21, 2019	Morning Session	1
Discussion		1
Submissions by Mr. Souster (Appeal)		2
Submissions by Mr. Higgerty (Appeal)		15
Submissions by Mr. Billington (Appeal)		24
Submissions by Mr. Hutchison (Appeal)		32
Submissions by Mr. Mahoney (Appeal)		48
Submissions by Mr. Souster (Appeal)		50
Certificate of Record		56
Certificate of Transcript		57

1 Proceedings taken in the Court of Appeal of Alberta, Calgary Courts Centre, Calgary, Alberta
2

3
4 March 21, 2019 Morning Session
5
6 The Honourable Mr. Justice Berger Court of Appeal of Alberta
7 The Honourable Madam Court of Appeal of Alberta
8 Justice Rowbotham
9 The Honourable Mr. Justice McDonald Court of Appeal of Alberta
10
11 C.M.A. Souster For Easy Loan Corporation
12 P.B. Higgerty, Q.C. For Easy Loan Corporation
13 R.N. Billington, Q.C. For BDO Canada Ltd.
14 P.F. Mahoney For Larry Revitt and Others
15 D. Hutchison For Thomas Wiseman and Others
16 M. Kheong For Thomas Wiseman and Others
17 Z. Ncube Court Clerk
18

19
20 **Discussion**
21
22 THE COURT: So we will turn to the second appeal. Madam
23 Clerk, I am not sure whether I have the appearances on the Bench. Where are they? Oh,
24 there it is. Thank you so much.
25
26 Having regard to the plethora of names on the list, I think I will dispense with that, if
27 counsel do not mind, and there will be no need for any other introductions.
28
29 What I can tell you is that the panel has read much of the material -- I cannot say that we
30 have read every paragraph of every citation -- but we have certainly read the factums and
31 a great deal of the authorities that are cited, and of course, we have extracts from
32 (INDISCERNIBLE) also examined that the parties have filed.
33
34 We intend to proceed in an orderly fashion. I would imagine that counsel have had an
35 opportunity to consult with one another to determine who will address the Court and in
36 what order. And I would also anticipate that very likely no counsel will want to repeat
37 what other counsel have already put before the Court. So redundancy is something to be
38 avoided.
39
40 So with that in mind, we will begin. As counsel know, there are time limits for argument.
41 I would anticipate that there will be a number of questions put by members of the Court to

1 counsel as we go along. That should be something that you keep in mind, if I may say so,
2 so that you adhere to the Rule that I must enforce -- whether I like it or not -- and that is
3 the temporal limitation.
4
5 So with that caution in mind, you will want to use the time as valued as you can. There
6 may be extenuating circumstances where I will extend the time somewhat -- if there had
7 been a, shall I say, a great deal of interventions from the Court -- but otherwise, you are
8 stuck with the Court's policy of, I think it is 45 minutes for appellant, 45 minutes for
9 respondent.
10
11 So with that in mind, we will ask the appellant to begin.
12
13 **Submissions by Mr. Souster (Appeal)**
14
15 MR. SOUSTER: Good morning, My Lordships and My Lady.
16 This is an appeal by Easy Loan of the decision of Justice Yamauchi to apply the lowest
17 intermediate balance rule, otherwise known as LIBR, as a method for distributing the
18 funds remaining in the frozen RBC Base account.
19
20 It's the appellant's position is that the pro rata ex post facto method is more appropriate in
21 these specific circumstances, when dealing with competing claims of beneficiaries in a
22 co-mingled account.
23
24 With respect --
25
26 THE COURT: I hate to stop you so early, but I want to be, I
27 want to confirm one thing. You do not appeal Justice Yamauchi's finding that there is a
28 constructive trust over this account?
29
30 MR. SOUSTER: We do not.
31
32 THE COURT: Thank you.
33
34 MR. SOUSTER: But we respectfully submit that Justice
35 Yamauchi erred in law by finding that *LIBR* was the general rule relating to comingled
36 funds in circumstances where the beneficiaries knew that their funds were being
37 comingled. And further, they failed to consider the nature and purpose of the mixed fund
38 in arriving at its decision, notwithstanding his determination on the evidence that the
39 beneficiaries understood and conceded that their moneys would be comingled and then
40 pooled.
41

1 We submit that these are errors in law, not errors of fact, and they should be reviewed on
2 the standard of correctness.
3
4 Now, with respect to review, upon my review of the appellate case law to be proffered, in
5 all of the decisions now before this panel, the higher Courts gave little to no deference to
6 the lower Court. And so I submit that that speaks to the standard of correctness in matters
7 such as these. And I will close my opening by saying that this is the first time that this
8 Court has been faced with these types of issues, and it is obviously an important issue for
9 determination in the province of Alberta.
10
11 I will be speaking to the reasons why the appellant says the pro rata ex post facto
12 approach is a proper methodology for this matter, and my friend, Mr. Patrick Higgerty,
13 will be providing a critique of the LIBR calculation in general and the LIBR calculation
14 in the case at hand specifically.
15
16 I'll commence my argument by asserting that the law appears to be settled, in that the
17 overarching consideration is achieve a result that is just, convenient, and fair. And I
18 would summarize the two desperate positions before you as a competition between the
19 lended fund theory and the distinguishable fund theory, or otherwise referenced as the
20 amount of fund theory, as was characterized by *Christian Shamroan v. Cortland*
21 (phonetic), which is located in tab 12 of the book of authorities, and which is further
22 discussed in the case law upon which we rely.
23
24 Mr. Cortland describes a blended fund theory as a fund in which it is an indistinguishable
25 mixture of value. The individual deposits lose their identity in the increased balance of
26 the fund, and the beneficiary traces its proprietary interest in into the fund as a whole. It
27 is ascribed for the intent of the beneficiaries to hold funds in one account as co-owners in
28 that fund.
29
30 Now, conversely, for the distinguishable fund theory, the individual deposits retain their
31 identity in the fund, and withdrawals can be ascribed to particular deposits. The opines
32 that this arises where the beneficiaries intend to segregate their funds.
33
34 We respectfully submit that the blended fund theory should be accepted in this matter, as
35 the RBC account was an account for which the investors understood their funds would be
36 co-mingled and then pooled and loaned out to the borrowers. In fact, this was a finding of
37 fact by Justice Yamauchi at paragraph 8 of his decision, where he stated that the investors
38 understanding is that Base would pool the investments and loan to borrowers.
39
40 And further, at paragraph 14, he stated that the claimants conceded that these funds were
41 comingled.

1
2 The appellant asserts that in every case before this panel, where the depositors knew the
3 funds were being deposited into a mixed fund, that the pro rata ex post facto methodology
4 was utilized as the distribution method.
5
6 THE COURT: Now, when you use the term "mixed fund," you
7 are not speaking of funds that were intended for some other purpose, other than the object,
8 as you put it, mindful of the intention of the beneficiaries?
9
10 MR. SOUSTER: I'm not. Comingling is when the funds are
11 pooled like drops of water into one large colander, as opposed to a wrongful mixture of
12 two funds.
13
14 THE COURT: Yes. Because the term "mixed funds," I think
15 you would agree is a term of art. It represents a fund in which there are, the source of
16 which is from a number of different originating pools of money. Do you agree with that?
17
18 MR. SOUSTER: I think that there is a distinguish between the
19 comingling of funds in an account and the mixture. As I see it, the case law somewhat
20 uses those interchangeably, but there is the distinction as drawn by Mr. Cortland, in that
21 you treat those funds which were the intention of the beneficiaries, to be placed into one
22 trust account, much like a solicitor's trust account. As --
23
24 THE COURT: But insofar as the frozen bank account is
25 concerned, do you say that all the funds are distinguishable from funds that may have
26 emanated from a different source?
27
28 MR. SOUSTER: I say that they are not distinguishable. That
29 there are no other sources. That this --
30
31 THE COURT: No other sources?
32
33 MR. SOUSTER: No.
34
35 THE COURT: All right.
36
37 MR. SOUSTER: This is a Ponzi scheme. The only --
38
39 THE COURT: So just so I am clear, sorry, so the sources are
40 all various investors or would be investors?
41

1 MR. SOUSTER: Correct.
2
3 THE COURT: All the money in this Royal Bank account are
4 coming, or came from people that thought they were investing in this mortgage scheme of
5 Mr. Breitkreutz?
6
7 MR. SOUSTER: Correct.
8
9 THE COURT: Okay.
10
11 MR. SOUSTER: To the best of the ability of the receiver to
12 investigate, there had been no mortgages, there was no business other than the Ponzi
13 scheme.
14
15 THE COURT: But there is, for example, a collection of rent
16 from something else that is going in there. You say these are, you know, from some other
17 kind of payment or deposit? You say these are all from people who put money in in
18 relation to the Ponzi scheme?
19
20 MR. SOUSTER: I am in a difficult position, because there was a
21 determination by Justice Romaine just this past Friday -- and I don't know if the panel
22 wants to hear that, it is certainly not before the panel -- but my position is that those assets
23 for which the rent was derived came from the fund itself. So either Mr. Arnold
24 Breitkreutz or Base or one other company in which he controls received moneys from the
25 Base account -- which was the invested funds. Those were traced into these other assets,
26 as was determined by Justice Romaine, and the entire pool of assets -- be it the money in
27 the RBC frozen account or any of the real property for which rents were derived -- are all
28 part of the constructive trust, and all flowed from the investments of the beneficiaries.
29
30 THE COURT: So from your client's perspective, the funds that
31 are frozen do not in any way emanate from the perspective of, say, creditors of the
32 company?
33
34 MR. SOUSTER: No.
35
36 THE COURT: That is your position?
37
38 MR. SOUSTER: That is our position.
39
40 THE COURT: Okay. Thank you.
41

1 MR. SOUSTER: We assert that in every case before you where
2 the depositors knew the funds were being deposited into a mixed fund, that the pro rata ex
3 post facto was utilized as the distribution method. And as in those cases, we submit that
4 here there is sufficient indication of the intention of the beneficiaries to comingle their
5 funds as co-owners of the fund.
6
7 And we relied heavily on Justice Blair's reasoning in the *LSUC* case -- that's the *Law*
8 *Society of Upper Canada* -- and adopted in the Alberta case of *Elwood* (phonetic), by
9 Justice Sulatycky, as well as previous reference to Mr. Cortland's article, in which he
10 asserts that the beneficiaries understood their moneys would be comingled in an account.
11 That is enough to support the blended fund theory and an ex post facto distribution,
12 without further examination.
13
14 THE COURT: Well, but the one, seems to me, significant
15 difference here is that we have with respect to this RBC account that was set up in May of
16 2014, we have complete records.
17
18 MR. SOUSTER: Yes.
19
20 THE COURT: There is not a situation where there is a posity
21 of records, or with enough patience and attention to detail and all the rest of it, in theory,
22 every deposit could be traced through. Because the records are there that would allow
23 that exercise to be done.
24
25 MR. SOUSTER: Correct. However, that's not the only
26 consideration, and I think what Your Lordship is referring to is the issue of convenience
27 or workability. What Justice Blair said is we also need to look, or the Court needs to look
28 at the nature and purpose of the mixed fund. And I submit that the nature and purpose of
29 this fund, as was the intention of the beneficiaries investing in a mortgage investment
30 corporation, is that it had to be a comingled fund.
31
32 THE COURT: Right, because you are going to aggravate funds
33 to put in mortgages. So $100,000 from Investor A, and $200,000 from Investor B, in
34 theory, there would be a $300,000 mortgage that would be beneficially belong to the two
35 investors. That is the theory of it, wasn't it?
36
37 MR. SOUSTER: It was.
38
39 THE COURT: There was never any mortgage, but they would
40 have received this one-page or two-page document saying your money is in an investment
41 here, and the terms of such and such, and the interest rate is such and such?

1
2 MR. SOUSTER: Yes. And interestingly that assignment
3 document also specified that any one investor could pull out their funds with or without
4 notice, irrespective of the term of the assignment, and arguably irrespective of the term of
5 the mortgage. So where could they be considering their repayment will come from, but
6 from the aggregate pool of funds in Base's account?
7
8 I submit that it not only convenient for the nature and purpose of the account, but it was
9 necessary that there be a comingling based upon the structure that was represented by
10 Arnold Breitkreutz to the investors. And as Justice Yamauchi determined in his decision,
11 it was understood by the investors.
12
13 Now, we've relied heavily on the *Law Society of Upper Canada* case, and that's located at
14 tab 1 of the book of authorities. And this was a solicitor's misappropriation case where he
15 misappropriated 900,000 from a comingled trust account. And the bank in that case
16 deposited moneys right before the account was frozen, and it involved a claim of
17 competing beneficiaries to the shortfall in the account. And the Court considered whether
18 there should be a claim to the whole of the fund, or if the fund can be unmixed, in theory,
19 pursuant to the rules of tracing and proprietary interest.
20
21 The Learned Justice Blair in that case placed particular emphasis on the *Greymac* case,
22 opined that the effect of applying LIBR in the *LSUC* case is much like that in the
23 Clayton's Case, in that it benefits the last-in.
24
25 Our position is given that the beneficiaries understood their funds would be comingled,
26 and in adopting the blended fund approach, much like Justice Blair determined the ex
27 post facto distribution should be preferred.
28
29 Now, it's been argued by the respondents and by other counsel that *Greymac* supports pro
30 rata upon tracing -- otherwise known as LIBR. But I note that in paragraphs 21 and 22 of
31 the *LSUC* case, Justice Blair interprets the Courts consideration of the issue of time as
32 being related to the wrongful comingling of the account and the time of which that
33 occurred, as opposed to the timing of the deposits and the proprietary interest on any
34 moneys deposited after their contribution.
35
36 So it's the initial wrong which is the comingling of funds that were intended to be
37 segregated, is what he is referring to, as opposed to the timing of any specific deposit.
38 And that you need to look at the fund as a whole.
39
40 We submit that Justice Blair was correct in these circumstance, and that *Greymac* does
41 not erode support for the blended fund theory or the ex post facto method.

1
2 Now, we spoke to this issue, and I won't belabour it, about the fact that if the LIBR is
3 unworkable, that it should not be used. That's our position, but we -- and in these
4 circumstances, and my friend will, Mr. Higgerty will speak to his position on the
5 workability of the LIBR approach -- but we believe that you really need to look at the
6 nature and purpose of the fund when keeping in mind the issue of manifest fairness of the
7 distribution method.
8
9 THE COURT: Does the nature of the defalcation vary from one
10 case to another? Because we have a number of citations, of course, that we have looked
11 at, and can you distinguish, for example, the *Law Society* case from a Ponzi scheme
12 defalcation? What is your submission in that regard? Because the argument has been
13 made that the Ponzi scenario is distinguishable. What do you say about that?
14
15 MR. SOUSTER: I would say that it's not in the sense of looking
16 at what the intentions of the beneficiaries were at the time they entered into the
17 investment scheme. There's case law -- and I believe it's the *Greymac* case, where -- and
18 Justice Blair examined this issue when he said you don't look at the intentions of the
19 wrong-doer. Those are not of any benefit to us. You do not look at those circumstances.
20 You look at what the intentions were of the beneficiaries.
21
22 Because it gives the Court some direction as to how it should fairly and justly distribute
23 the funds based upon those intentions. And that's contrasted in the LIBR approach, when
24 we're dealing with an entirely arbitrary event. And I will submit that in LIBR there's a
25 couple of different arbitrary events that could occur. Firstly, there could be a situation
26 envisioned where by the investor provided its cheque to Base Finance or the trustee on
27 December 1st, for example. The investor put that -- or the trustee put that cheque in his
28 pocket, and didn't deposit it in the bank.
29
30 Investor B deposited on the next day, and the cheque in action bent into the bank account
31 on December 2nd. There was a defalcation on December 3rd, and moneys were removed
32 from the account; and then thereafter, the first person who presented the cheque, its
33 deposit went in on the 4th.
34
35 Under LIBR, the person who presented their cheque first would be in the money, simply
36 based on the deposit of the cheques. And this was some of the difficulty -- and
37 Mr. Higgerty will speak to this more in-depth -- that our accountants had, in that they
38 didn't know whether to go by the name of the accrual method of accounting, as the date of
39 presentment, or the cash basis of accounting, as to the date upon which the funds were
40 deposited into the account.
41

1 And I don't want to steal Mr. Higgerty's thunder, but they has used an analogy much like
2 the game of musical chairs. There's more investors than there are chairs, and the ASC
3 controls the music. And simply by mere chance or happenstance, they're either in the
4 money or you're out of the money. And that runs contrary, we say, to the common
5 intention of the beneficiaries to share the co-ownership of that comingled account.
6
7 Now, Blair acknowledged that LIBR may manifestly be more fair in a pure sense of the
8 tracing analysis. But he questions whether the proprietary remedies should be inflexibly
9 applied to that proprietary right. And he also observed at paragraph 26, and again at 32,
10 that no authority has ever applied LIBR in rival claims of trust and beneficiaries.
11
12 THE COURT: Could I have those paragraph numbers, please.
13
14 MR. SOUSTER: In paragraphs 26 and at 32, as well as, Sir, as
15 paragraph 27, 28, and 47.
16
17 THE COURT: Thank you.
18
19 MR. SOUSTER: Justice Blair reiterated that the Court should
20 apply the method which is more just, convenient, and fair. And at paragraph 31, he made
21 the determination that that should be ex post facto, due to the fact that the, it was a
22 comingled account, that LIBR was unworkable, but also with respect to the nature and
23 purpose of the mixed fund.
24
25 Now, the Court adopted in that occasion the position that when considering the nature and
26 purpose of the mixed fund, is fund should be considered as a whole. And for a mixed
27 fund or a whole fund, the timing of the deposits is relevant, as there is no longer any
28 existence for any one deposit. The issue of the constructive trust should continue to apply
29 against the whole fund to the proportionate extent of the investor's contributions.
30
31 In other words, the beneficiaries share equally in the loss as a result of their common
32 misfortune, and this is the blended fund approach, which was preferred. If you were to
33 accept the blended fund approach, you must accept that it's the money in the fund that is
34 stolen, and not any particular beneficiary's deposit.
35
36 Now, in *LSUC*'s conclusions of the Court, at paragraphs 51 through 53, the Court returned
37 to the primary objective of fairness in quoting the motion Judge, and equating the
38 unfairness of the Rule in Clayton's Case to the effect of LIBR in the *LSUC*. And at
39 paragraph 54, they quote:
40
41 To apply the LIBR principle in the circumstances of this case would be

1 "to throw all the loss upon [some], through the mere chance of [their]
2 being earlier in time." It would be "irrational and arbitrary." It would
3 be "to apportion a common misfortune through a test which has no
4 relation whatever to the justice of the case."
5
6 Now, at the very end of that case, Justice Blair also closes by affirming the assertions in
7 *Greymac*, that the use of the ex post facto approach doesn't run contrary to the doctrine of
8 equity, but is actually a gradual refinement of the doctrine of equity.
9
10 Now, relating these principles to the case before you, the RBC account is a comingled
11 account with the knowledge of the beneficiaries. I've already discussed the nature and
12 purpose of that account was to pool loan out moneys to investors. We submit that the
13 intentions of the beneficiaries as it relates to the purpose of the account could not be
14 reasonably be interpreted any other way. And certainly the claimants did not state in any
15 of their affidavit materials that they intended that their funds remain segregated.
16
17 Now, the balance of my submissions relate to the authorities we adduced, and I'm not
18 proposing to go through all the authorities, but I would do a brief summary and show how
19 the intent of the beneficiaries and the nature and purpose of the fund has affected the
20 chosen methodology for distribution.
21
22 In the *Ontario Securities Submission* case, at tab 3, at paragraphs 68 and 69, this case
23 supports pro rata in proportion to the total contributions of the beneficiaries to the fund.
24 Now, this case was a very complicated comingling of various investments and funds, and
25 admittedly there were different facts to the current case, but we submit that the analysis of
26 that Court is applicable in the case before you.
27
28 At paragraph 76, the Court discusses the effect of strict rules of tracing in accordance with
29 LIBR in a distribution scenario. When the application of strict rules of tracing lead to
30 arbitrary results of circumstances of chance and timing over which the investors have no
31 control, the Court should try to resolve entitlement in a fair manner that reflects the
32 intentions of the parties. This can be achieved by treating investors with similar
33 expectations equally, and by allowing them to share proportionately in an equal priority in
34 a common fund.
35
36 And so it is respectfully submitted that applying a LIBR principle in the case before you
37 will result in arbitrary results because of chance and timing. The timing of the deposit
38 initially, and potentially, but also certainly the timing of the freezing of the account.
39
40 At tab 4, what I'll refer to as the *Windsor* case. These funds were comingled trust
41 accounts with the knowledge of the beneficiaries, and it was determined that the

1 appropriate distribution method was pro rata without a daily tracing; otherwise, LIBR.
2
3 We submit this case stands for further confirmation of the distinction between a
4 wrongfully comingled funds and funds which were comingled with the knowledge or
5 consent of the beneficiaries.
6
7 At tab 5 is the *TD Bank v. Ontario*, and like the *LSUC* case, the beneficiaries authorized
8 the comingling of the account. Again, the approved method of distribution was the ex
9 post facto approach, and in that case, the Court saw fit to transfer the funds to the
10 receiver, BDO Canada Limited, for their distribution.
11
12 At tab 6, there is the bankruptcy and insolvency case, which reversed the decision of
13 *Graphicshoppe Ltd.* and this case quoted Blair J. and the *LSUC* case and adopted the
14 blended fund approach, or blended or whole fund approach, and the ex post facto method
15 of distribution. It confirmed the timing of the contributions should not matter, given the
16 nature and purpose of a mixed fund.
17
18 Now, interestingly, in that case, at paragraph 93, they quoted Blair again in the *LSUC*
19 case, in that both theories enable equity to offer a remedy. So that's both the ex post facto
20 and the LIBR. However, the LIBR approach that they refer to as the amalgam approach
21 unnecessarily limits the reach of equitable proprietary remedies.
22
23 THE COURT: What is that paragraph number, please?
24
25 MR. SOUSTER: 93.
26
27 THE COURT: Thank you.
28
29 MR. SOUSTER: Now, these types of matter happen before the
30 Alberta Court, and in tab 11 I'll refer to *Elliott* case, Justice Sulatycky was the Justice
31 presiding on that matter. And this was a comingled solicitor's trust fund with the consent
32 to the beneficiaries. And Justice Sulatycky looked at the nature of the comingled account
33 and its purpose. And at paragraphs 36 through 48, he followed the *LSUC* decision and
34 determined that pro rata ex post facto was the proper methodology. There's reference to
35 that decision also in paragraphs 47 and 48 of that decision.
36
37 Much like Justice Blair in the *LSUC* case, Justice Sulatycky quoted *Greymac* at the Court
38 of Appeal level, that LIBR would be akin to the Rule in Clayton's Case, and that it would
39 be:
40
41 Unfair, arbitrary, and based upon fiction.

1
2 And quote can be found at paragraph35 in that decision.
3
4 And we submit that like in *LSUC* and the *Elliott* case, if the pro rata ex post facto is the
5 most appropriate methodology for a solicitor's trust account, we submit that it is all the
6 more appropriate when there is clear knowledge of the comingling and evidence of an
7 intention for the co-ownership in the fund, in the case before you.
8
9 Tab 13 is the *Barlow Clowes* case, and that stands in our submission for the principle that
10 you need to look to the intentions of the investors in the mixed fund. It supports the
11 theme that we're presenting today.
12
13 Now, I'm going to close my review of the case law by circling back to the article in
14 paragraph 12, which is located, yes, at tab 12. And the author summarizes, and I'll quote:
15 (as read)
16
17 In summary, the intention of the beneficiary should be considered on a
18 case-by-case basis. LIBR should be applying cases where the
19 beneficiaries intended to segregate their funds, or where the intention is
20 unclear. The pro rata approach should be applied in cases where the
21 beneficiaries intended to hold their funds as co-owners in an omnibus
22 account, or where they intended to segregate their funds, but it has
23 become impossible to trace because accurate records have not been kept.
24
25 And that is located on page 9 of that article.
26
27 On page 20 of that article, the author at the very last paragraph opines: (as read)
28
29 Secondly, if the beneficiaries actually intended to hold as co-owners, it
30 was unnecessary for the Court to provide any further justifications for
31 applying the pro rata approach.
32
33 Now, the respondents relied heavily upon *Greymac*, which is located at 12.9, but there are
34 some distinctions. *Greymac*, there were real shares, and they were trading albeit at an
35 exaggerated value. It was not a Ponzi scheme.
36
37 And in *Greyhawk*, the initial wrong of the trustee was the comingling of the funds. The
38 beneficiaries in that case had not intended their funds should be comingled. And this is
39 where LIBR was and could be used. And it is submitted that this was the Court was
40 opining when it said LIBR should be the general rule in these types of scenarios. These
41 types of scenarios, wherein the initial wrong was a wrongful comingling of the funds.

1
2 And we agree with the respondent that in these scenarios, the adherence to the strict rules
3 of tracing is preferred over the given intent of the beneficiaries, for their funds to remain
4 segregated, or perhaps where it isn't clear, as it would be a fiction to impress the
5 beneficiaries with the intent of co-ownership in the fund.
6
7 Another distinguishing factor of the *Greyhawk* case, and the Court states at paragraph 92,
8 is that:
9
10 By the time of the applicant's --
11
12 THE COURT: Sorry, what was that paragraph number again?
13
14 MR. SOUSTER: 92:
15
16 By the time of Gibson's investment, the evidence is clear that these early
17 investors had lost over 88 per cent of their investment value.
18
19 Hence, of course, it was unfair to the late investors, who could trace their moneys into the
20 account, should bear the brunt of the losses of earlier investors.
21
22 But in the *Base* case, that is not the case. In fact, as a result of the receiver's investigation,
23 approximately 90 percent of the money was already repaid to the investors. And further,
24 a good portion of the respondents today were repeat investors -- either over years or over
25 decades. And I submit that that affects the equities.
26
27 Now, in *Greyhawk* --
28
29 THE COURT: Why?
30
31 MR. SOUSTER: Why?
32
33 THE COURT: Why?
34
35 MR. SOUSTER: Because we're not dealing with a situation
36 where, as in the *LSUC* case, there was an investor that simply put his money in and
37 received no investment moneys out or had not had a previous participation in the fund.
38 That the conduct of the parties and the length and period of time of their investment, the
39 fact that they admittedly have received moneys out, speaks to the issue of the common
40 intention of the parties, and they're not saddled with the entire burden of the loss of the
41 fund.

1
2 THE COURT: You say that the fund, are you talking about
3 going right back to its inception 25 years earlier? Or what is the time frame that we're
4 talking about here?
5
6 MR. SOUSTER: Well, you know, when we're dealing with a
7 Ponzi scheme, my understanding is that the entire scheme is impressed with the trust. So
8 to the extent that it's possible to review the records, and the records are reviewable, it
9 would have to go back to the inception of the fund.
10
11 What we're proposing --
12
13 THE COURT: And as I understand it, usually the early
14 investors get all their money, that is why it is such an attractive investment for people
15 down the road.
16
17 MR. SOUSTER: Well, that -- in part, that was true in this case.
18 There was some investors that is right made whole. There are some investors that are net
19 winners, or net gainers, and there are some that are net losers.
20
21 But there were also reinvestments of those moneys, so you know, there's -- any interest
22 they received is, for lack of a better phrase, the yield ungain as a result of the fraud. And
23 my point is that the re investment of those moneys into the fund does not saddle the latest
24 investors with the brunt of the loss of the earlier investors. And specifically so because 90
25 percent of the moneys went back to investors.
26
27 In *Greyhawk*, at paragraph 56, counsel to Gibson takes the position that equity directs in
28 favour of applying LIBR in the present circumstances. And just as the early investors
29 would not have expected to share their gains the later investors, they should not be
30 allowed to so share their losses. But again, in our case, there is a distinction relating to
31 the intention of the beneficiaries. These beneficiaries understood that they were investing
32 in a pool mortgage, and thereby accepted the loss and gains from the investment invest,
33 given that the investor could be swapped out with new investors, we submit a strong
34 support for an intention of co-ownership.
35
36 Now, there is one case in paragraph 17, it's a U.S. case, *Credit Van Corp.* (phonetic), and
37 the second-last page, it's highlighted at paragraph 89, and the U.S. District Court states --
38 and I acknowledge it's a U.S. District Court -- but it states: (as read)
39
40 That a finding of a constructive trust does not defeat the equitable
41 authority of the Court.

1
2 And I would submit it has legislated under the *Judicature Act* of Alberta.
3
4 The respondents assert that because we're dealing with a constructive trust tracing, we are
5 strictly bound to tracing principles, and this is located in paragraph 54 through 46 of the
6 respondent's factum.
7
8 However, I wish to impress upon the Court that the overarching objective is fairness, and
9 we submit that the Court still has the equitable authority to craft a fair distribution based
10 upon the intentions of the beneficiaries, as opposed to the arbitrary events, like a freezing
11 of the account by the ASC.
12
13 So in closing, it's respectfully submitted that the Court is taxed with arriving at a fair
14 distribution in these types of matters. The respondents have not asserted that their funds
15 were intended to remain segregated, but it conceded that they were to be comingled,
16 pooled, and then loaned. The respondents' understanding and intent was that they were to
17 be receiving interest from the date the moneys were presented, regardless of when the
18 cheques were deposited in the account by Base, how long those moneys may have
19 remained in the account before being loaned out, or who might invest moneys in the
20 account after them.
21
22 This was a mixed and pooled mortgage investment fund, as was determined by Justice
23 Yamauchi, and it is respectfully submitted that to distribute funds contrary to that
24 intention, and based upon an arbitrary event such as the freezing of the account by the
25 ASC is contrary to those intentions, and is unfair.
26
27 THE COURT: Thank you.
28
29 **Submissions by Mr. Higgerty (Appeal)**
30
31 MR. HIGGERTY: Good morning, My Lady and My Lords. I am
32 here to speak to the critique of labour calculation. And the main focus is on the
33 convenience test, as to workability and practicality of that approach versus the pro rata
34 approach.
35
36 I might just say at the outset that the order approving the LIBR calculation was very hard
37 to follow. There were eight pages, and it was totally incoherent. So I had to, in order to
38 make sense of it, I had to take it all together. This is not new information, I simply put the
39 pages together for coherence.
40
41 THE COURT: Yes. It is in the factum of (INDISCERNIBLE).

1
2 MR. HIGGERTY: Yes, it is in the (INDISCERNIBLE), that's
3 where it is.
4
5 So -- and in fact, you need a yardstick in order to look at the entries from left to right, and
6 it's challenging, but -- and it's not surprising, I submit, that it took over eight months for
7 the order to, for the calculations to be finalized. There were several, a couple of
8 appearances. The appellant never consented to the correct calculation. The appellant
9 always maintained that the calculation was incorrect, even using the LIBR approach.
10
11 Now, my colleague has --
12
13 THE COURT: I should not be facetious in pointing out that a
14 lot of lawyers are not very good at math though?
15
16 MR. HIGGERTY: Well, they may have tasked me with this
17 because of some misperception that I might --
18
19 THE COURT: You are an accountant now, you can tell us?
20
21 MR. HIGGERTY: No. I do have an economics background, but in
22 any case, so talking about convenience, it equates to workability, and it has to do with
23 being capable of practical application, weighing consideration of judicial administration
24 over abstract justice. And there was a good quote from the *LSUC* case of Justice Blair,
25 it's at paragraph 38, and it, he says there:
26
27 First, with regard to "convenience," I note the following comment of
28 Morden J.A. in *Greymac*, at pages 688-89:
29
30 While acknowledging the basic truth of Lord Atkin's observation
31 that "[c]onvenience and justice are often not on speaking terms,"
32 I accept that convenience, perhaps more accurately workability,
33 can be an important consideration in the determination of legal
34 rules. A rule that is in accord with abstract justice but which for
35 one or more reasons, is not capable of practical application, may
36 not, when larger considerations of judicial administration are
37 taken into account, be a suitable rule to adopt.
38
39 Now, the authorities, the decision itself that we're appealing from acknowledges a
40 statement in *Greymac*, and to the affect that possible inconvenience or unworkability
41 should not stand in the way of potentially using the LIBR calculation.

1
2 But Justice Yamauchi in his decision has lowered the standard, perhaps even eliminated it
3 as to the convenience test. He said -- and this is in the decision itself -- he said that --
4
5 THE COURT: What paragraph?
6
7 MR. HIGGERTY: It's paragraph, he said in paragraph 70, he
8 quotes from *Greymac* -- no, I've got the wrong one here -- paragraph 71 of his decision, he
9 says:
10
11 Inconvenience should not stand in the way of fairness.
12
13 Is what he said. But I might just add that point that in the *Elliott* case, which Mr. Souster
14 referred to, it states in that case, at paragraph 72, that:
15
16 Workability is a component of the fairness of the ultimate result of any
17 rule applied.
18
19 In any case, back to Justice Yamauchi and his deviation from the convenience test, so we
20 submit, he also states at paragraph 29 of the decision:
21
22 Workability is a component of the fairness of the ultimate result of any
23 rule applied.
24
25 Pardon me, that was *Elliott*, I quoted from the wrong one. I'm referring here to the
26 justice, the Justice says:
27
28 The real key is whether LIBR is workable or "practically impossible" to
29 use.
30
31 "Practically impossible" is what he says in paragraph 72.
32
33 So the, LIBR is more difficult and complicated than the pro rata approach, and one must
34 find a solution that's workable, so Justice Yamauchi said, and he refers to other authorities
35 in paragraph 66 of his decision.
36
37 And Justice Blair, again, in the *LSUC* case states, at paragraph 33, that:
38
39 What LIBR involves -- as best I can ascertain it from the authorities and
40 the literature bearing on the subject -- is a transaction by transaction
41 examination of the mixed fund, in terms of deposits made by the

1 beneficiaries and withdrawals taken by the wrongdoer, and the
2 application of a proportionality formula in respect of each such
3 transaction.
4
5 And even Justice Yamauchi in his decision, at paragraph 66, acknowledges that:
6
7 The LIBR approach is difficult to apply "where there are numerous
8 deposits and withdrawals, as the LIBR has to be determined at multiple
9 points throughout the account's history.
10
11 And he cites the *Elliott* case for that as well.
12
13 So as I was alluding to, there hasn't been a comprehensive articulation of the LIBR
14 formula in the authorities. All we have are a few simplistic examples, such as involving
15 few depositors, such as just two depositors in the example in *Boughner*, and three in
16 *Greymac*, and compare that to the transactions before the Court, the numerous ones there
17 are.
18
19 And the only other thing the Courts do to assist us in understanding what the formula is, is
20 they make broadly stated principles, and they're referred to in the decision of Justice
21 Yamauchi as well, and I might just keep moving on, but they are there, but they don't give
22 any better guidance than what I've already stated from the quote from Justice Blair.
23
24 And it's telling that Justice Blair -- again, in the *LSUC* case -- makes a statement. He
25 says -- to validate what I've just said, he says:
26
27 The mechanics of how the lowest intermediate balance rule actually
28 works have never been fully explained.
29
30 Now, he said that back in 1998, when he made that decision, but there's been nothing
31 further since then, so we have found.
32
33 Now, the calculation, the LIBR calculation itself has, has certain elements to it, and it has
34 certain problems associated with it. But just in terms of the calculation, what we know
35 for sure is that we look at the deposit of each depositor as an opening balance for a
36 distribution to that depositor. And then we take, for every amount taken out of the
37 account, we apportion a certain portion to that distribution to the depositor so that
38 ultimately the depositor gets less and less as withdrawals occur.
39
40 Here we have 25 depositors, we have 24 withdrawals, and 24 deposits over a period of
41 two years thereabouts. Now, it's interesting that other than fathoming it from the visile

1 few examples we have, as I've mentioned, there's no judicial statement as to how that
2 portion is calculated. And Blair again, in the case said, in the *LSUC* case said, and this is
3 another important quote, I submit, he says at paragraph 39, he says:
4
5 > LIBR is difficult to apply in cases involving any significant number of
6 > beneficiaries and transactions. Even in this age of computer technology,
7 > I am not convinced that trustees of mixed funds -- who might be in a
8 > position of having to sort out misappropriation transactions on such an
9 > account and the distribution of what remains -- should be assumed or
10 > required to possess the software to enable a LIBR type of calculation to
11 > be done in the myriad of situations that might arise. Indeed -
12
13 THE COURT: But if they do have the software, I understood
14 here there was a program, there was the software. Mr. Mahoney was charged with taking
15 this to the bank and sorting it out.
16
17 MR. HIGGERTY: He used an Excel spreadsheet, and I'm not
18 aware of any office shelf software program. I was left with the impression that he
19 customized it for this purpose. And he's not probably an accountant either, or an
20 economist.
21
22 So in any case, I was reading from the quote about:
23
24 > Possess the software to enable a LIBR type of calculation to be done in
25 > the myriad of situations that might arise. Indeed, there is no evidence
26 > that such software programs exist, although it may well be that they do
27 > -- at what cost and difficulty we do not know.
28
29 THE COURT: Sorry, what was that case you are quoting from?
30
31 MR. HIGGERTY: That, I'm referring to the *LSUC* case, which
32 Mr. Souster referred to as well.
33
34 THE COURT: Yes.
35
36 MR. SOUSTER: And it's in tab 1 of our book of authorities.
37
38 THE COURT: And that is from 1998?
39
40 MR. HIGGERTY: That was from 1998, but I submit this --
41

1 THE COURT: Well, it is dated on the software.
2
3 MR. HIGGERTY: Well, I looked it up myself, and I haven't been
4 able to find such software, and challenge anyone else to advise the Court otherwise.
5 That's my information right now, Ma'am.
6
7 Now, the direction in the decision added further uncertainties and complications to what
8 might be the correct LIBR calculation. Justice Yamauchi said to work backwards from
9 the last deposit. That would be the start at the top conceptually, with the most recent
10 depositor, and work your way down. You'll notice that Mr. Mahoney's calculation does it
11 the other way. So in terms of an impression, it does create some confusion.
12
13 And I might add as well that working from the, working backwards is not illustrated in the
14 few examples I have referred to. It does not work that way.
15
16 But there's an alternate formula by working backwards which works as well, and it's
17 different than the calculation Mr. Mahoney did. And it deviates in terms of the LIBR,
18 proposed LIBR distributions to each of the investors.
19
20 THE COURT: Mr. Higgerty, can I just ask a question?
21
22 MR. HIGGERTY: Mm-hm.
23
24 THE COURT: No disrespect to lawyers, but we have a receiver
25 here. Why -- I mean, they have got a bunch of accountants and people that are good with
26 numbers. Why were they not passed this analysis?
27
28 MR. HIGGERTY: I prefer to let Mr. Billington speak to that. He
29 represents the receiver. I have not privy to that.
30
31 THE COURT: Well, I appreciate that, but that was not bandied
32 around in --
33
34 MR. HIGGERTY: Not in my circle, Sir.
35
36 THE COURT: It was bandied around. They could not pay the
37 receiver, and Mr. Mahoney offered to do it.
38
39 MR. SOUSTER: Yes, that's correct.
40
41 THE COURT: Okay.

1
2 MR. HIGGERTY: So I can elaborate on how the working
3 backwards created an alternate formula which I worked out, and it did, in fact, get to the
4 same results as the visile examples. It worked, starting from the top and working down.
5 And I'd be happy to elaborate on that if the Court would wish, but we're running out of
6 time.
7
8 And the no set-off or otherwise direction also created a potential deviation from what
9 might be perceived as the conventional LIBR calculation. But again, it fit into this
10 alternate formula that I'm referring to.
11
12 The no set-off or otherwise direction has the potential for over-compensation. In fact, I've
13 been advised by the receiver that -- just as an example -- that one of the depositor's would
14 be supposed investors, they are Mel Holdings (phonetic), had a $474,483 net gain from all
15 three bank accounts. And yet still stands to receive another $26,463 under the LIBR
16 calculation.
17
18 There are potential inequities in using the tracing methods, and the receiver is trying to
19 trace other assets, it's important to note -- real estate and possibly recouping
20 overpayments made to certain depositors.
21
22 And to avoid inequities, we submit that the pro rata approach is appropriate, and that it be
23 applied across the board, regardless of what type of asset one is looking at. And that was
24 done in the *TD v. 202627* decision, which is in tab 5 of our book of authorities. It's an
25 Ontario Supreme Court decision. And it was decided to apply it across the board in that
26 instance, where a small group of investors, during a very narrow time frame, were asking
27 to have their funds traced on LIBR. And the Court found that, as a matter of economics,
28 it didn't justify it.
29
30 And the economics of doing these things, and judicial administration is an important
31 consideration in determining whether to or not to apply LIBR.
32
33 Pro rata is simpler, we know that. In this case, we know we can get from the three
34 accounts -- in fact, I've been advised we already have from the three accounts -- the
35 percentage of gross deposits of each investor. We have that information. And so, and it
36 goes back as far as history will take us, which is seven years. This particular account that
37 was frozen has a two-year life to it, but all three accounts go back seven years. Then the
38 receiver has managed to figure out what the percentage that each depositor has made, the
39 numerator being the total amount of deposits he made --
40
41 THE COURT: Okay. So the receiver has done some analysis

1 on these accounts?
2
3 MR. HIGGERTY: Yes. And Mr. Billington can speak to that
4 further.
5
6 THE COURT: All right.
7
8 MR. HIGGERTY: But we can figure out what percentage of the
9 total deposits from all three accounts, which is as far as this history goes, we can figure
10 out what percentage each depositor put into those accounts, all three of them in totality.
11
12 Now, in conclusion, the LIBR calculation doesn't meet the required tests, and I'm
13 referring to the LIBR calculation that involves multiple transactions is apparently not
14 logical, just, equitable, convenient, workable, and it's, in fact, illogical and it's fictitious,
15 along, as my friend Mr. Souster, has already referred to. It's overly complex, and even
16 uncertain. It's even uncertain. LIBR has not proven to be convenient in this matter. It's
17 proven not on the convenient, we submit.
18
19 The fact that the calculation may have ultimately been done does not make this a good
20 precedent in the interests of the judicial administration such that it would be done
21 routinely, draining valuable Court resources.
22
23 In this case, in order to meet the Rule of convenience, it should be left to the receiver, we
24 submit, to trace and distribute the funds on a pro rata basis, subject to a proper claims
25 process. And we submit that the LIBR calculation should only be applied in special
26 circumstances, such as where evident in the *Greymac* and the *Greyhawk* cases.
27
28 THE COURT: Mr. Higgerty -- this may be a better question for
29 the respondents -- but is anyone else disputing the calculation, other than the appellant?
30
31 MR. SOUSTER: I can add, Ma'am, we are really the only
32 investor that's shown up. We are leading the front, I guess, for the benefit of the all the
33 investors -- as oddly as it may be for my client to bear the expense of doing so. No other
34 investors really came to the table, and I will point out we're dealing, based upon my
35 experience of conversations, after having filed the receivership order and the number of
36 calls I received, a large majority of these individuals are senior citizens, and there were
37 concerns that Justice Yamauchi had with respect to service, because it was done through a
38 website with the receiver or through the ASC, and he had concerns as to whether or not
39 they even had, you know, access to computers, or would know to access the receiver's
40 site.
41

1 So no one else is disputing it because I don't believe anyone else has been present, no one
2 else has seen it, they have not been engaged.
3
4 I can advise --
5
6 THE COURT: Those people who participated, on the other
7 side, they were content with the ultimate math?
8
9 MR. SOUSTER: Well, they are all in the money, so to speak, to
10 use the vernacular.
11
12 THE COURT: They have some money, and they are content
13 with what they have got.
14
15 THE COURT: So speaking to the side of the calculation, I
16 mean, it has worked for some people and is accepted (INDISCERNIBLE).
17
18 MR. HIGGERTY: We, on the other hand, are uncertain as to
19 whether it's the credit calculation having regard to the submissions I made in that regard.
20 Thank you.
21
22 THE COURT: Thank you very kindly.
23
24 So we will turn to the respondents. I take it that you agreed on the order, in which you
25 will address?
26
27 MR. HUTCHISON: We have not. I would suggest since the receiver
28 is suggesting --
29
30 THE COURT: Yes, we could go to the receiver first.
31
32 MR. HUTCHISON: I would suggest, Sir, that we do that.
33
34 THE COURT: I think that is a good suggestion.
35
36 MR. HUTCHISON: Thank you.
37
38 THE COURT: So we will call upon Mr. Billington.
39
40 So, Mr. Billington, before you get started, just a follow-up on the point I raised earlier,
41 and I understand that Mr. Mahoney was paid for his work to do the calculations. Was

1 there some reason why the receiver wouldn't have offered -- obviously for
2 compensation -- to do these calculations? You have a staff of accountants and people
3 who are adept at numbers.
4
5 MR. BILLINGTON: The receiver did do calculations on the labour
6 basis, My Lord. It came out differently from the calculations that we have before the
7 Court, as prepared by the respondents.
8
9 THE COURT: Okay. So there has been an analysis of this
10 account?
11
12 MR. BILLINGTON: That's correct.
13
14 THE COURT: Okay. And is it substantially different or just
15 different details?
16
17 MR. BILLINGTON: My Lord, I am uncertain as to the extent of that.
18 And it's not properly in evidence before the Court. I do have the receiver here, and I
19 could put that inquiry to him at this point.
20
21 THE COURT: Well, just more general information.
22
23 MR. BILLINGTON: Okay. What we know is that it came out, it was
24 a different result. It was then that the lawyers took over. There was concern expressed by
25 respondents that they didn't want to see funds going towards the receiver in order to do
26 the calculation. We found it to be somewhat ironic that then the Court approved the
27 $5,000 towards Mr. Mahoney's efforts in that respect, and as Your Lordship, through your
28 earlier question noted, sometimes lawyers are not the best at math.
29
30 THE COURT: I was not casting any aspersions on
31 Mr. Mahoney, he might be a real whiz at this, but it just strikes me that accountants, this
32 is more what their expertise is in.
33
34 MR. BILLINGTON: I would agree, My Lord.
35
36 **Submissions by Mr. Billington (Appeal)**
37
38 MR. BILLINGTON: My Lords, My Lady, I do not propose to go over
39 the review of the jurisprudence, which my friends Mr. Souster and Mr. Higgerty have
40 done. Rather, as counsel for the receiver, I wish to emphasize certain aspects of the facts
41 of this. While we support generally the pari passu ex post facto calculation, we view our

1 role as being more of an objective one to point out certain matters which this Court ought
2 to have in mind in rendering its decision.
3
4 I'll begin by noting that the funds were comingled into an undedicated account, and that
5 was permitted by the one-page terms of investment that the investors signed, in those
6 cases where anything was signed. In no case was a specific piece of land or lands
7 identified in these documents. In no case was a specific mortgagor or group of
8 mortgagors identified. In no case -- and I wish to emphasize over the course of the $120
9 million or so that have been invested that we're aware of -- in no case did Base hold a
10 valid first mortgage of properties in Alberta.
11
12 In no case did the one-page contract, the assignment mortgage, require immediate
13 investment of the funds. They could be held, they would be comingled. And in no case
14 was an express trust created. The trust provisions arise as a result of the application of
15 equity to the circumstance. It is a constructive trust which springs from the
16 circumstances. There was no express trust.
17
18 THE COURT: Can I just stop you there for a minute, because I
19 want to be very satisfied of some, of what is and is not at issue here.
20
21 There is authority from this Court that says that the fourth *Soulos* requirement is not met
22 when there is a receivership of a, or a bankruptcy, because there are other creditors who
23 are affecting the rights of other creditors. That is a case called *Brookfield*. There is
24 another case to that effect from our Court since then, I think, involving a lawyer's account.
25 I think the lawyer's name was Beakram (phonetic).
26
27 Was that argued in the Court below? Or was everyone in agreement that the *Soulos*
28 factors were present, and a constructive trust was available here?
29
30 MR. HUTCHISON: I can answer that question, My Lady, if you
31 don't mind?
32
33 THE COURT: I do not mind.
34
35 MR. HUTCHISON: The issue that, it was argued on behalf of the
36 receiver, and as well as on behalf of the appellants, that a trust was not appropriate.
37
38 THE COURT: A constructive trust was not appropriate.
39
40 MR. HUTCHISON: Correct, correct, that any trust in any form.
41

1 THE COURT: Okay.
2
3 MR. HUTCHISON: If you've looked at the transcripts in the
4 hearing --
5
6 THE COURT: Well, I will need the references to that.
7
8 MR. HUTCHISON: -- there was a concern as to whether, there was
9 argument whether there was an express trust here, and there was discussions of the three
10 certainties. I went with that, and we made it clear that no, we were not -- as the applicants
11 in that -- the first application in front of Justice Yamauchi -- no, we're not arguing for an
12 express trust. We're arguing for a constructive trust on the four factors that Your
13 Ladyship have pointed out out of the *Soulos* test.
14
15 My friends argued against that. His Lordship ruled that in his view, that a constructive
16 trust, that the elements were presents and he ordered a constructive trust. And I would
17 note that your first question for Mr. Souster was --
18
19 THE COURT: My next question of the receiver then, thank
20 you. I think I understand.
21
22 MR. HUTCHISON: Thank you.
23
24 THE COURT: Is there any appeal by either the receiver -- as
25 the appellants have already answered that -- of Justice Yamauchi's finding that, in fact,
26 this was an appropriate situation for a constructive trust?
27
28 MR. BILLINGTON: There was no appeal by the receiver, My Lady.
29
30 THE COURT: No appeal? Okay. So we are to assume that we
31 have to proceed on the basis that that is the finding, and there is no appeal?
32
33 MR. BILLINGTON: There is certainly no difficulty that we have, My
34 Lady, with the consent of the trust being construed over the circumstances. The concern
35 that we have is that in the application of the LIBR, that it is affectively preferring certain
36 beneficiaries, or those parties who ought to be beneficiaries, over others.
37
38 THE COURT: Thank you.
39
40 That accords, does it not, your response to the specific questions put with the earlier
41 advice to the Court that creditor's funds were not comingled in this frozen account at

1 RBC. Do you agree?
2
3 MR. BILLINGTON: That's correct, My Lord. The only creditors, per
4 se, are the notional investors, who paid funds in.
5
6 THE COURT: Thank you.
7
8 MR. BILLINGTON: There is no, if I can use a somewhat vernacular
9 phrase, there is no magic to the RBC account. More technically, there is no identified
10 specific status to the RBC accounts. The Base companies held funds for investors
11 initially, at least over the course of the medium to reasonable distant past, to two BMO
12 accounts. They were gathered from some of the same people. They were gathered on
13 exactly the same form of contract. They were gathered as well from some others other
14 than those represented in the RBC account. They were also comingled. They were
15 obtained on the same fraudulent basis, and without any requirement to invest any of those
16 funds immediately.
17
18 Those funds held in the two BMO accounts, were held until such time as those accounts
19 were closed at the behest of BMO, because that bank was concerned about the use that
20 was being made of that account.
21
22 The RBC account was opened two days after the closure of the two BMO accounts, on
23 May 14th, 2014. In no way was the RBC account anything whose nature was key to these
24 particular investors or investments. It did not represent anything new. There was no new
25 investment opportunity or punitive investment opportunity. No change in the fraudulent
26 investment solicitations. It was the same pot of money, solicited, comingled, and misused
27 in the same way, just at a new bank because the old bank would no longer have anything
28 to do with it.
29
30 You may hear various parties in these proceedings speak of interest payments. To be
31 clear, investors may have been misled into believing that they were earning interest, or
32 they may have had an expectation that they would earn interest. But there was no interest
33 earned, and there was no interest paid at any time in the history of Base, that the receiver
34 has been able to find.
35
36 There were no underlying legitimate investments. Not one cent of interest was earned.
37 Not one cent.
38
39 Now, some of those investors who have received, under the calculation directed by
40 Justice Yamauchi, from the RBC account, some of those investors had paid funds into
41 Base in the past. And on those, some took out some degree of return. It wasn't an

1 increase in the value of the investment, because there was no value, there was no valid
2 underlying investment we treat it simply as a return on principle. Some of those persons
3 were engaged in the RBC account and are due to receive some funds.
4
5 Any payments over the course of the time that we've been able to identify as the receiver
6 that had gone to the various investors have come from funds fraudulently obtained from
7 the entire investor pool. It appears that some, a few, may have recovered in absolute
8 terms, more money than they put in. The history of their investments and payments must
9 be more fully investigated and traced upon the complete production of documentation
10 from the debtors and their principals, which has not yet fully occurred.
11
12 There are a few investors who fall within the classic definition of what's referred to in
13 some at cases -- particularly in the United States -- as net winners. That is, that they have
14 received more than they put in.
15
16 There are other investors who, at either no fault or merit of their own, have received
17 proportionately less or more in terms of payments out of these funds than other investors.
18
19 We may be in a situation in which, although they have received back less than they put in,
20 they have certainly, on a proportionate basis, received substantially more or substantially
21 less than the other investors into these funds.
22
23 THE COURT: Mr. Billington, just one quick question. The net
24 winners --
25
26 MR. BILLINGTON: Yes.
27
28 THE COURT: -- so-called, people that receive back their
29 notional principle, plus the notional rate of interest they were to earn on their investment?
30
31 MR. BILLINGTON: It may be attributed that way, My Lord, and it
32 may not exactly accord to what it is that they expected to receive via interest. We're in a
33 situation where a further calculation has to be done.
34
35 THE COURT: Okay. But that would be notionally the idea?
36 That they got their principle paid from some other source of funds, and some other later
37 investors, presumably. And to the extent that they got more than their principle, that
38 would be characterized as interest presumably?
39
40 MR. BILLINGTON: Well, that would have been the investor's
41 understanding of what they received.

1
2 THE COURT: That is what I am saying, the investor's
3 understanding?
4
5 MR. BILLINGTON: That's correct.
6
7 THE COURT: I am not saying that is what it was. That is what
8 they would have been led to believe that it was.
9
10 MR. BILLINGTON: That's what they would have been presumably
11 led to believe it was.
12
13 The calculation of who has received more on average than other investors can be done on
14 a preliminary basis by the receiver. It involves a review of the investments going back
15 much further than May of 2014, when the RBC account was opened, and the BMO
16 accounts were closed.
17
18 Those who received proportionately more did so from comingled funds, in which they
19 cannot trace any identified investment, and from which funds had been paid out. They
20 were truly comingled. They were mixed with investments to which all of the punitive
21 investors have a claim in equity. Not just the investors whose funds were initially
22 deposited in the RBC account that was frozen by the Alberta Securities Commission.
23
24 The appellants have provided you with one authority at tab 16, the decision of the United
25 States Supreme Court in *Cunningham v. Brown* (phonetic), and at page 4, the Court
26 commented on what we consider to be circumstances which ought to be particularly borne
27 in mind in this case. In that case, the Ponzi victims were, quote: (as read)
28
29 All of one class, actuated by the same purpose, to save themselves from
30 the effect of Ponzi's insolvency, whether they sought to rescind or sought
31 to get their money, as by the terms of the contract, they were in their
32 inability to identify their payments, creditors, and nothing more. It is a
33 case the circumstances of which call strongly for the principle that
34 equality is equity, and this is the spirit of bankrupt law. Those who were
35 successful in the race of diligence violated not only a spirit, but its letter,
36 at secured and unlawful preference.
37
38 So to here, there were no identified legitimate payments or creditors. There was a
39 comment earlier about rent. The receiver is of the view that if anything is attributed as
40 rent, it is of an insignificant amount, and we see nothing to verify that it would
41 legitimately have been rental funds that were received. We do not accept that accounting

1 entry constitutes that it was rental payments received, or that there was any underlying
2 entitlement to it.
3
4 We can identify payors and recipients and amounts. A calculation of how much has gone
5 in and how much has come out must yet be done in the course of the receivership. There
6 should be no creditors in the receiver's view at the end of the day who book a greater rate
7 of recovery than others, for to do so would be to benefit them with fraudulently obtained
8 funds. That will, as the U.S. Supreme Court stated, violate the law's spirit alder, and
9 secure an unlawful preference.
10
11 Our view as the receiver is that the process which must yet fully be followed through in
12 the course of this receivership is that a calculation must be done of those persons who
13 legitimately believe they were making an investment, determine over time how much
14 money they had put into these investments, how much money they have recovered, and
15 then to aim towards having a pro rata equitable distribution, as amongst those creditors.
16 That will undoubtedly require a claims process. The receivership is not yet at the point
17 where that process has been initiated.
18
19 The receiver's concern is that there was no basis for Justice Yamauchi, at paragraph 10 of
20 his order -- and this is the no-duty to account and no set-off provision, which reads, in its
21 entirety: (as read)
22
23 No investor in Base Finance who received funds from Base Finance
24 from the Base bank account --
25
26 That is the RBC account:
27
28 -- shall be required to account for those funds by way of set-off or other
29 wise.
30
31 There was no basis in our view, for Justice Yamauchi to have made that order and to
32 sanctify the status of those particular investors, whose funds could be attributed to
33 deposits made in September of 2015, the last month before the Alberta Securities
34 Commission froze that account. Those were the funds that were deposited to the RBC
35 account.
36
37 Through that order, Justice Yamauchi is stating that they are to be exacted from any
38 inquiry as to whether their deposits and receipts were in excess of the pro rata average,
39 and it takes them out of the realm of inquiry, even for deposits or payments received prior
40 to September 2015.
41

1 To the receiver, that is unequal. To the receiver, that is fundamentally inequitable, and
2 contrary to the equitable principles which ought to govern any construed trust.
3
4 On another area, and whether much turns on this or not at this stage is an open question,
5 Justice Yamauchi, at paragraph 2 of his order, denied the application of the receiver to
6 have funds from the account paid out to it. This was an error in that, very simply, there
7 was no such application before Justice Yamauchi on that day.
8
9 It is understandable -- what had happened was the receiver had moved a motion some
10 time before the February hearing, at which a request was put to have the RBC funds paid
11 into the hands of receiver and distributed. That was adjourned sine die. That was
12 certainly not brought back by the receiver, it was my office, it was not brought back by
13 the receiver before hearing before Justice Yamauchi on that day. I did not argue that. I
14 can advise the Court -- this isn't otherwise in evidence -- I did hear one of the respondent's
15 counsel, who I don't believe is in Court today, make mention that they believed that they
16 thought that application was before the Court.
17
18 Very simply, it was the refer's decision to not bring that application forward, because we
19 wanted to find out what Justice Yamauchi was going to decide on February --
20
21 THE COURT: Well, how did that end up in the order though?
22 I mean, it looks like there is a consent page attached to the draft of order, but we do not
23 have all the counter --
24
25 MR. BILLINGTON: I had objected to that, with my friends. It was
26 included in the order at the end of the day. Very simply, that application was not before
27 the Court, and was not argued before the Court on that day.
28
29 As I say, from a practical perspective, I don't know that much turns on it, but I want to
30 take care of making sure that the history is straight on this. It may well be that with
31 whatever this Court's decision is -- or whatever further Queen's Bench decisions may be
32 required down the road in the course of this receivership -- that will become a moot point
33 when the issue opens up any way. But I did want to take care of that.
34
35 On those basis, and as I indicated previously, the receiver did, has advised me that he has
36 done a LIBR calculation which did come out differently. Our view is that it would be
37 appropriate to apply the pari passu ex post facto. Particularly in light of the desire of the
38 receiver to effect a determination over the course of receivership whereby as accurate a
39 calculation can be done of how much have the various investors, legitimate investors,
40 paid in, how much have they paid out, and what are the funds which were available? And
41 then that ought to be not interfered with as a result of either the LIBR or pari passu ex

1 post facto calculation.
2
3 Unless you have other questions, those are my submissions.
4
5 THE COURT: Thank you very kindly.
6
7 Subject to the convenience of counsel, we are going to take the morning break, ten
8 minutes.
9
10 (ADJOURNMENT)
11
12 **Submissions by Mr. Hutchison (Appeal)**
13
14 MR. HUTCHISON: Good morning My Lords, My Lady. Dean
15 Hutchison, for the record.
16
17 I would like to start with the standard of review and what this Court is being asked to do
18 with respect to Justice Yamauchi's decision. This Court is being asked to review his
19 decision and determine if he made any error, and then only to interfere with his decision
20 if, in fact, an error has been determined. So therefore, we must look at what that standard
21 of review and what the issues are before this Court.
22
23 As, My Lady, you correctly pointed out, there's been no appeal with respect to the, his
24 finding with respect of constructive trust, and I'll get to this more and the significance of
25 this in a minute, but that affects several of the issues, then, that this Court is expected to
26 look at. Which is really, after a constructive trust has been determined, what is the
27 appropriate method of distribution of those trust moneys? That was the issue that was
28 before His Lordship. Can it be said that in determining the lowest intermediate balance
29 rule, also known as pro rata sharing based on tracing, was inappropriate in the
30 circumstances?
31
32 The test is what is the most just, convenient, and equitable distribution method in the
33 circumstances of the particular case? That is applying the facts of the case to the legal
34 standard. That is a question of mixed law and fact, and the off-cited decision of *Coulson*
35 (phonetic) clearly indicates that that's the standard of review with respect to that, is a
36 palpable and overriding error, also known as reasonableness.
37
38 The second issue is did he error with respect to not requiring an accounting of any moneys
39 the trust beneficiaries had received from the trustee, the trustee being Base Finance.
40 Again, that's an issue of, or a question of fact, and that again, the standard of review with
41 respect to that is palpable and overriding error, also known as reasonableness.

1
2 Now, my friend, Mr. Souster, focussed a lot of his submissions with respect to the
3 intention of the investors, and what was the intention of the beneficiaries of the trust with
4 respect to the fund? And he indicated that the intention was clearly to be comingled, and
5 that they, the common intention of beneficiaries was to share in the ownership of the
6 comingled account.
7
8 Well, let's look at what Justice Yamauchi actually found with respect to what the
9 intention of the beneficiaries of the trust, being the investors and Base actually were. I
10 refer to Court to paragraph 11 of Justice Yamauchi's decision -- a copy of his decision is
11 at pages F-67 to F-80 of the appeal record, pleadings, and final documents.
12
13 THE COURT: Sorry, you said paragraph 11?
14
15 MR. HUTCHISON: Yes, My Lady.
16
17 THE COURT: Thank you.
18
19 MR. HUTCHISON: And it reads, quote:
20
21 In all cases, Base Finance represented to the investors that the loans
22 were not being made by the investors directly to Base Finance. Rather,
23 Base Finance was acting as an intermediary in the transactions involving
24 the investors and the borrowers.
25
26 What the investors thought that they were getting was a mortgage. Base Finance was
27 specifically acting as an agent, as a conduit, by which their moneys would be taken and
28 provided directly to third-party mortgagors. That obviously did not happen, but that's
29 what investors thought that they were doing. They did not think that they were putting it
30 into some bank account with Base Finance that would be used to pool and go to, used to
31 finance returns for other investors. They thought it was going to be acting as an
32 intermediary, and that's key with respect to what the intention was.
33
34 And that was a finding of fact by Justice Yamauchi.
35
36 Further to that point, I refer you to, My Lady and My Lords to paragraph 51(b) of Justice
37 Yamauchi's decision, where he says, quote:
38
39 The Applicants provided their investments to Base Finance on the
40 understanding that Base Finance was the conduit through which the
41 investments would flow through to the mortgagors.

1
2 Then further down on the paragraph:
3
4 The Receiver argues that nowhere in the Irrevocable Assignment of
5 Mortgage Interest document is the word "agent" or "agency" used. That
6 is not the test. The Court can look at the surrounding circumstances to
7 determine whether such a "relationship" exists between the parties in the
8 manner that Professor Fridman describes.
9
10 And this is the key sentence next:
11
12 This Court finds that Base Finance held itself out as the investors' agent
13 in using their invested funds for loans that were to be secured by a
14 mortgage for their benefit.
15
16 That's what the intent, or at least what the understanding of investors were. That it was
17 going to be an agency relation, acting as a conduit. So it certainly cannot be said that
18 there was, their intention was for these funds to be commonly pooled. They thought they
19 were using their funds for specific investments, going to some particular mortgages.
20
21 Now, my, in their factum, the appellants argue that Justice Yamauchi erred in law in
22 finding that the lowest intermediate balance rule is the preferred approach unless it is
23 practically possible. So that's just simply, that is the law. The law, and I will walk
24 through this in a moment, is in fact that. If the funds are traceable, if it is determined that
25 the lowest intermediate balance is workable, that is a rule that shall apply. And that's
26 been stated by the Ontario Court of Appeal in *Greymac*, which was affirmed. There was
27 a respondent's -- sorry -- the respondents in that appeal to the Supreme Court of Canada
28 were not even called upon. The Supreme Court of Canada adopted the reasons of the
29 Ontario Court of Appeal.
30
31 And with that, that is the law in Canada. That if the funds can be traced, if the lowest
32 intermediate balance rule is workable, that is a general rule that can be applied.
33
34 And where that comes from, My Lords and My Lady -- and this is at paragraphs 32 and 33
35 of our factum -- but the quote from the *Greymac* at the Court of Appeal decision, and this
36 is at paragraph 43:
37
38 While it might, possibly, be appropriate in some circumstances to
39 recognize claims on the basis of a claimant's original contribution --
40
41 Which is otherwise known as pro rata ex post facto or pro rata based on original

1 contribution, which is the method that the appellant and the receiver are suggesting
2 should be used to distribute the funds, the trust funds.
3
4 Going back to the quote:
5

> 6 -- (but see Scott The Law of Trusts, vol. 5, 3rd ed. (1967), at pages
> 7 3647-52) -

8
9 And this is the key to the quote:
10

> 11 I do not think that it is appropriate where the contributions to the mixed
> 12 fund can be simply traced, as in the present case.

13
14 Then Morden J. goes on at paragraph 45 to state:
15

> 16 While acknowledging the basic truth of Lord Atkin's observation that --

17
18 And I would note as about aside that my friend, Mr. Higgerty, used this same quote, but
19 did not complete the whole quote that we have that we would suggest you look at, and
20 that is again:
21

> 22 While acknowledging the basic truth of Lord Atkin's observation that
> 23 "[c]onvenience and justice are often not on speaking terms" (*General*
> 24 *Medical Council v. Spackman*, I accept that convenience, perhaps more
> 25 accurately workability, can be an important consideration in the
> 26 determination of legal rules. A rule that is in accord with abstract
> 27 justice but which, for one or more reasons, is not capable of practical
> 28 application, may not, when larger considerations of judicial
> 29 administration are taken into account, be a suitable rule to adopt.

30
31 And this is the key to the quote, My Lords and My Lady:
32

> 33 However, I am not persuaded that considerations of possible
> 34 inconvenience or unworkability should stand in the way of the
> 35 acceptance, as a general rule, of pro rata sharing on the basis of tracing.
> 36 That it is sufficiently workable to be the general rule is indicated by the
> 37 fact that it appears to be the majority rule in the United States.

38
39 And again, what the Court in *Greymac* ultimately determined, that LIBR was not
40 appropriate in the circumstances, it was not workable in the circumstances of that case.
41 That is also the situation with the *Law Society* case that's been cited a great deal by our

1 friends in their factum, and their submissions today was the same issue. The Court there
2 found that it was unworkable in that case. Not that it was not the general rule that should
3 be applied.
4
5 I note also, Sir, that the Ontario Court of Justice -- and again, on appeal, the Ontario Court
6 of Appeal -- dealt with this same issue in the *Boughner v. Greyhawk* decision, and that's
7 at tab 1 of our book of authorities. And I refer to Court to paragraphs 21 through 34 of the
8 decision of Justice Morawetz. And there, Justice Morawetz was asked to do quite similar
9 to what Justice Yamauchi was asked to do in the lower decision, and that is that you had
10 an issue of, we have a trust declared. What is the appropriate distribution method with
11 respect to the funds? There's not enough money to go around with respect to the
12 beneficiaries of the trust. How, then, do you distribute the funds?
13
14 You had one party, Waldock, making the same arguments that my friends have made to
15 you today, which is that the pro rata ex post facto rule should apply. And if you look at
16 paragraphs 21 through 34 of the decision, many of the arguments, it almost reads like a
17 script that my friends have followed in their factum with respect to the arguments they are
18 making and the cases that they are relying upon for the pro rata ex post facto rule.
19
20 In particular, paragraph 25 from the decision almost reads verbatim as what is at
21 paragraph 42 of the appellant's factum with respect to why a pro rata sharing is the
22 appropriate method, in their view.
23
24 Justice Morawetz looked at all of those arguments, and then ultimately found that the
25 lowest intermediate balance rule is the rule that should be applied. And I refer to Court to
26 two paragraphs, starting at 69, the Law and Analysis. This is where His Lordship, Justice
27 Morawetz actually got into his decision. He noted:
28
29 Both parties argue that *Greymac* suggests their position. I disagree. I
30 have concluded that the reasoning in *Greymac* aligns with the position
31 put forth by *Gibson*.
32
33 *Greymac* is the controlling authority and, given the submissions of
34 Waldock, must be contrasted with the decision in *Law Society*.
35
36 Paragraph 71:
37
38 In *Law Society*, the issue before the court was how to distribute the
39 funds in the comingled account and whether the bank should be able to
40 claim priority with a pro rata distribution based on tracing (the court in
41 *Law Society* referred to this as LIBR).

1
2 The court in *Law Society* found against the bank and concluded that
3 distribution on the basis of pro rata ex post facto was appropriate.
4
5 And then this is the key at paragraph 73:
6
7 The result in *Law Society* is consistent with the result in *Greymac*.
8 Morden J.A. acknowledged in *Greymac* that, in circumstances where
9 pro rata on the basis of tracing (LIBR) is not practically possible,
10 distributions should proceed on a pro rata ex post facto basis. The court
11 in D, at page 271 O.R., determined that it was not "practical" to
12 undertake a tracing exercise in the circumstances of that case.
13
14 Then as His Lordship reviews the interplay of *Law Society* and *Greymac*, and notes at
15 paragraph 76:
16
17 Given the statements in *Law Society*, and the fact that *Law Society*
18 follows *Greymac*, it is necessary to consider the statements of Blair J. In
19 *Law Society* in the context of the decision. In doing so, it seems to me
20 that there is no direct contradiction between the two decisions.
21
22 He then reviews the two decisions, and at paragraph 81, states:
23
24 From the above, I discern the following:
25
26 (i) The controlling authority, *Greymac*, clearly rejects the rule in
27 Clayton's Case as unfair, arbitrary and based on a fiction.
28
29 I would note that no one argued in front of Justice Yamauchi -- nor is anyone arguing
30 today -- that that rule, also known at the first-in/first-out rule -- is applicable:
31
32 (ii) The court in *Greymac* held that, as a general rule, the
33 mechanism of pro rata sharing based upon tracing (or LIBR) was
34 the preferable approach to resolving competing claims to mingled
35 trust funds.
36
37 Then Justice Morawetz quotes from *Law Society* and says:
38
39 In *Law Society*, the outcome is consistent with *Greymac*.
40
41 And he explains in paragraph (iv) that:

1
2 The finding in *Law Society* as expressed above falls within the
3 exception provided for in *Greymac*. In essence, the general rule,
4 as stated by Morden J.A., could not, in the view of Blair J., be
5 applied in the circumstances of *Law Society*. The court in *Law*
6 *Society* spent considerable time addressing the parameters and
7 practical application of LIBR. However, this analysis has to be
8 considered in the context of the conclusion reached by Blair J., as
9 set out at page 271 O.R., namely, "In this case, it is not
10 practicable to conduct the LIBR exercise."
11
12 That is the issue, is its practicality. But it's quite clear that the law is if you can trace the
13 funds, and if it is workable, that the lowest intermediate balance rule is the general rule.
14
15 THE COURT: Can you assist me a little bit with the cases,
16 which I am clearly going to go back and spend some more time with. But Mr. Billington
17 makes the point that what we have here is uncertainty in the sense that there could be
18 more money and there could be more investors. Is that a concern, or is that present in
19 these other cases?
20
21 MR. HUTCHISON: Well, the -- no. But the issue that
22 Mr. Billington, I think, neglects to point on is that we have a trust claimed here. So we're
23 not dealing with all the assets of the estate. Because we had a constructive trust, by
24 operation, then, that does not form --
25
26 THE COURT: On this bank account only?
27
28 MR. HUTCHISON: Correct, with this bank account only, that's
29 correct. That's an excellent point, My Lady, and that was something that Justice
30 Yamauchi made clear is, Look, my decision relates only to the bank account. That is
31 where I put the constructive trust. Therefore, that does not form part of the assets of the
32 estate that would be available for the various creditors through a claims process that both
33 the appellants and receivers are suggesting should happen.
34
35 What we're dealing with then, then, is proprietary interest with respect to that specific
36 trust assets and how you distribute those trust assets.
37
38 And then at, to go back to the *Boughner* decision, I would note paragraphs 88 through 91,
39 where Justice Morawetz said the following:
40
41 Thus, it seems to me that although the Court of Appeal for Ontario did

1 not, on the facts, apply LIBR in *Law Society*, it was accepted by
2 Moldaver J.A. in *Graphicshoppe*. Thus, by virtue of the Supreme Court
3 of Canada's affirmation of *Greymac* and the more recent decision in
4 *Graphicshoppe*, LIBR is an available mechanism to distribute
5 comingled funds.
6
7 The controlling authority, *Greymac*, directs, in my view, that pro rata
8 sharing based on tracing (LIBR) is the "general rule" that ought to be
9 applied in this case unless it is practically impossible to do so.
10
11 In the present case, I accept the uncontroverted evidence of the Receiver
12 that all steps have been taken to establish that LIBR calculations can be
13 made. As such, the general rule as set out in *Greymac* must be applied
14 in this case.
15
16 In my view, the application of the general rule as set out in *Greymac*
17 produces a result that I consider to be just and equitable. Morden J.A.
18 recognized that the principles of "logic, justice and convenience" govern
19 in circumstances such as these (see *Greymac*, at page 680 O.R.). Blair J.
20 In [*Law Society]* also noted that "the court should therefore seek to
21 apply the method which is the more just, convenient and equitable in the
22 circumstances."
23
24 And I would note that this decision of Justice Morawetz was upheld on appeal by the
25 Ontario Court of Appeal, and that's at tab 2 of our book of authorities. And the Court
26 noted there, at paragraph 7, that:
27
28 The appellant submits that the motion judge erred in finding that pro rata
29 sharing "on the basis of tracing or LIBR" is the "general rule" that ought
30 to be applied in this case unless it is practically impossible to do so.
31
32 That's the exact argument that the appellants are makes before you this morning.
33
34 And then paragraph 8:
35
36 We do not accept this submission. In a very careful analysis, the motion
37 judge discussed three leading decisions of this court, *Ontario Securities*
38 *Commission v. Greymac Credit Corp.*; *Law Society of Upper Canada v.*
39 *Toronto-Dominion Bank*; and *Graphicshoppe Ltd. (Re)*.
40
41 And paragraph 9:

1
2 We agree with this analysis. The general rule, and the preferred
3 allocation method, in cases like this is, per *Greymac*, the LIBR method.
4 In some cases, as in *Law Society*, this method will not be appropriate
5 because, as Blair J.A. (ad hoc) said at paragraph 33, "it is manifestly
6 more complicated and more difficult to apply."
7
8 I would also note what the Court had to say about the standard of review, and that was at
9 paragraph 11, and the last sentence:
10
11 We see nothing in the record or in the appellant's submissions
12 demonstrating that the motion judge's conclusions on this issue are
13 palpable and overriding errors.
14
15 THE COURT: But is that not about their second ground? I was
16 just reading that too. Did they not have two grounds, and one is about --
17
18 MR. HUTCHISON: Yes, they did.
19
20 THE COURT: -- the math?
21
22 MR. HUTCHISON: Correct.
23
24 THE COURT: And they say, Well, the math is reasonable.
25
26 MR. HUTCHISON: Correct, which is --
27
28 THE COURT: But I was trying to see if they actually said what
29 the standard of review was on whether the right test was applied. I am not seeing it, but --
30
31 MR. HUTCHISON: It does not, My Lady --
32
33 THE COURT: -- I might find it somewhere.
34
35 MR. HUTCHISON: -- speak specifically to, with respect to that to
36 the first ground of appeal. But it does say with respect to the second ground of appeal,
37 similar to what the second ground of appeal here is today, that palpable and overriding
38 error is the standard.
39
40 So, in fact, in terms of what the law is, the law is quite clear that that is the, LIBR is the
41 rule that should be applied, if you can trace is funds, and if it's workable.

1
2 THE COURT: And your position is that revealing that this one
3 specific bank account that was set up in May of 2014, and it was frozen at the end of
4 September 2015, there has been a constructive trust declared over the proceeds that were
5 left there, that is not at issue on this appeal. And that the calculations in the scheme of
6 things are not difficult -- they may be tedious, I think I saw that referenced in somebody's
7 factum -- but they are not difficult?
8
9 MR. HUTCHISON: Yes. I think my friend, Mr. Mahoney, said this:
10 It's boring, it contains a whole lot of cutting and pasting in the spreadsheet. And that goes
11 to the -- that's a good segway into the issue of what my friend, Mr. Higgerty, focussed on,
12 is whether the workability of these, and the issue, which is the key issue. You use LIBR,
13 unless it's not workable. And clearly it's workable in this case.
14
15 There's talk about software. Well, simple software, a spreadsheet, it's -- you work
16 backwards. You look at what the, you look at the traceable contributions made by the
17 contributors to the, the trust asset, and then determine what percentage does that
18 contribution make up of the then total amount of the fund, or the balance of the fund at
19 that point in time. And then you look if there's been distributions or if there's been
20 withdrawals taken of the fund, what you share, you still share pro rata, but you share
21 based on tracing.
22
23 So that was my deposit. My deposit made up X percentage of the balance of the fund at
24 that time. That percentage, that proportion of any withdrawals, then, of the fund that was
25 taken out, I have to, it goes against my amount. And I'll show you how that works in
26 practise --
27
28 THE COURT: Before you do, would you be kind enough to
29 help me with this: First question, and I will await the response before I put the second
30 question, if you would be so kind.
31
32 MR. HUTCHISON: Yes, Sir.
33
34 THE COURT: Is this Court bound by the test of practical
35 impossibility, with the emphasis on "practical impossibility," the latter word?
36
37 MR. HUTCHISON: I would say, well, there's been some, there's
38 differing nomenclature used with respect to that.
39
40 THE COURT: What do you say?
41

1 MR. HUTCHISON: I'd say it's workability is --
2
3 THE COURT: Workability?
4
5 MR. HUTCHISON: Convenience has been used. Workability, I
6 think, is the language that Morden J.A. used in *Greymac*.
7
8 THE COURT: Well, let me put the question another way: Do
9 you say that if tracing is practically impossible, what flows from that?
10
11 MR. HUTCHISON: If you cannot trace, then LIBR is not an
12 appropriate method of distribution.
13
14 THE COURT: And how do you measure the relative
15 impossibility? Do you measure it in practical terms? Is that why the phrase is "practical
16 impossibility"?
17
18 MR. HUTCHISON: Practical or workability, yes. And then also
19 another issue is whether you have the information available to view it. And then in the
20 circumstances, would the, doing these calculations, yes, it can be done, but it is so
21 inconvenient, and it would take so much work, that it's not practical in the circumstances
22 of particular case.
23
24 THE COURT: That is a good segway to my second question.
25 Because I may have misunderstood, or perhaps I didn't record accurately what
26 Mr. Billington said about the topic, but he spoke in terms of further investigations. Does
27 that bear upon the issue of practicality?
28
29 MR. HUTCHISON: No, no. And the reason for that is you're not
30 going to be adding to the fund in question. Again, this goes to the point of the
31 constructive trust. We're only talking about a specific asset. So the assets of the trust are
32 the moneys that are in that bank account. That is not going to be added to or through any
33 further investigations that the receiver is doing.
34
35 THE COURT: But in terms of tracing, to what extent is further
36 investigation required?
37
38 MR. HUTCHISON: In terms of the tracing with respect to the
39 moneys within the trust, the trust fund?
40
41 THE COURT: The tracing of contributions?

1
2 MR. HUTCHISON: The tracing of contributions, then,
3 (INDISCERNIBLE). Okay. Then can you apply -- that is relative in terms of
4 determining how do you, can you apply LIBR? So if you can trace the moneys that are in
5 the trust fund to specific contributors, and if that is relatively easy to do or not practically
6 impossible to do, and if it's convenient to do, then you apply it.
7
8 THE COURT: Do you agree that further investigations are
9 required --
10
11 MR. HUTCHISON: No.
12
13 THE COURT: -- in order to do that in this case?
14
15 MR. HUTCHISON: No.
16
17 THE COURT: Help me with that. Why is that?
18
19 MR. HUTCHISON: Because those further investigations relate to
20 other assets that Base Finance, the debtor in the receivership proceedings -- and then of
21 course there's been allegations of fraud here -- have done. That's related to what's going
22 to form the assets of the estate that form what the receivership can look at for its fees,
23 what the receivership can look at for providing distributions to the creditors of the estate.
24 Those do not relate to the trust, and the trust is with respect to the bank account only.
25
26 THE COURT: Okay.
27
28 In fact, the trust is outside the receivership?
29
30 MR. HUTCHISON: Correct, exactly. Which would take me to -- so
31 a couple nice segue-way you have given me, My Lord, but I'll go there with respect to the
32 assertion, then, that the receiver's application to have the funds paid to it was not dealt
33 with by Justice Yamauchi. Clearly it was.
34
35 If the trust has been claimed over that money, it does not form part -- it cannot form part
36 of the receivership estate, and it cannot, then, be available to the receiver of which to look
37 for payment of its fees.
38
39 So clearly His Lordship addressed that --
40
41 THE COURT: Well, the effect of his decision is --

1
2 MR. HUTCHISON: Correct.
3
4 THE COURT: -- to deal it away from. The receiver has no
5 recourse to that for its fees, expense, or anything else.
6
7 MR. HUTCHISON: Correct.
8
9 So then going back to, digressing as to how, just giving you an example of how the LIBR
10 calculations work and just show that it is available in this matter, look at the example of
11 the 500,000 deposit made by Mr. Thomas Wiseman. So Mr. Wiseman made a deposit, an
12 investment that was deposited into the account the day before, on September 24th, the day
13 before it was frozen by, firstly by RBC, and then later by the Alberta Securities
14 Commission cap.
15
16 So at the time, if you're looking at the banking records, at the time of the deposit, the
17 balance in the account was $624,185 --
18
19 THE COURT: Can you actually just take us to --
20
21 MR. HUTCHISON: Certainly.
22
23 THE COURT: It is on the order, is it not? Is it not attached to
24 the order?
25
26 MR. HUTCHISON: No. The banks records wouldn't be attached to
27 the order, My Lady.
28
29 THE COURT: Banking record A-885, I think is the page.
30
31 MR. HUTCHISON: I believe you are correct, Sir.
32
33 THE COURT: A-885?
34
35 MR. HUTCHISON: You are correct, My Lord. So if you all have
36 that in front of you, if you look, so you can see on September 24th, Deposit 0068,
37 $500,000.
38
39 So the balance prior to that deposit, I can see on the line, was $624,185.03. So after the
40 deposit was made of 500,000 deposit, a contribution of Mr. Wiseman was made, that
41 raised the balance of the account to $1,124,185.03.

1
2 THE COURT: Can I just write that in there?
3
4 MR. HUTCHISON: $1,124,185.03.
5
6 THE COURT: Okay.
7
8 MR. HUTCHISON: So then you look at what proportion, then, did
9 Mr. Wiseman's contribution make up to the then-balance of the account? That's 44.47
10 percent of the then-balance.
11
12 You then look at what happened after the deposit was made, okay? There was four
13 withdrawals, you can see them there. Those withdrawals total $39,581. So
14 Mr. Wiseman's proportion, of his contribution with respect to those withdrawals is the
15 44.47 percent of what he made up of the balance of the account. So you times that
16 proportion against the total amount of withdrawals, you get $17,604.31.
17
18 You then subtract that from his contribution, the $500,000, and that is how you get what
19 he's going to be getting in the distribution under the LIBR distribution method, which is
20 $482,395.69.
21
22 Now, granted, his is the easiest calculation to do because his was the last money that went
23 into the account.
24
25 As you work backwards, and even going back to 885, you then see where the last prior
26 deposit to Mr. Wiseman's contribution was. There was a deposit made on September
27 22nd for $300,000. 200 of that was by, I believe by Mr. (INDISCERNIBLE),
28 Mr. Mahoney's client's. And the other was by the Unger's, who I'm representing on the
29 appeal. So you do the same math. What percentage did you look at, and then that
30 proportion changes when Mr. Wiseman's distribution counts.
31
32 So it does get slightly more complicated as you go backwards, but it can be done, and
33 relatively easily. So the spreadsheet was a simple formula, and I won't steal
34 Mr. Mahoney's thunder, he can explain to you how he did that, but it's quite simply done.
35
36 And you can trace it, in this case, because you have all the banks records that show
37 exactly what went in, who made it and when, and you can work backwards.
38
39 THE COURT: There is complete records going all the way
40 back to the inception of the accounts, as I understand it.
41

1 MR. HUTCHISON: Correct, correct. And there's been no -- and that
2 was an issue in the *(Re) Elliott* case before Associate Chief Justice Sulatycky. In that
3 case, he did not have the appropriate methods before him to be able to do the calculation.
4 This was noted by Justice Yamauchi in his decisions, specifically saying again, he
5 couldn't do that.
6
7 And it was noted in *Elliott* that LIBR is manifestly fairer than pro rata. Because if you
8 look at the fairness and the equities of it -- and Justice Yamauchi did this in his decision --
9 he went and looked at the pros and cons and the advantages and the disadvantages of the
10 two different distribution methods. And he noted that with respect to pro rata ex post
11 facto, pro rata based on original contribution, the earlier investors are gaining recoveries
12 on the back of later investors.
13
14 So an example of that is Mr. Wiseman. Prior to his deposit on the day before the bank
15 account was frozen, the balance of the account was only $624,000. The next day, it's now
16 up to 1.1 million. So if you use pro rata, then 44 percent of the recoveries are coming to
17 everybody else, are coming completely on his back. That's unfair to the latter investors.
18
19 So -- and clearly he could not have been seen as contributing to the losses before his
20 contribution was ever made. So, and that's something that the Courts have noted as to
21 why LIBR is the appropriate method, if you can trace and if it's workable. And His
22 Lordship found that it was in this instance. That the calculations have been done and
23 provided is further example of that.
24
25 And going to your question, Justice McDonald, about as to why Mr. Mahoney did it rather
26 than the receiver, generally it was the issue of cost. And plus it's just an example of, look,
27 this isn't that difficult. We can get a spreadsheet to do it, and we can work backwards and
28 do it.
29
30 So with respect to my friend's, the appellant's submissions -- particularly those of
31 Higgerty, that this is so difficult and unworkable, simply, those don't hold merit.
32
33 THE COURT: It is so easy, even a lawyer can do it? Is what
34 that you are saying?
35
36 MR. HUTCHISON: Precisely, precisely. And I think if you read the
37 transcripts, we had some fun at Mr. Mahoney's expense at the fact that, Look, even
38 Mr. Mahoney can do it. So it can't be that hard. So -- but that just goes to show, look, it's
39 not that difficult.
40
41 THE COURT: I can help you out a bit on my colleague's

1 intervention. Lawyers eventually become Judges.
2
3 THE COURT: And I never claimed to be very good at math.
4
5 MR. HUTCHISON: And most went to, did their B.A.'s before as
6 well, so, yes, there are a few accountants that go to law school, but it's few and far
7 between.
8
9 So with that, we would submit is a full answer to the appeal of, on the issue as to whether
10 LIBR is the appropriate distribution method. It clearly is. That is the law. If it's
11 workable, it was determined by Justice Yamauchi on the facts that it is workable. I think
12 that's borne out in the evidence. We would submit to the Court, and then finally, is it, can
13 you trace it? And clearly you have. You have the banking records, you can trace it.
14 Nobody is taking any issue that we don't have the information available to perform the
15 calculations.
16
17 So then I note the other part of the appeal, with respect to whether Justice Yamauchi erred
18 in not requiring an accounting. Well, we've seen no authority for that, that a trust
19 beneficiary somehow has to account for any other moneys that he or she may have
20 received. And this is trust property, and this is not debtor/creditor issues, this is trust. So
21 that is why it is so significant. And I'm glad you asked that question right off the start, My
22 Lady, that there's been no appeal of the trust.
23
24 You have, that's significant. If we were dealing with a creditor/debtor situation, then
25 issues of set-off -- often accounting -- become relevant. But they did not become relevant
26 in here.
27
28 And I think also, Sir, Justice McDonald, you hit on this point too. Well, what is the, how
29 do you do this? So how far back do you go? Do you go back to the inception of this, of
30 this company, of Base Finance, 35 years? You look at all of its banking records ? Justice
31 Yamauchi clarified in paragraph 7 of his order that no, it's only the -- the lack of
32 accounting is only with respect to the moneys from the account.
33
34 But even if you go back to that, you would have to go through, it would be a significant
35 exercise to go and do that accounting; and then second, what are you looking at? Was
36 this thing always a Ponzi scheme? Or was it legitimate at one point in time? If it was
37 legitimate, at what point in time was it legitimate? Who was duped, who wasn't duped?
38 These are all, and Justice Yamauchi hits on some of these various myriad of issues in his
39 decision. And we would submit that there's been no overriding, palpable and overriding
40 error -- or even any error at all -- with respect to His Lordship's decision in that regard.
41

1 So subject to any questions you may have, those are my submissions.
2
3 THE COURT: Thank you very kindly.
4
5 **Submissions by Mr. Mahoney (Appeal)**
6
7 MR. MAHONEY: Bearing in mind your admonitions against
8 repeating anything that's been said, I would simply like to say this in terms of the appeal
9 itself. We're going to get rid of this two different ways: In my submission, the correct
10 way is on the standard of review, which I submit is reasonableness. And there's been no
11 argument presented to you that the decision was unreasonable. The whole appeal has
12 stood on the foundation of correctness.
13
14 My submission, when you read even the cases that the appellant has given you, including
15 the *Law Society of Upper Canada* decision, the *Greymac* law is clear. Even on a
16 correctness basis, the law is that what Justice Yamauchi did was correct.
17
18 And I would refer you to paragraph 31 of Justice Blair's decision, where he said:
19
20 > In the end, there remain two general approaches which may be taken to
21 > the resolution of how pro rata distributions are to be made in
22 > circumstances such as this case -- the rule in Clayton's Case having now
23 > been discarded for such purposes. The first is that of applying the
24 > lowest intermediate balance rule. The second is that of applying what
25 > Woolf L.J. called the "pari passu ex post facto" approach, in *Barlow*
26 > *Clowes International*. There seems to be no binding authority
27 > compelling the application of one approach or the other to circumstances
28 > such as those in this case. The court should therefore seek to apply the
29 > method which is the more just, convenient and equitable in the
30 > circumstances.
31
32 I submit to you that is what Justice Yamauchi did.
33
34 My main reason for appearing today was in case the Court had any particular reasons
35 about the calculations. I am the one who did them. They are boring. Software is not
36 required. I happened to use a program called Microsoft Excel to the it, and I did circulate,
37 for the Court's information, that digital file to all concerned parties, with the invitation
38 that they review it and advise of any issue they took with those calculations. At no point
39 did I ever receive such information.
40
41 I had actually -- Justice McDonald, I think you asked -- why was Mr. Mahoney chosen? I

1 had actually, prior to even appearing before Justice Yamauchi, in my materials, I had
2 done the calculations. Because I was reading these cases, and even was talking about
3 how difficult this was, and I was having a hard time understanding why adding and
4 subtracting, multiplying, and dividing was so difficult. I was in a room full of people with
5 many many years of university education, and so I -- being a person who is somewhat
6 skeptical -- I decided to see for himself how hard it would be.
7
8 And I did have to actually work backwards, contrary to what Mr. Higgerty -- I don't know
9 where he got the idea that I did it the other way -- I had to start with Wiseman and work
10 backwards. You have to do it that way until the money disappears.
11
12 THE COURT: You want to be careful, however, not the
13 introduce into the record something that is not properly before us. I think it is our -- that
14 is to say -- your own approach, to how you went about this --
15
16 MR. MAHONEY: Well, it is in evidence.
17
18 THE COURT: -- but let me finish, then, I assure you, the
19 principle of *Arcand* always is followed in this courtroom, so let me finish, please, thank
20 you.
21
22 It seems to me that if you give evidence as to precisely how you went about it, that
23 tends -- perhaps arguably, I don't know with certainly -- to supplement the official record
24 that is properly before us. So by all means, I think it is fair to say on this record -- and
25 counsel will correct me if I am wrong, including yourself, Mr. Mahoney -- that no one has
26 questioned your calculations. Is that fair?
27
28 MR. MAHONEY: Well, I understood that Mr. Higgerty didn't
29 perhaps question my conclusions. I think he was questioning what he thought was my
30 procedure, which was incorrect. But the receiver, I then heard -- and that was the first I
31 heard of it -- apparently the receiver has done some calculations, which are alleged to
32 have differed. I heard Mr. Billington say that.
33
34 THE COURT: Well --
35
36 MR. MAHONEY: That was the first I had heard of that as well.
37
38 THE COURT: Yes. Well, fair enough, but insofar as any
39 competing calculation is concerned, there is nothing before us.
40
41 MR. MAHONEY: And there was nothing before Justice Yamauchi

1 either.
2
3 So unless you have any questions for me about that calculation, those are my submissions.
4
5 THE COURT: Thank you very kindly.
6
7 MR. MAHONEY: Thank you.
8
9 THE COURT: So, I think at this juncture, we turn to the
10 appellant for reply.
11
12 **Submissions by Mr. Souster (Appeal)**
13
14 MR. SOUSTER: Sir, the respondents talked about the intentions
15 of the beneficiaries, and specifically, the respondent beneficiary. And I would draw the
16 Court's attention to page A-7, The Extracts of Key Evidence. Which is, in fact, the
17 affidavit by Mr. Thomas Wiseman, Mr. Hutchison's client, and it starts out on the
18 preceding page, A-6. It's a description of the history with Arnold Breitkreutz and Base.
19 And Mr. Wiseman states that: (as read)
20
21 I understood Base to be a mortgage lending company, whereby Base
22 would obtain investments from individuals like myself that would be
23 pooled by Base.
24
25 Now, I wrote down what my friend said, and he said, No, it was not an intention to be
26 pooled. That it was simply a conduit, and the moneys would flow directly from the
27 investors through to the (INDISCERNIBLE). That's contrary to the express affidavit
28 evidence of Mr. Wiseman himself.
29
30 And if we look further down on that paragraph, he goes on to say that: (as read)
31
32 I understood that the loans would be secured by mortgages --
33
34 Not just against my mortgage in relation to my money, but against mortgages. And I
35 submit that the language in that affidavit is indicative that there were to be a pooling of
36 the investor's funds into any one or more mortgages.
37
38 And then it goes on to say: (as read)
39
40 Held in the name of Base, placed on the subject real estate of the
41 borrower, and that such mortgages --

1
2 Again, plural:
3
4 -- would be held by Base would be for the benefit of its investors.
5
6 Not on my behalf, but on all of the investors in Base. That's the language that
7 Mr. Wiseman used in his affidavit. And I would submit that that language is reiterated in
8 those respondent claimants that set out what their understanding was in any degree of
9 detail.
10
11 THE COURT: So do you say that Justice Yamauchi, that was a
12 palpable and overriding error, for him to find that this was an agent through which money
13 was placed? Or is it just the manner in which Mr. Hutchison characterized the judgment?
14
15 MR. SOUSTER: Well, I took issue at the initial hearing with the
16 issue of agency. And I won't belabour the Court with my background, but I'm a
17 foreclosure lawyer. I got involved with this file because it was a mortgage investment
18 company, and I got up to speed as far as I'm able with respect to trust and concerns with
19 trust.
20
21 My initial argument was that, in fact, it was not an agency relationship. I was referring
22 more to debtor/creditor type relationship based upon the assignment of contract between
23 individuals. That was rejected by Justice Yamauchi.
24
25 The second point that my friend made was with respect to *Greymac*. And I believe he
26 said that in *Greymac*, it was stated that it was a general rule. I didn't hear any cite to that.
27 My friend, Mr. Higgerty, and I looked at it. We can't see that *Greymac* said that LIBR
28 was to be the general rule.
29
30 My understanding in reviewing the cases -- and I could stand to be corrected -- that that
31 statement was made in *Greyhawk*, and at paragraph 9. Now, I noted that my friend
32 quoted that, but there was one difference in his language. Paragraph 89 on tab 10, he
33 said:
34
35 The controlling authority, *Greymac*, directs, in my view, that pro rata
36 sharing based on tracing (LIBR) is the "general rule" --
37
38 And then Mr. Hutchison said:
39
40 -- that ought to be applied in cases.
41

1 However, the language used is:
2
3 -- that ought to be applied in this case unless it is practically impossible
4 to do so.
5
6 And this dovetails into my earlier arguments, that there can be a distinction between
7 *Greymac* and between the *LSUC* case. In that you need to look at the intentions of the
8 parties.
9
10 So yes, when the intentions of the parties were that the funds should be made segregated,
11 there would be no comingling, there would be no co-ownership in the fund, then I don't
12 dispute that may be the general rule. But for the Court to apply strict rules of tracing, to
13 ignore the equities that were most eloquently stated by Mr. Billington, and to
14 preferentially -- no, I'm not going to use the word "preferentially" -- but to allow some of
15 the claimants to receive more money when they have already received likely more than
16 some of the other individuals that will be at a net loss, is inherently unfair and is
17 inherently inequitable.
18
19 And whether we're looking at LIBR or whether we're looking at the pari passu ex post
20 facto, the overarching objective is to arrive at a distribution method which is the most fair
21 and just.
22
23 THE COURT: Before you sit down, if I can put one further
24 question to you in light of my conversation with your colleagues on the issue of practical
25 impossibility of tracing. In the light of the competing arguments -- and I am mindful of
26 your focus upon intention -- do you maintain a position that given what we've heard about
27 the spreadsheet and Mr. Mahoney's diligent hard work, do you maintain practical
28 impossibility of tracing?
29
30 MR. SOUSTER: Well, practical impossibility was the language
31 of Justice Yamauchi, and as was argued by my friend, Mr. Higgerty, that's not what the
32 case law set the standard of. It was on a much lower balance, being workability or
33 perhaps what's most convenient in the circumstances.
34
35 And so with respect to practically impossible, I don't believe that's the law. I don't believe
36 that's what the case authorities stand for, that proposition.
37
38 THE COURT: But given the response that Mr. Mahoney gave
39 to the question put about no dispute with respect to his calculations, whatever the test may
40 be -- workability, practicality, practical impossibility, et cetera -- given that there is
41 nothing that challenges the -- that is, in real terms -- the calculations, is there any residual

1 argument on the issue of how one goes about tracing the various contributions?
2
3 MR. SOUSTER: My response to be, Sir, that just because there
4 has been no challenge to the arithmetic in his calculations doesn't mean that they are
5 correct. And the issue on whether or not they are correct would dovetail into the concept
6 of workability. We have heard from the receiver. The receiver has a different
7 calculation. If the receiver's calculation is different than Mr. Mahoney's -- in fact, I don't
8 want to step outside the record -- but we had an accountant that conducted calculations --
9
10 THE COURT: Well, do not step outside the record.
11
12 MR. SOUSTER: Certainly. And if we only have, if we had at
13 least two different calculations, and one done by the accountant, and one in fact, done by
14 the receiver, the experts, I think it impacts on whether there is a workability. Because
15 what is the correct determination? What is the correct calculation?
16
17 I will point out, Sir, that in the LIBR calculation that was conducted by Mr. Mahoney, the
18 actually fraudster himself, Mr. Breitkreutz, actually receives money. And in addition,
19 there were various unidentified individuals that are going to be receiving money. There
20 has been no investigation by the receiver as to whether or not these are true investors or
21 could be third-parties. These are people that have not come forward and have not been
22 identified.
23
24 So in closing, a claims process as proposed by the receiver would ensure that any
25 unidentified third-parties that may not properly be entitled to any proceeds of the RBC
26 Base account would not receive them.
27
28 THE COURT: This does lead me to a last question. To adopt
29 something that is proposed by the receiver, are we not going against the whole basis of
30 this, which is this bank account is not part of the receivership, as a result of a decision
31 unchallenged in the Court below?
32
33 MR. SOUSTER: Well, that is a difficult at this, My Lady. My
34 response -- and I'm not sure if this will answer the question, but I will do my best -- is that
35 it was a response that was put forward by Mr. Billington that whether there's a trust over
36 the bank account, or whether -- essentially all these moneys flow from investors. It was
37 all to be impressed with the trust.
38
39 We do know that there are other assets. We do know that there is real property. There is
40 some indication that there is some property down in the U.S., value which is unknown.
41 There may be further property. There is money missing. And so --

1
2 THE COURT: This is mainly speculation at this point. I mean,
3 I read somewhere that there was properties maybe in Goliad County, Texas, but they
4 hadn't been produced yet, so, I mean...
5
6 MR. SOUSTER: Well, there are assets there. It would be
7 speculation to say whether or not there's any equity in those properties or --
8
9 THE COURT: But really, in fairness to Justice Yamauchi, the
10 focus of the application before him, though, was the status of this bank account? And the
11 battle really, your friend said they want constructive trusts, and so our clients have
12 recourse to this. And whatever else is out there, we are not concerned about that.
13
14 THE COURT: And once it is outside the receivership, it is
15 outside the receivership. It is a pool of money that by agreement -- effectively now, by
16 not appealing that issue -- is trust money, not to be dealt with by the receiver, nor form a
17 part of the receivership.
18
19 THE COURT: Now, the appeal before us, would you agree, is
20 with respect to the RBC frozen account? It is no different than what was before Justice
21 Yamauchi. Although that said, I take your point that we still are entitled to consider the
22 whole of the evidence, inclusive of the calculations of the receiver who, after all, did his
23 calculations in anticipation possibly of an order that the funds be paid in trust to him.
24
25 Do you quarrel with any of that?
26
27 MR. SOUSTER: I don't, Sir.
28
29 THE COURT: Well, thank you very much --
30
31 THE COURT: I have got other questions.
32
33 You would agree that the investor funds were, in effect, impressed with the trust in the
34 hands of the Base mortgage? And just to help you on that, I'm going to refer you to A-12
35 in your materials there. As I understand it, this is one of these one-page
36 (INDISCERNIBLE) assignment of mortgage interest documents that we have been
37 hearing about?
38
39 MR. SOUSTER: Yes.
40
41 THE COURT: And if I could just take you -- I mean, this one,

1 just for the record, is between Base Finance Limited and some outfit called Limited
2 Gigolo West Holdings (phonetic), which is described as the lender. And in paragraph 3:
3 (as read)
4
5 It is further agreed that the lender shall indemnify and save harmless
6 Base from any and all claims and demands against Base with respect to
7 the assigned portion of the mortgage. The lender agrees that its sole
8 remedies with respect to default by the borrowers shall be against the
9 demised premises and the borrowers.
10
11 So that again just goes to the point that these were trust funds in the hands of Base
12 Mortgage. I mean, that was how it was constructed. Like, we are just the trustees, and we
13 are going to take your funds, perhaps comingle with others, and in they go to the
14 mortgage. And you get the assignment of the mortgage interest.
15
16 MR. SOUSTER: That's how the mechanism was presented to the
17 investors.
18
19 THE COURT: Yes.
20
21 THE COURT: Well, we would express our appreciation for the
22 quality of advocacy this morning. Your submissions have been most helpful. It is a
23 difficult case, and it will come as no surprise to any of you that judgment is reserved.
24
25 Court will adjourn.
26
27
28
29 PROCEEDINGS ADJOURNED
30
31
32
33
34
35
36
37
38
39
40
41

1 **Certificate of Record**
2
3 I, Gugulethu Ncube, certify that this recording is the record made of the evidence in the
4 proceedings in the Appeal Court, held in Courtroom Number 1, at Calgary, Alberta, on
5 the 6th day of December, 2016, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

1 **Certificate of Transcript**
2
3 I, J. Aubé, certify that
4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and
8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.
11
12
13
14 Janice Aubé, Transcriber
15 Order Number: AL-JO-1002-6796
16 Dated: March 25, 2019
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

EXHIBIT 17

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Form 44
Rule 10.35(1)

Clerk's Stamp:

COURT FILE NUMBER	1501-11817
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	EASY LOAN CORPORATION AND MIKE TERRIGNO
RESPONDENTS	BASE MORTGAGE AND INVESTMENTS LTD., BASE FINANCE LTD., ARNOLD BREITKREUTZ, SUSAN BREITKREUTZ, SUSAN WAY AND GP ENERGY INC.
DOCUMENT	**BILL OF COSTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Osler, Hoskin & Harcourt LLP** Suite 2500, 450 – 1st Street SW Calgary, Alberta T2P 5H1 Attention: Randal Van de Mosselaer / Emily Paplawski Telephone: (403) 260-7060 / 7071 Facsimile: (403) 260-7024 Email: rvandemosselaer@osler.com / epaplawski@osler.com Matter: 1196307

BILL OF COSTS OF BDO CANADA LIMITED

Fees Claimed:

ITEM	**AMOUNT**
Reviewing and Responding to Application • R. Van de Mosselaer – 10 hours • E. Paplawski – 5 hours	$10,400
Cross Examination on Affidavit • R. Van de Mosselaer – 15 hours • E. Paplawski – 15 hours	$19,650
Preparation and Filing of Brief • R. Van de Mosselaer – 10 hours • E. Paplawski – 20 hours • Articling Student – 20 hours	$22,300
Preparation for and Attendance at Application • R. Van de Mosselaer – 10 hours	$10,400

• E. Paplawski – 5 hours	
TOTAL FEES (excluding GST):	**$62,750**

Disbursements:

DESCRIPTION	**AMOUNT**
Printing Costs	$100.00
TOTAL DISBURSEMENTS (excluding GST):	**$100.00**

GST:

(a) Amount claimed on fees: $3,137.50

(b) Amount claimed on disbursements: $5.00

TOTAL GST **$3,142.50**

Total Amount Claimed:		**Amount allowed by assessment officer:**	
Fees:	$62,750	Fees:	$
Disbursements:	$100	Disbursements:	$
GST:	$3,142.50	GST:	
TOTAL:	**$65,992.50**	**TOTAL:**	**$**

CERTIFICATE OF ASSESSMENT OFFICER:

I, _______________________________, certify that $____________________ is to be paid by Mike Terrigno, Easy Loan Corporation, Barile Investments Inc., and Darrell Winch to BDO Canada Limited

Dated: ___________________________

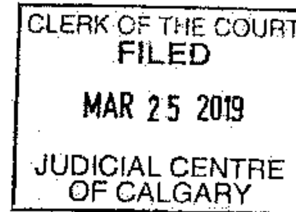
Name of Assessment Officer: ____________________________________

EXHIBIT 18

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Form 27
[Rules 6.3 and 10.52(1)]

Clerk's Stamp



COURT FILE NUMBER	**1501 – 11817**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	EASY LOAN CORPORATION and MIKE TERRIGNO
DEFENDANT	BASE MORTGAGE & INVESTMENTS LTD., BASE FINANCE LTD., ARNOLD BREITKRUETZ, SUSAN BREITKRUETZ, SUSAN WAY and GP ENERGY INC.
DOCUMENT	**APPLICATION BY MIKE TERRIGNO**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Mike Terrigno 212-10a ST NW Calgary, Alberta T2N 1W6 mike@terrigno.ca

NOTICE TO RESPONDENT: BASE FINANCE LTD. and service list for investors

This application is made against you. You are a respondent. You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	**April 2, 2019**
Time:	**2pm**
Where:	**Calgary Court Center 601 5 St SW, Calgary, AB**
Before Whom:	**Honourable Madam Justice B.E.C. Romaine – Commercial List**

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An order granting leave to Mike Terrigno, or any creditor of Base Finance Ltd. ("Base Finance") to petition Base Finance into bankruptcy. Alternatively, directing the receiver to petition Base Finance into bankruptcy.

Scanned by CamScanner

2. An order granting leave to Mike Terrigno and other interested parties to pursue legal action against BDO Canada LLP and thereby lifting the stay on QB Action#1901 - 01990 (the "Negligence Claim") in which BDO is a named Defendant on such terms and conditions as the Court deems appropriate.

3. An order directing a trial of an issue, or such other procedure, to determine whether the receiver/trustee is statute barred to pursue a fraudulent preference claim on behalf of the estate unwinding certain transaction pursuant to a net/winner loser analysis.

4. An order directing the receiver/trustee to complete the aforesaid net winner/loser analysis with estate funds.

5. An order directing that the receiver shall not use estate funds for purposes of defending the Negligence Claim or its wrongdoing.

6. An order directing the receiver/trustee to assign the fraudulent preference claim to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

7. An order directing the receiver/trustee to assign any interest of the estate available against Robert Smyth to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

8. An order directing the receiver/trustee to assign the debtor estate claim against 69th Avenue SW property to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

9. An order directing the receiver/trustee to assign the negligence claims against BDO Canada LLP to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit.

10. An order directing the receiver/trustee to disclose to Mike Terrigno, and/or any interested party to these proceedings, the receiver's net winner/loser analysis already completed to 2004 including source material and electronic material but not working papers.

11. An order directing the receiver/trustee to assign the estate's claim against the following individuals to Mike Terrigno, or any creditor of Base Finance, on such terms and conditions as this Honorable Court deems fit. Furthermore, lifting the stay and allowing Mike Terrigno, and other Plaintiffs, to pursue their various Actions against the following parties:

    a. Arnold Breitkruetz
    b. Susan Breitkruetz
    c. Susan Way
    d. Bonnie Way
    e. Robert Way
    f. Lyle Hogaboam
    g. Brian Fox
    h. John Manolescu
    i. BDO Canada
    j. Such other parties as the Applicant may identify and this court deems fit to consider.

Scanned by CamScanner

12. An order directing the receiver to file amended T5s for Base Finance on such terms and conditions as this Honorable Court deems fit.

13. An order winding down and discharging the receiver on such terms and conditions as the Court deems appropriate.

14. An order of costs on a fully indemnity basis (or such other basis as this Court deems fit) against legal counsel for the receiver, Randal van De Mossaer.

15. An order directing a process by which this application may be heard.

16. An order deeming service of this application good and sufficient.

17. An order abridging time for service of this Application.

18. Such further and other relief as this Honorable Court deems fit to grant.

Grounds for making this application:

Petition Base Finance Ltd. into Bankruptcy

19. Pursuant to section 43(1) *Bankruptcy and Insolvency Act, RSC 1985, c B-3* ("BIA"), the debts owing to the applicant creditor or the general body of creditors amount to greater than one thousand dollars and Base Finance has committed an act of bankruptcy as annumerated under s. 42(1) BIA.

20. The Applicant, and other investors including the estate, will benefit from rights under Section 38 BIA.

21. There is an overall benefit to both the general body of creditors and the estate for these proceedings to be captured under the authority of the BIA the benefit of which exceeds the small cost associated to the conversion into bankruptcy.

22. The receiver is qualified and able under the receivership order to act as a trustee.

23. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Trial of an Issue

24. There is a serious issue to be tried. Namely, whether the receiver is statute barred from pursuing the fraudulent preference proceeding to unwind certain transaction flowing through the Base Finance bank account(s) for the benefit of the general body of creditors.

25. The benefit of the trial of an issue is not only for purposes of determining whether the receiver can take the fraudulent preference proceeding or assign a viable proceeding but also what damages to the general body of creditors has been sustained by losing the right to pursue the said proceeding.

Scanned by CamScanner

26. There is an expediency and an efficiency to resolve this issue within these proceeding due to the significant value of approximately **$45million** to the general body of creditors. However, this issue must not delay the receiver from completing the net winner/loser analysis for reasons that follow.

27. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Directing the Receiver to Complete the Net Winner/Loser Analysis

28. The Net Winner/Loser Analysis is already substantially complete with little work remaining to complete it. There are efficiencies in the receiver competing the analysis.

29. There is no initiative the receiver can undertake that is of more value to the general body of creditors then to complete the Net Winner/Loser analysis given the significant amounts in issue of about **$45million dollars** that could be recovered for redistribution.

30. There is adequate estate funds available to complete the initiative and the receiver has agreed to complete the analysis.

31. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Assignment of Claims/Proceedings

32. The Applicant is a creditor of Base Finance.

33. The Applicant requested the receiver to:

    a. take proceedings relating to a fraudulent preference claim by unwinding certain transactions of Base Finance. A process more commonly known as a *Titan* proceeding by virtue of the decision rendered in *Re Titan Investments Limited Partnership*, (Judicature Act), 2005 ABQB 637.

    b. to take proceedings against Robert Smyth.

    c. to take proceedings against property located at 69th ave sw Calgary, Alberta

    d. to take proceedings against John Manolescu, Brian Fox, Lyle Hoagboam, Bonnie Way, Susan Way, Quinn Briekrutz, Arnold Briekrutz , Susan Briekrutz, who are defendants in various QB Actions already filed in which the Plaintiffs are the Applicant and other related parties.

34. Regarding the Titan proceeding, the financial records of Base Finance are sufficiently detailed and complete to conduct the fraudulent preference proceeding. However, the receiver is unable to do so in a cost-effective manner. The Applicant has received quotes from various accountants and lawyers that demonstrate it can complete the fraudulent preference proceeding for ¼ of the receiver's cost. Furthermore, the receiver has shown to be incompetent, negligent and interested

Scanned by CamScanner

in its own profits disregarding its duties as a court official to the detriment of creditors thereby causing a negligence claim exceeding $45million dollars.

35. The fraudulent proceeding has many precedents to support the process such as but not limited to Re Titan Investments Limited Partnership, (Judicature Act), 2005 ABQB 637. The process is not novel. The Applicant can take the proceedings in a more far more cost-effective manner than the receiver.

36. There are significant sums that can be recovered pursuing the fraudulent preference proceedings and it is necessarily the only process that will allow the Applicant, and any creditor, to recover from the Ponzi scheme.

37. The fraudulent preference proceeding is the normal operating procedure in dealing with recovery for Ponzi scheme victims.

38. Regarding the assignment of claims against the aforesaid individuals, the receiver has thus far refused or neglected to take proceedings against the aforesaid individuals. Furthermore, it is now statute barred in doing so. As the Applicant has already filed claims against the aforesaid individuals it has the only viable action from which proceedings can be pursued.

39. The Applicant is prepared to take the assignments and allow other creditors to participate pursuant to the normal procedure available under ss.38 BIA.

40. There is threshold merit to the proposed proceedings.

41. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Lifting Stay of Proceedings

42. By order of Madam Justice Romaine granted on June 4, 2018, the Applicant and related Plaintiffs in various QB Actions were stayed to allow the receiver to proceed against the Defendants without interference.

43. To date, the receiver has taken no action against the Defendants in the stayed QB Actions.

44. The receiver does not have sufficient funds to proceed against the said Defendants.

45. It is just and equitable to allow the Applicant and related Plaintiffs to pursue their personal claims against the Defendants in the applicable QB Actions.

46. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Scanned by CamScanner

Amended T5s

47. The Applicant, and the general body of investors of the Ponzi scheme, were issued T5 slips for purposes of recording interest income earned. Of course, the interest payments were false and were simply a repayment of capital pursuant to the operations of the Ponzi scheme.

48. The Applicant, and the general body of investors of Base Finance Ponzi scheme, have been denied the recharacterization of the T5 income ("interest income") as return of capital by the Canada Revenue Agency. Said differently, the Applicant, and the general body of investors of Base Finance have been denied income tax deductions or proper tax treatment of the *"interest"* payment by Canada Revenue Agency.

49. The Canada Revenue Agency has advised those who have been denied applicable tax treatment that Base Finance is to issue amended T5 slips in order to obtain the requisite tax treatment/deductions. Namely, the recharacterization of interest income to return of capital.

50. The T5 slips should be amended to $0 and submitted to the Canada Revenue Agency in order for investors to obtain proper tax treatment of the funds received from the Ponzi scheme.

51. It has been years that the receiver/trustee has been dealing with this nominal issue and nothing has been resolved to assist the general body of investors/creditors who remain highly prejudiced by this.

52. In fact, steps that were taken by Richard Billington regarding this issue were improper thereby causing unnecessary delay and expense to the estate. Furthermore, despite the Applicant seeking clarity as to why the receiver does not simply amend the T5s has fallen on deaf ears and it appears that replacement counsel is also fumbling with this nominal issue without properly advising the general body of investors/creditors of the issue.

53. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Winding Down and Discharging the Receiver

54. Limited steps remain for the receiver to conclude the estate administration. As the applicant understands, the receiver has the following steps:

    A) Opposing Arnold Breikrutz's appeal of the decision of the Honorable Justice Romaine B.C.E. granted in December 2018 in this action. The said appeal will likely not proceed as there are many filing irregularities and Arnold Breikrutz requires leave of the Court of Appeal to proceed with its appeal. Furthermore the appeal is currently struck.

    B) Dealing with the claim on the 69th avenue property in which Arnold Breikrutz currently resides the title of which is encumbered with CLPs for the benefit of the estate. The receiver has acknowledged that it would like to assign this claim.

    C) Dealing with the Claw Back calculation.

Scanned by CamScanner

D) Standard winddown and discharge proceedings such as issuing a final receiver report and passing of the receiver's accounts that the Applicant seeks directed to a taxation.

55. The receiver has not diligently fulfilled the powers entrusted to it under the receivership order or in enforcing the rights of the estate and protecting the interests of the creditors thereof.

56. The receiver has been negligent dissipating the estate by well over **$45million dollars** that will likely result in a class action proceeding although the Applicant has already filed its own separate claim to preserve the limitation period.

57. The receiver's conduct and activities have resulted in a dissipation of the estate and/or adversely affected the interest of creditors thereof as follows: (without limitation):

   a. Failing to facilitate the organization of a creditor group to guide the receiver actions although requested by the Applicant, and other creditors, to do so. As this never occurred, the receiver has been doing whatever it wants without direction from the general body of creditors of the estate which actions have amounted to little, if any, real value to the estate considering the amount expended. I.e. to date the receiver has spent roughly $1,400,000 and no investor has obtained any recovery and it is unlikely that they will receive any recovery.

   b. Failing to provide full and honest information to investors. For example, at the investor meeting conducted on August 3, 2018, counsel for the receiver advised investors that various legal actions were being reviewed for purposes of determining whether they could be pursued, i.e. actions against banks used by Base Finance and the Real Estate Council of Alberta. However, the actions had been reviewed over about 2 years prior to the said investor meeting by the Applicant in cooperation with the receiver and by the time of the investor meeting those claims were statute barred. The receiver, neglected to advise investors of the foregoing and gave them a false perception of reality. Furthermore, in the receiver's 7th report, the receiver claims that it has imperfect financial records to complete the claw back calculation or conduct the claw back proceedings. It was only after the Applicant provided evidence contrary to the receiver position has it now changed it position and is now seeking to complete the analysis. Lastly, in the 8th receiver report paras 37 – 48 are not true statements and mislead investors.

   c. Failing to assign for good and valuable consideration various legal actions such as but not limited to the claim against Robert Smyth which claim dissipated the estate as the receiver missed the claim filing deadline causing it to be statute barred. Although the Applicant, Mike Terrigno, was ready, willing and able to take the assignment for good and valuable consideration.

   d. Failing to properly deal with amending or cancelling the T5s issued to investors by Base Finance. To date, few investors/creditors of the estate have been able to obtain income tax deductions for their losses from the Base Finance Ponzi scheme. After 3 years, and after creditors of Base Finance have strongly requested the receiver to take action as they have been unable to obtain income tax deductions while the said T5 remains effective, the receiver has failed to take appropriate steps in a timely manner. Steps taken by the receiver were improper and did not resolve the thereby causing delays and unnecessary expense to the estate. The issue remains outstanding and investors remain significantly prejudiced.

Scanned by CamScanner

e. Failing to properly conduct legal proceedings. For example, the receiver allowed concurrent actions of Arnold Breikrutz to proceed although the concurrent proceedings were duplications and an abuse of the Court. For example, Arnold Breikrutz concurrently appealed the order of the Honorable Justice Romaine B.C.E. granted on December 2, 2016 and also brought an application to vary the said order. When the appeal was heard, the appeal panel admonished both the receiver's legal counsel and legal counsel for Arnold Breikrutz for allowing concurrent duplicated proceedings to continue in the face of the obvious abuse of process. As a result, the appeal could not proceed and was cancelled at great expense to the estate. Furthermore, Arnold Breikrutz continues to take frivolous appeals of decisions of this Court. The receiver has done nothing to stop his abuse of the court system which abuse has caused significant delay and expense to the estate.

f. Failing to properly oversee legal counsel for the receiver. For example, the receiver advised Mike Terrigno numerous times over many months that it was terminating Richard Billington retainer due to poor services and overbilling. However Richard Billington was replaced with Randal van De Mossaer of Oslers who is conflicted as he was the lawyer for the Terrigno family (interested parties in these proceedings) for many years a fact he conveniently decided not to disclose when interviewed by the receiver.

g. Failing to conduct proper searches to locate estate assets. The only assets realized on by the receiver were the ones found by the Applicant.

h. Failing to conduct questioning of parties suspected as cohorts in the Ponzi scheme such as but not limited to John Manolescu, Susan Way, Susan Brickrutz, Brian Fox, Lyle Hoagaboam, Bonnie Way. Although the receiver said that it intended to conduct the questionings they have not occurred. The receiver has only questioned Arnold Breikrutz once and only for about 2 hours. The receiver did questioned Brian Fox but not in these proceedings. Brian Fox was questioned in separate action that dealt with a foreclosure.

i. Such further and other conduct and activities that the Applicant may advise and this Honorable Court deems fit to consider.

58. Allowing the receivership to continue without constraints would lead to a further dissipation of the estate instead of a preservation of the estate.

59. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Disqualifying Receiver's Legal Counsel

60. Receiver's legal counsel, Randal Van de Mosselaer, has acted for the Terrigno family, including Mike Terrigno for many years while he was employed with Macleod Dixon LLP, as it was then.

61. Randal Van de Mosselaer has confidential information obtained in a solicitor client relationship with the Mike Terrigno and other related interested parties in these proceedings which confidential information relates to matters relevant in these proceedings.

62. Randal Van de Mosselaer, or Oslers LLP, remaining as receiver's counsel will not satisfy the public requirement that not only should there not be an actual conflict but also there must not be an appearance of conflict as enunciated in MacDonald Estate v. Martin, [1990] 3 SCR 1235.

Scanned by CamScanner

63. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Lift Stay - Leave to Pursue Proceedings Against BDO Canada LLP

64. The Applicant has filed a statement of claim naming BDO as a Defendant. It was filed to preserve the limitation period and for no improper purpose. The Applicant has cooperated with the receiver and has advised that Statement of Defence at this time is not required to be filed and no further action will be pursued under the Negligence Claim without notice to the receiver.

65. The Applicant complains that the receiver was grossly negligent resulting in a dissipation of the estate as follows:

    a. Failing to appeal the decision of the Honorable Justice Yamauchi J. that resulted in a loss to the estate of approximately $1,100,000.

    b. Failing to take proceedings against Robert Smyth who redirected ill-gotten funds through his trust account for the use and benefit of Arnold Breitkreutz that resulted in a loss to the estate of approximately $192,000.

    c. Failing to take the fraudulent preference proceedings within the limitation period that resulted in significant loss to the estate in the approximate amount of $45million.

66. The aforesaid impugned actions have not received court approval and should not receive court approval without a full hearing on the merits.

67. There is a factual basis for the proposed claim.

68. The proposed claim discloses a cause of action and are significantly meritorious.

69. Granting leave to lift the stay will not frustrate the completion of the receivership. The Applicant agrees to an informal stand still position to allow the receiver to wind down and discharge.

70. Such further and other grounds as the Applicant may advise and this Honorable Court deems fit to consider.

Costs Against Randal van De Mossaer

71. Richard Billington was removed a receiver's legal counsel as a result of incompetency, negligence and conflict.

72. Replacement receiver's legal counsel, Randal van De Mossaer, was fully aware of this prior to coming on to the file, he understood the delays, expense and additional issues caused by Richard Billington.

73. Yet despite knowing that the hardship caused to the receivership by Richard Billington actions and knowing he was one of the Terrigno family's legal counsel for many years while a partner at macleod Dixon LLP as it was then, Randal van De Mossaer made the contentious decision not to disclose to the receiver the conflict as receiver's legal counsel. As a result, he placed his over interests over the interests of the receivership for the predominant motive to profit at the expense of creditors in light of the fact that the creditors have already been significantly prejudiced by this receivership.

Scanned by CamScanner

74. As a result of the foregoing, Randal van De Mossaer has engaged in serious misconduct by purposely misleading (or omitting to advise) the receiver of his conflict prior to being retained and flagrantly disregarding his duties as court official for the sole purpose to profit at the expense of investors. Such conduct is indecent and worthy of condemnation.

75. Such further and other grounds as the Applicant may advise and this Court deems fit to consider.

Material or evidence to be relied on:

76. Evidence and Reports of the Receiver filed in this Action.

77. Affidavits of Mike Terrigno sworn on January 17, 2019, January 22, 2019.

78. Affidavit of Rocco Terrigno sworn on March 23, 2019

79. Such further and other evidence or materials as the Applicant may advise and this Honourable Court may permit.

Applicable rules:

80. Alberta Rules of Court, Alta Reg. 124/2010, Rules 1.2, 1.4, 10.4(6), and 10.50.
81. Such further and other Rules as the Applicant may advise and this Honorable Court deems fit to consider.

Applicable Acts and regulations:

82. *Business Corporations Act*, RSA 2000, c. B-9, as amended

83. *Judicature Act*, RSA 2000, c J-2, as amended

84. *Limitations Act*, RSA 2000, c L-12

85. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

86. *Fraudulent Preferences Act*, RSA 2000, c F-24

87. Such Acts and regulations as the Applicant may advise and this Honorable Court deems fit to consider.

Any irregularity complained of or objection relied on:

88. None.

How the application is proposed to be heard or considered:

89. In person before the Honourable Madam Justice B.E.C. Romaine on April 2, 2019.

WARNING
If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part

Scanned by CamScanner

in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

Scanned by CamScanner

EXHIBIT 19

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Lewis, David

From: Mike Terrigno <mike@terrigno.ca>
Sent: May 13, 2019 4:15 PM
To: 'Kristine Kirby'; 'rvandemosselaer@osler.com'
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Justice Romaine,

I was reminded by Mr. Van de Mosselaer that paragraphs 6 and 10 of my application filed March 25, 2019 were also withdrawn.

Also to clarify all withdrawn relief only deals with me, in my personal capacity, and does not have anything to do with the corporate Plaintiff's right to seek whatever relief it may wish to seek in this action.

I will be overseas during the June 26, 2019 application. Therefore, I will not be in attendance and Mr. Souster will be attending for the Plaintiffs.

Have a nice summer.

Sincerely yours,
Mike Terrigno [MBA/J.D., REM (Harvard) CICA (tax)]

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the noted recipient herein us unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you cannot use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please notify us immediately by e-mail or telephone and delete the e-mail from any computer. If you or your employer does not consent to internet e-mail messages of this kind, please notify us immediately. All reasonable precautions have been taken to ensure no viruses are present in this e-mail. As the sender cannot accept responsibility for any loss or damage arising from the use of this e-mail or attachments we recommend that you subject these to your virus checking procedures prior to use. The views, opinions, conclusions and other informations expressed in this electronic mail are not given or endorsed by the sender unless otherwise indicated by an authorized representative independent of this message.

From: Mike Terrigno
Sent: Monday, May 13, 2019 11:55 AM
To: Kristine Kirby <Kristine.Kirby@albertacourts.ca>; rvandemosselaer@osler.com
Subject: RE: 1501 11817 - Easy Loan Corporation et al v. Base Mortgage & Investments Ltd. et al

Please see attached.

Sincerely yours,
Mike Terrigno [MBA/J.D., REM (Harvard) CICA (tax)]

Privileged/Confidential information may be contained in this message and may be subject to legal privilege. Access to this e-mail by anyone other than the noted recipient herein us unauthorised. If you are not the intended recipient (or responsible for delivery of the message to such person), you cannot use, copy, distribute or deliver to anyone this message (or any part of its contents) or take any action in reliance on it. In such case, you should destroy this message, and notify us immediately. If you have received this email in error, please

May 13, 2019

Delivered by Email:
kristine.kirby@albertacourts.ca

Alberta Court of Queen's Bench
Calgary Court Centre

Attention: The Honourable B.E.C Romaine

My Lady:

Re: Mike Terrigno et al. v. Base Finance Ltd. et al. Action 1501-11817

I have settled matters with Richard Billington and the receiver. As part of the settlement, I am required to inform that you that I withdraw paragraphs 1, 3, 4, 5, 7, 8, 12, 13 and 14 of my application filed March 25 (copy enclosed for ease of reference).

Respectfully,

Mike Terrigno *[MBA J.D., REM (Harvard) CICA (tax)]*

Email: mike@terrigno.ca

EXHIBIT 20

To the Receiver's Ninth Report to Court
Dated January 17, 2020

Clerk's Stamp:

COURT FILE NUMBER	1501 - 11817
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	EASY LOAN CORPORATION AND MIKE TERRIGNO
RESPONDENTS	BASE MORTGAGE AND INVESTMENTS LTD. AND BASE FINANCE LTD., ARNOLD BREITKREUTZ, SUSAN BREITKREUTZ, SUSAN WAY AND GP ENERGY INC.
DOCUMENT	DISCHARGE CERTIFICATE

DATED January 17, 2020

PREPARED BY BDO CANADA LIMITED

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

OSLER, HOSKIN & HARCOURT LLP

SUITE 2500 TRANSCANADA TOWER

450 - 1st Street SW

Calgary, Alberta T2P 5H1

Lawyers: Randal Van De Mosselaer

Phone Number: 403.260.7060

Fax Number: 403.260.7024

Email Address: rvandemosselaer@osler.com

Pursuant to an Order of the Alberta, Court of Queen's Bench (the "Court") dated October 15, 2015; BDO Canada Limited was appointed Receiver of the Base Finance Ltd. and Base Mortgage & Investments Ltd. ("**BFL**" and "**BMIL**" respectively, or jointly the "**Companies**"). Pursuant to an Order of the Court dated the _____ of _______________, 2020 (the "Discharge Order"), subject to the filing of a Discharge Certificate substantially in the form attached as Exhibit "18" to the Ninth Report to the Court of the Receiver (the "Receiver's Ninth Report"), the Receiver is discharged and relieved from any further obligations, liabilities, responsibilities or duties in its capacity as Receiver of the Companies.

THE RECEIVER HEREBY CERTIFIES THAT:

1. All funds in the Receivership were received and distributed as shown in the Statement of Receipts and Disbursements as set out in Exhibit 1 of our report dated November 30, 2019.
2. All funds under the control of the Receiver as set out in Exhibit 1 of our report dated November 30, 2019, were paid as professional fees.
3. The books and records of the Companies have been put into storage for a period of five (5) year, once the 5 years lapse the records will be destroyed.
4. The Breitkreutz's Appeal has been heard.
5. The Receiver has sent out all required statutory notices to the Creditors and Superintendent of Bankruptcy.
6. The administration of the Receivership proceedings as described in the Receiver's reports to Court has been completed.

DATED at City of Calgary, in the Province of Alberta, this ___ day of _______________, 2020.

BDO CANADA LIMITED, solely in its capacity
As Court Appointed Receiver (as defined in
the Order), and not in its personal Capacity

Per: ______________________________

David Lewis, CA, CPA, CIRP, LIT
Vice-President

EXHIBIT 21

To the Receiver's Ninth Report to Court
Dated January 17, 2020

BDO CANADA LIMITED
IN THE MATTER OF THE RECEIVERSHIP OF
BASE FINANCE LTD. & BASE MORTGAGE & INVESTMENTS LTD.
INVOICE SUMMARY FOR THE PERIOD OF DECEMBER 23, 2013 to June 30, 2019

Date	Invoice #	WIP	Discount	Disbursements	Invoice (Net)	GST	Invoice (Total)
23-Dec-15	88343072	$ 370.00	$ -	$ 61.00	$ 431.00	$ 21.55	$ 452.55
28-Dec-15	88344827	185.00	-	16.50	201.50	10.08	211.58
10-Mar-16	88413467	-	-	70.00	70.00	-	70.00
15-Apr-16	88470918	325.00	-	520.50	845.50	42.28	887.78
30-May-17	88978410	356,619.90	-	699.77	357,319.67	17,865.98	375,185.65
30-May-17	88978411	7,264.35	-	16,756.81	24,021.16	1,201.06	25,222.22
24-Aug-17	89079569	26,083.05	-	-	26,083.05	1,304.15	27,387.20
08-Nov-17	89160404	21,363.75	-	-	21,363.75	1,068.19	22,431.94
08-Dec-17	89186692	12,124.30	-	-	12,124.30	606.22	12,730.52
11-Dec-17	89187346	1,176.90	-	1,968.00	3,144.90	157.25	3,302.15
28-Feb-18	89268698	21,837.40	-	-	21,837.40	1,091.87	22,929.27
13-Apr-18	89332490	9,529.70	-	-	9,529.70	476.49	10,006.19
23-Jul-18	89504839	18,043.05	-	-	18,043.05	902.15	18,945.20
29-Sep-18	89572587	21,281.70	-	64.67	21,346.37	1,067.32	22,413.69
29-Nov-18	89641056	9,054.85	-	-	9,054.85	452.74	9,507.59
Subtotal		505,258.95	-	20,157.25	525,416.20	26,267.31	551,683.51
01-Jan-19	234822	47,722.20	-	109.11	47,831.31	2,391.57	50,222.88
18-Jun-19	271239	100,293.75	(74,522.66)	58.00	25,829.09	1,291.45	27,120.54
31-Aug-19	311108	5,715.00	-	-	5,715.00	285.75	6,000.75
31-Oct-19	359878	11,460.00		-	11,460.00	573.00	12,033.00
15-Dec-19	417130	9,537.50		40.75	9,578.25	478.91	10,057.16
15-Dec-19	417132	1,057.50			1,057.50	52.88	1,110.38
		175,785.95	(74,522.66)	207.86	90,835.40	4,541.77	95,377.17
SUBTOTAL		681,044.90	(74,522.66)	20,365.11	616,251.60	30,809.08	647,060.68
	Cost to Close	10,000.00		-	10,000.00	500.00	10,500.00
TOTAL		$ 691,044.90		$ 20,365.11	$ 626,251.60	$ 31,309.08	$ 657,560.68

OSLER, HOSKIN & HARCOURT LLP
LEGAL COUNSEL IN THE MATTER OF THE RECEIVERSHIP OF BASE FINANCE LTD.
INVOICE SUMMARY FOR THE PERIOD OF NOVEMBER 16, 2018 TO SEPTEMBER 30, 2019

Date	Invoice #	Time	Discount	Disbursements	Invoice (Net)	GST	Invoice (Total)
20-Dec-18	12230053	$ 32,132.50		$ 527.39	$ 32,659.89	$ 1,633.00	$ 34,292.89
22-Jan-19	12241093	43,395.50		1,078.02	44,473.52	2,222.28	46,695.80
15-Feb-19	12250882	68,530.00		4,034.52	72,564.52	3,625.73	76,190.25
20-Mar-19	12260286	39,537.50		702.19	40,239.69	2,011.99	42,251.68
31-May-19	12284376	147,111.00	(19,881.50)	8,290.41	135,519.91	6,776.29	142,296.20
27-Jun-19	12291207	2,190.50	-	17.00	2,207.50	110.38	2,317.88
17-Jul-19	12301218	9,103.50		192.23	9,295.73	9,758.02	19,053.75
21-Aug-19	12311524	3,787.50		10.15	3,797.65	189.89	3,987.54
27-Sep-19	12321804	25,072.50		1.80	25,074.30	1,253.72	26,328.02
29-Oct-19	12331112	17,867.90		12.52	17,880.42	893.40	18,773.82
31-Dec-19	12351110	6,590.50			6,590.50	329.53	6,920.03
SUBTOTAL		395,318.90	(19,881.50)	14,866.23	390,303.63	28,804.23	419,107.86
	Cost to Close	10,000.00		-	10,000.00	500.00	10,500.00
Total		405,318.90	(19,881.50)	14,866.23	400,303.63	29,304.23	429,607.86

FASKEN MARTINEAU DUMOULIN LLP
LEGAL COUNSEL IN THE MATTER OF THE RECEIVERSHIP OF BASE FINANCE LTD.
INVOICE SUMMARY FOR THE PERIOD OF NOVEMBER 16, 2018 TO FEBRUARY 15, 2019

Date	Invoice #	Time	Discount	Disbursements	Invoice (Net)	GST	Invoice (Total)
20-Dec-18	1278327	$ 9,500.00		$ 16.80	$ 9,516.80	$ 475.84	$ 9,992.64
15-Feb-19	1299904	607.50		-	607.50	30.38	637.88
TOTAL		10,107.50	-	16.80	10,124.30	506.22	10,630.52

JACKSON WALKER LLP
LEGAL COUNSEL IN THE MATTER OF THE RECEIVERSHIP OF BASE FINANCE LTD.
INVOICE SUMMARY FOR THE PERIOD TO NOVEMBER 18, 2015

Date	Invoice #	Time	Discount	isbursemen	Invoice (Net)	GST	Invoice (Total)
18-Nov-15	1461154	$2,502.50		$ -	$ 2,502.50	$ -	$ 2,502.50

PEACOCK LINDER HALT & MACK LLP
LEGAL COUNSEL IN THE MATTER OF THE RECEIVERSHIP OF BASE FINANCE LTD.
INVOICE SUMMARY FOR THE PERIOD TO APRIL 5, 2019

Date	Invoice #	Time	Disbursements	Invoice (Net)	GST	Invoice (Total)
05-Apr-19	24602	$ 7,257.50	$ 152.00	$ 7,409.50	$ 370.13	$ 7,779.63