

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990 C. C.43, AS AMENDED**

B E T W E E N:

**B&M HANDELMAN INVESTMENTS LIMITED, FLORDALE HOLDINGS LIMITED,
M. HIMEL HOLDINGS INC., 1530468 ONTARIO LTD., MAXOREN INVESTMENTS,
and SHEILACO INVESTMENTS INC.**

Applicants
(Respondents in Appeal)

- and -

CHRISTINE DROTOS

Respondent

FACTUM OF THE APPLICANTS (RESPONDENTS IN APPEAL)

(Motion before a Judge of the Court of Appeal for Ontario on December 14, 2018 at 10:00 am)

December 10, 2018

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FACTUM OF THE APPLICANTS (RESPONDENTS IN APPEAL)**PART I - OVERVIEW****A. Introduction**

1. The Applicants (Respondents in Appeal) (collectively, the “**Second Mortgagee**”) file this factum in connection with a motion for directions by Rosen Goldberg Inc., the Court-appointed receiver (the “**Receiver**”) of the property municipally known as 4 Birchmount Avenue, in Toronto (the “**Property**”). The Receiver’s motion arises from a notice of appeal filed by Pillar Capital Corporation (“**PCC**”) on November 28, 2018 from an Order of the Honourable Mr. Justice Dunphy (the “**Motion Judge**”) dated November 27, 2018 (the “**Order**”) and a related notice of motion for a stay of the Order pending appeal. Directions are sought on the question of whether PCC has an automatic right to appeal the Order, or whether leave is required.

2. The Second Mortgagee submits that there is no automatic right of appeal from the Order and leave to appeal is required pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act* (the

“*BIA*”). The Second Mortgagee further submits that leave should not be granted because: (a) the proposed appeal is not of general importance to the bankruptcy/insolvency practice or to the administration of justice as a whole; (b) the proposed appeal is not *prima facie* meritorious; and (c) a stay arising from the granting of leave would unduly hinder the progress of these proceedings. Alternatively, if the Order is stayed by PCC’s filing of the notice of appeal, the Second Mortgagee submits that the stay should be cancelled.

B. The Order Appealed From

3. The Order was granted pursuant to a motion by the Receiver for directions to distribute the net proceeds from the sale of the Property.¹ There were competing claims to the funds as between PCC and the Second Mortgagee. On the uncontroverted facts in the documentary record, the Motion Judge found that the first mortgage registered against the Property had been repaid in full on August 15, 2014. He, therefore, held that the transfer of the first mortgage to PCC that was registered almost (9) months later, on May 5, 2015, was a nullity and directed the Receiver to repay the Second Mortgage in full from the net proceeds.²

4. The Second Mortgagee submits that there was nothing ground breaking in the Motion Judge’s decision. The Motion Judge gave extensive consideration of the facts in the paper record before him and applied trite principles of law governing mortgages and assignments.

PART II – FACTS

A. Background

5. The Receiver was appointed by Order of McEwen J. dated April 13, 2018 upon application by the Second Mortgagee.³ The only asset subject to the Receiver’s administration was the Property. The Property was originally owned by the Respondent Christine Drotos (“**Drotos**”). Drotos assigned herself into bankruptcy in May of 2010.⁴

¹ Decision of Justice Dunphy dated November 26, 2018 (“**Reasons of Justice Dunphy**”) at para. 1.

² *Ibid* at para. 68.

³ *Ibid* at para. 3; Order of Justice McEwen dated April 13, 2018, Tab 2A of the Moving Parties’ Motion Record dated August 2, 2018 (“**Moving Parties’ Motion Record**”) at pp. 23-39.

⁴ Reasons of Justice Dunphy, *supra*, at para. 13.

6. At the time of the Receiver's appointment, the Property was subject to three (3) mortgages: (a) a first mortgage of \$1,425,000 in favour Home Trust Company ("**Home Trust**") registered on September 27, 2006 (the "**First Mortgage**"); (b) a second mortgage of \$900,000 in favour of the Second Mortgagee (the "**Second Mortgage**") registered on May 27, 2008; and (c) a third mortgage of \$35,000 in favour of DMS Inc. registered on October 7, 2008 (the ("**Third Mortgage**").⁵

7. A transfer of the First Mortgage from Home Trust to PCC was registered on May 5, 2015.⁶

8. A transfer of the Third Mortgage from DMS Inc. to 2176506 Ontario Inc. was registered on December 2, 2012. A further transfer from 2176506 Ontario Inc. to World Finance Corporation ("**WFC**") was registered on April 27, 2012. A final, partial transfer of the Third Mortgage from WFC to Money Gate Investment Corporation ("**Money Gate**") was registered on December 1, 2017.⁷ Accordingly, both WFC and Money Gate were registered transferees of the Third Mortgage at time of the Receiver's appointment on April 13, 2018.

9. On November 6, 2018, upon application by the Ontario Securities Commission, Grant Thornton was appointed receiver of Money Gate.

B. The Receiver Sells the Property

10. Pursuant to an Approval and Vesting Order dated June 1, 2018, the Receiver was authorized to complete a sale of the Property. The Approval and Vesting Order was made over the objections of PCC and WFC.⁸ PCC and WFC are related entities.

⁵ Reasons of Justice Dunphy, *supra*, at paras. 15-17; First Mortgage, Tab 2K of the Moving Parties' Motion Record at pp. 90-91; Second Mortgage, Tab 2I of the Moving Parties' Motion Record at pp. 82-83; Third Mortgage, Tab 2L of the Moving Parties' Motion Record at p. 93-94.

⁶ Transfer of Charge, Tab 2M of the Moving Parties' Motion Record at p. 96-97.

⁷ Transfers of Charge, Tab 2N of the Moving Parties' Motion Record at p. 99-102.

⁸ Reasons of Justice Dunphy, *supra*, at para. 4; Approval and Vesting Order of Justice Dunphy dated June 1, 2018, Tab 2C of the Moving Parties' Motion Record at pp. 43-52.

11. WFC sought to appeal the Approval and Vesting Order. On June 13, 2018, Paciocco J.A. declared that WFC did not have an appeal as of right and leave to appeal should not be granted.⁹

12. The transaction was completed on June 15, 2018 for a sale price of \$3.45 million, leaving approximately \$2.955 million in net proceeds available for distribution.

13. The amounts claimed under the mortgages against the Property vastly exceeded the proceeds available for distribution. As of June 14, 2018, PCC claimed to be owed \$2,360,003.25 plus legal costs under the First Mortgage.¹⁰ As of June 19, 2018, the amount owing under the Second Mortgage was \$1,135,753.39 plus legal costs. As of May 14, 2018, WFC claimed that \$6,700,916.93 was owing under the Third Mortgage.

C. The Priority Dispute Between PCC and the Second Mortgagee before the Motion Judge

14. The Motion Judge considered the factual history surrounding the First Mortgage prior to its transfer to PCC to be the death knell for PCC.

15. According to the paper record, on four (4) occasions, namely, July 23, 2014, July 25, 2014, August 7, 2014 and August 8, 2014,¹¹ Gowlings, who represented Home Trust in connection with the payout of the First Mortgage, wrote to two (2) lawyers, initially to Rasik Mehta (“**Mehta**”) and subsequently Anita Verma (“**Verma**”), to confirm that upon payment in full of the amount set out in Home Trust’s statement, the First Mortgage would be discharged rather than assigned unless Home Trust received a valid direction from someone with an equity of redemption in the Property, pursuant to s. 2 of the *Mortgages Act*.¹²

16. On August 15, 2014, a letter from Verma was hand delivered to Home Trust enclosing a certified cheque in the amount of \$1,372,368.70. The cheque contained Verma’s file number

⁹ Decision of Justice Paciocco dated June 13, 2018, Tab 2D of the Moving Parties’ Motion Record at pp. 54-71.

¹⁰ Mortgage Statement, Tab 2X of the Moving Parties’ Motion Record at pp. 183.

¹¹ Reasons of Justice Dunphy, *supra*, at paras. 43-46; Correspondence from William Walker and Anita Verma in relation to the payout of Home Trust, Tab 2U of the Moving Parties’ Motion Record at p. 142-146.

¹² S. 2 of the *Mortgages Act* entitles a mortgagee whose mortgage a mortgagor is entitled to redeem to refuse to assign its mortgage to anyone who is not an existing encumbrancer or the mortgagor (in other words to anyone who does not have an existing equity of redemption).

and the word “discharge” on the subject line. The letter was directed to the “Discharge Department” of Home Trust and specifically directed Home Trust to forward a copy of the registered discharge to Verma’s attention and a release of Home Trust’s interest in the mortgagor’s insurance policy. The amount tendered represented the full amount of the indebtedness under the First Mortgage.¹³

17. There was no evidence in the record as to who Mehta or Verma acted for in connection with the payout of Home Trust and neither were examined by PCC as witnesses.¹⁴ Nor was there any documentation in the record or substantive affidavit evidence adduced by PCC to suggest that Verma’s request for a discharge was mistaken or countermanded.¹⁵

18. Moreover, Pillar Capital Corporation was not incorporated in Ontario until October 16, 2014. Another company, also named Pillar Capital Corporation, was incorporated in the Cayman Islands on October 20, 2014.¹⁶ The issue of why two (2) companies with the same name were incorporated in two (2) separate jurisdictions within four (4) days of each other was not satisfactorily explained by PCC’s affiant in cross-examination.¹⁷ Nevertheless, it was incontrovertible that Mehta and Verma could not have represented PCC when Home Trust was paid in full on August 15, 2014 because PCC did not exist.

19. The Motion Judge examined the evidence in the paper record (of which there was a paucity) in the interregnum between August 15, 2014 and the registration of the transfer of the First Mortgage to PCC, almost nine (9) months later on May 5, 2015.¹⁸

20. On November 5, 2014, Ara Missaghi (“**Missaghi**”) forwarded an email to Verma attaching the October 20, 2014 Certificate of Incorporation of Pillar Capital Corporation in the Cayman Islands and instructed Verma to have the First Mortgage assigned to that company.¹⁹

¹³ Reasons of Justice Dunphy, *supra*, at para. 48.

¹⁴ *Ibid* at paras. 42 and 45.

¹⁵ *Ibid* at para. 50.

¹⁶ *Ibid* at para. 56; Certificate of Incorporation, Tab 1N of the Respondent’s Motion Record dated August 14, 2018 (“**Respondent’s Motion Record**”) at p. 81; Certificate of Incorporation of Pillar Capital Corporation (Ontario), Tab 1R of the Respondent’s Motion Record at p. 175.

¹⁷ Transcript of Cross-Examination of Ara Missaghi dated September 14, 2018 (“**Missaghi Transcript**”) at p. 23-26, q. 94-105.

¹⁸ Reasons of Justice Dunphy, *supra*, at para. 61.

¹⁹ Reasons of Justice Dunphy, *supra*, at para. 57; Tab 1C of the Respondent’s Supplementary Motion Record dated November 27, 2018 at p. 286.

21. On November 24, 2014, Verma wrote to Home Trust's clerk Ms. Srel (rather than to Gowlings) advising that she had "handled the payout of the Mortgage Assignment" and that she was now "in the process of preparing the Assignment to a named company". She did not name the company.²⁰

22. On November 27, 2014, Ms. Srel gave Verma the name of another person at Home Trust, Ms. Ibasco, to contact. No further correspondence involving Home Trust between November 27, 2014 and April 10, 2015 was produced by PCC.²¹

23. On April 10, 2015, Verma again wrote to Ms. Srel and, in her absence, was put on to the same Ms. Ibasco that Ms. Srel had originally directed her to. The communication did not raise the question of whether an assignment had ever been agreed upon in August 2014. It was simply premised on the assumption that an assignment had to be documented. Verma insisted on the name of a lawyer to sign off on the transfer on Teraview. She was eventually given the name of a different lawyer. On May 4, 2015, Verma delivered an ultimatum that the assignment had to be registered by the next day or else the matter would be handed to litigation counsel. The transfer was registered the next day.²²

24. On the basis of the foregoing, the Motion Judge was not prepared to infer an agreement to assign the First Mortgage emerging from email correspondence months after the fact involving increasingly aggressive demands made on clerks inside Home Trust – circumventing counsel – resulting in a lawyer apparently agreeing to register a transfer months after the fact under a litigation ultimatum.²³

25. The Motion Judge noted that a debt once discharged cannot be revived by the creditor and assigned to a third party.²⁴ Because it was incontrovertibly clear from record that the indebtedness of Drotos to Home Trust under the First Mortgage was fully paid on August 15, 2014 and no agreement existed at the time to assign the First Mortgage rather than discharge it,

²⁰ Reasons of Justice Dunphy, *supra*, at para. 58; Correspondence between Anita Verma and Chheat Srel ("**Verma Correspondence**"), Tab 1L of the Respondent's Motion Record at pp.63-64.

²¹ Reasons of Justice Dunphy, *supra*, at para. 59; Verma Correspondence, *supra* at p. 62.

²² Reasons of Justice Dunphy, *supra*, at para. 60. Verma Correspondence, *supra* at pp.58-62.

²³ *Ibid* at para. 63.

²⁴ *Ibid* at para. 67.

the Motion Judge held that the May 5, 2015 transfer of the First Mortgage was a nullity as nothing was owing under the First Mortgage at the time of the transfer.²⁵

26. PCC also asserted priority over the Second Mortgage in connection with a Tax Arrears Cancellation Certificate registered against the Property on December 21, 2015 pursuant to s. 345 of the *City of Toronto Act* (the “Act”). The Certificate evidenced that a payment was made on November 30, 2015 of \$307,981.81 by “Pillar Capital Corporation c/o Meridian Law, Professional Corporation” to discharge a tax arrears certificate that was previously registered against the Property.²⁶

27. The Motion Judge noted that only a person entitled to notice under s. 345(1) of the Act or an assignee is entitled to receive notice of the filing of a tax arrears certificate. S. 346(3) of the Act provides that if “the cancellation price is paid by a person entitled to receive notice under subsection 345(1) or an assignee of that person, other than the owner of the land or the spouse of the owner, the person has a lien on the land concerned for the amount paid, or, upon payment of the cancellation amount, to become assignee of the resulting lien”.²⁷

28. When the lien was registered on December 23, 2014, PCC did not appear on title as an assignee of the First Mortgage. Accordingly, it was not entitled to notice under s. 345(1). By November 30, 2015, however, PCC was registered on title as assignee of the First Mortgage. Home Trust was entitled to receive notice under s. 345(1) of the Act when the original certificate was filed in 2014 as it continued to appear on the register as holder of a charge even though the obligation thereunder had been discharged through payment on August 15, 2014. Because the Motion Judge found that PCC was not in fact an assignee, even though the First Mortgage continued to appear on title when notice was required to be given under s. 345(1) of Act, he held that PCC was not entitled to the statutory lien prescribed by s. 346(3).²⁸

²⁵ *Ibid* at para. 68.

²⁶ *Ibid* at para. 74; Cancellation Certificate, Tab 2S of the Moving Parties’ Motion Record at p. 129.

²⁷ Reasons of Justice Dunphy, *supra*, at para. 75-76.

²⁸ *Ibid* at paras. 77-78.

29. Accordingly, the Motion Judge directed the Receiver to pay from the net proceeds of sale of the Property the balance due under the Second Mortgage together with the Second Mortgagee's costs of the receivership proceeding.²⁹

D. PCC Appeals

30. In its notice of appeal, PCC asserts that it has an automatic right of appeal from the Order pursuant to the *Courts of Justice Act* (the "**CJA**"), as the Order is a final order of a Judge of the Superior Court. Although not expressly provided for in its notice of appeal, counsel for PCC has advised that PCC also relies on s. 193(c) of the *BIA* as affording it an automatic right of appeal on the ground that the property involved in the appeal exceeds ten thousand dollars in value. Alternatively, PCC seeks leave to appeal pursuant to s. 193(e) of the *BIA*.³⁰

31. Among the purported errors cited in the notice of appeal, PCC asserts that the Motion Judge erred in failing to consider or apply the doctrine of equitable subrogation, notwithstanding that equitable subrogation was never raised (expressly or impliedly) by PCC before the Motion Judge.³¹

PART III – ISSUES

32. The following issues arise in this motion:

- (a) which appeal regime applies, the *Court of Justice Act* or the *BIA*?
- (c) whether PCC has an automatic right of appeal or leave to appeal is required?
- (d) if leave to appeal is required, whether it should be granted?
- (e) if the Order is automatically stayed, whether the stay should be cancelled?

²⁹ *Ibid* at para. 87.

³⁰ Notice of Appeal of Pillar Capital Corporation (Cayman) dated November 28, 2018 ("**Notice of Appeal**").

³¹ *Ibid*.

PART IV – LAW AND ARGUMENT

A. The Appeal is Governed by the *BIA*

33. It is well settled that appeals from orders made in proceedings instituted under the *BIA* are governed by the appeal regime under the *BIA* and the *Bankruptcy and Insolvency General Rules*, and not by provincial appeal regimes.³² In the case at bar, the Receiver was appointed in a proceeding instituted, *inter alia*, under the *BIA*. Although, the proceeding was also instituted under the *CJA*, to the extent that the appeal regime under the *CJA* conflicts with the *BIA*, the former is inoperative and the latter prevails by virtue of the doctrine of federal paramountcy.³³

34. In *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, the Supreme Court of Canada re-stated the test for identifying an operational conflict between federal and provincial legislation as follows:³⁴

Where the federal statute says “yes” and the provincial statute says “no,” or vice versa, compliance with one statute means a violation of the other statute. It is the archetypal operational conflict. [emphasis added]

35. The *BIA* provides for an automatic right of appeal *only* in the limited circumstances set out in s. 193(a) through (d). In all other cases, leave to appeal is required pursuant to s. 193(e). Moreover, unlike the *CJA* and the *Rules of Civil Procedure*, in which appeals from interlocutory orders of a judge require leave and appeals from final orders of a judge do not, the *BIA* makes no such distinction.³⁵

36. Accordingly, although the Order is clearly a final order (as it authorizes the Receiver to pay the Second Mortgagee in full from the net sale proceeds), which would provide PCC with an automatic right of appeal under the provincial regimes of the *CJA* and the *Rules of Civil Procedure*, the resulting operational conflict with the *BIA*'s limited approach to granting leave

³² *Re Orthoshaf, Inc.*, (1985) 57 C.B.R. (N.S.) 281, para. 3 through 6 (Que. C.A.).

³³ *Husky Oil Operations, Ltd. v. Minister of National Revenue*, 35 C.B.R. (3d) 1, [1995] 3 S.C.R. 453 at paras. 81 and 87.

³⁴ *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44 at para. 68.

³⁵ *Plotnick Brothers Ltd., Re*, 2 C.B.R. (N.S.) 126, [1961] B.R. 523, at paras. 2 and 3.

means that in the case at bar, where compliance with both regimes is impossible, the *BIA* takes precedence.³⁶

B. Leave to Appeal is Required

37. S. 193 of the *BIA* provides:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

...

(e) in any other case by leave of a judge of the Court of Appeal.

38. In *Business Development Bank of Canada v Pine Tree Resorts (“Pine Tree”)*, Blair J.A., in narrowly interpreting s. 193(c) of the *BIA*, reasoned that because the vast majority of bankruptcy claims involve amounts in excess of \$10,000, if the provision were broadly applied to permit any appeal involving a threshold dollar value of \$10,000, it would open the floodgates to appeals in proceedings instituted under the *BIA* and s. 193(e) would be rendered meaningless.³⁷

39. Strathy J.A. noted in *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.* that the adjudication of priority disputes “is the daily fare of judges in bankruptcy proceedings. To provide an appeal as of right from such decisions would negate the court’s gatekeeping function under s. 193(e) and would tie up bankruptcy proceedings in interlocutory appeals over routine issues.”³⁸

40. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, Brown J.A. noted that the requirement to seek leave to appeal pursuant to s. 193(e) in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signaled the need for appeal courts to control bankruptcy proceedings and promote the efficient and expeditious resolution of

³⁶ *Moore, Re*, 2013 ONCA 769 at paras. 59, 60, 68 and 81.

³⁷ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (“*Pine Tree*”), at para 17.

³⁸ *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 at para. 42.

bankruptcies. Brown J.A. explained that initially the *BIA* provided for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, Brown J.A. was of the view that the appeal as of right provisions in the *BIA* should be read harmoniously with the *Companies' Creditors Arrangement Act*, which requires leave for all appeals from orders made under the statute. He noted that reading the s. 193 appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.³⁹

41. Brown J.A. identified from prior case law three types of order which would not qualify for an automatic right of appeal pursuant to s. 193(c): (a) orders that are procedural in nature; (b) orders that do not bring into play the value of the debtor's property; and (c) orders that do not result in a loss. With respect to the latter type of order, Brown J.A. explained that for an order to "result in a loss" in the relevant sense, "the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor."⁴⁰

42. In the case at bar, the Order did not finally determine the economic interests of PCC in the Drotos estate. PCC was never a creditor of Drotos. The paper record showed unequivocally that before PCC came into existence the indebtedness underlying the First Mortgage was fully paid by Verma on behalf of her undisclosed client to Home Trust on August 15, 2014, with the intention and upon the express request that the First Mortgage be discharged. Moreover, PCC failed to lead to any evidence to controvert or place some other gloss on that fact.

43. The registration of the transfer of the First Mortgage to PCC on May 5, 2015 did not overcome the fact that as at August 15, 2014 the mortgage account as between Drotos and Home Trust was nil. In a real sense, therefore, the Order did not result in a loss. PCC was merely the transferee of a mortgage instrument, which at the time of transfer did not secure a debt. Therefore, the Order did not result in a loss to PCC as PCC had nothing to lose when the Property was sold.

³⁹ [2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.](#), 2016 ONCA 225 at paras. 47-50 ("**Bending Lake**").

⁴⁰ *Bending Lake*, *supra*, at paras. 53 and 61, applied in [Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.](#), 2017 ONCA 611 at paras. 22-23.

C. Leave Should Not be Granted

44. In *Pine Tree*, Blair J.A. adopted the following approach with respect to the factors to be considered on an application for leave to appeal under s. 193(e):

Beginning with the overriding proposition that the exercise of granting leave to appeal under Section 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and
- (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.⁴¹

45. Blair, J.A. also noted that an appellate court owes substantial deference to the discretion of commercial court judges charged with the responsibility of supervising insolvency and restructuring proceedings, and absent demonstrable error, will not interfere.⁴²

(a) No Issues of General Importance

46. The decision of the Motion Judge under appeal did not break new ground. On the specific, uncontroverted facts before him, and without PCC raising any argument or adducing any evidence to support a claim of equitable subrogation, the Motion Judge merely applied the trite legal principle applicable to assignments of mortgage that at the time of assignment an assignee takes subject to state of the mortgage account between the original parties.⁴³

(b) No *Prima Facie* Merit

47. The proposed appeal is not *prima facie* meritorious. The Motion Judge's decision to grant the Order was an exercise in judicial discretion and is therefore entitled to deference. Appellate courts will not interfere with such orders, unless there is an error of law, a serious misapprehension of the evidence, the discretion has been exercised on the basis of an erroneous

⁴¹ *Pine Tree*, *supra*, at para. 29, applied in [B&M Handelman Investments Limited v. Drotos](#), 2018 ONCA 581 at para. 32.

⁴² *Ibid* at para. 33 and 35.

⁴³ The principle is enshrined in s. 101(4) of the *Land Titles Act*, R.S.O. 1990, c L.5, which provides: "Every transfer of a charge is subject to the state of account upon the charge between the chargor and the charge."

principle or there was a failure to give any or sufficient weight to relevant considerations. In the case at bar, no such errors were made.

48. On the paper record before him, which was unequivocal insofar as the dealings between Verma and Home Trust were concerned, the Motion Judge found that the First Mortgage was paid in full on August 15, 2014, with the intention that it be discharged, rather than assigned. By virtue thereof, the Motion Judge correctly concluded that when the transfer of the First Mortgage was registered on May 5, 2015, no underlying debt existed. No palpable and overriding error is discernible from those findings.

49. With respect to the Tax Arrears Cancellation Certificate, because the Motion Judge found that PCC was not in fact an assignee of the First Mortgage, even though it continued to appear on title when notice was required to be given under s. 345(1) of Act, he held that PCC was not entitled to the statutory lien prescribed by s. 346(3). Importantly, however, in holding that PCC had no statutory lien in priority to the Second Mortgage, the Motion Judge did not expressly rule out the possibility that PCC could have some other proprietary claim to the surplus proceeds remaining in the hands of the Receiver following the repayment of the Second Mortgage.

50. Finally, the Second Mortgagee submits that on the question of the merits of the appeal, PCC's claim that the Motion Judge erred in failing to consider the doctrine of equitable subrogation is simply an afterthought. PCC did not mount its case before the Motion Judge as a subrogation claim. It should not be permitted to re-litigate its case in this Court on a new footing. In any event, the remedy of equitable subrogation is discretionary, underlied by the principle of fairness in all of the circumstances.⁴⁴ Given Missaghi's conduct, as summarized by the Motion Judge in his Reasons, PCC could not possibly qualify for equitable subrogation.

(c) Undue Delay in Progress of the Receivership Proceeding

51. The progress of this receivership proceeding has been delayed considerably and rendered unduly expensive by the machinations of Missaghi to date. Initially, he caused the sale of the Property to be delayed by approximately 2 weeks as a result of WFC's effort to appeal the

⁴⁴ [L-Jalco Holdings Inc. v. MacPherson](#), 2018 ONCA 488 at para. 10.

Approval and Vesting Order, which Paciocco J.A. dismissed on June 13, 2018. Notwithstanding that the sale of the Property was completed on June 15, 2018, by virtue of Missaghi's insistence that PCC has priority over the Second Mortgage to the lion's share of the net sale proceeds, with exception to an interim distribution to the Second Mortgagee on August 31, 2018, he caused and continues to cause the distribution of the proceeds to be delayed. As a result thereof, interest and costs have been accruing unnecessarily under the Second Mortgage over the past six months and eroding recoveries which would otherwise flow under the Third Mortgage. The delays have not only caused the Second Mortgagee's legal costs to mount, they have also lead to mounting professional fees on the part of the Receiver and its counsel and have prevented the Receiver from obtaining its discharge. The Second Mortgagee respectfully submits that it is high time for this Honourable Court to put an end to further delay.

D. Alternative Relief if the Court Directs that there is an Automatic Stay

52. If this Court decides that the Order is stayed under the *BIA*, then the Second Mortgagee requests that the stay be cancelled pursuant to s. 195 so that the Receiver can proceed with paying the Second Mortgagee in full.

53. S. 195 affords an appellate judge broad discretion in determining whether to cancel a stay.⁴⁵

54. In appropriate circumstances, appeals that are destined to be quashed on the basis that there is no serious issue to be decided on appeal can be stayed.⁴⁶ For the reasons discussed above, the Second Mortgagee submits that the appeal is devoid of merit. The Receiver further submits that the relative prejudice to the parties weighs in favour of cancelling the stay. A stay will result in interest and costs continuing to accrue under the Second Mortgage and will further erode recoveries under the Third Mortgage. It will also prevent the Receiver from obtaining its discharge. Moreover, the ability to seek financial redress from PCC, who according to its own evidence is a Cayman-incorporated company, is remote at best.

⁴⁵ *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637 at para. 5 ("*BDC Venture*").

⁴⁶ *1730960 Ontario Ltd. (Re)*, August 6, 2009, unreported (Ont. C.A. [In Chambers]), applied in *BDC Venture*, *supra*, at para. 16.

PART V – RELIEF REQUESTED

55. The Second Mortgagee respectfully requests an order declaring that there is no automatic right to appeal the Order, that leave to appeal is required, and that leave to appeal should not be granted. Alternatively, the Second Mortgagee requests an order cancelling the stay and directing the Receiver to carry out the Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of December, 2018.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Re Orthoshaf, Inc.*, [1985] R.D.J. 137, 57 C.B.R. (N.S.) 281 (Que. C.A.).
2. *Husky Oil Operations, Ltd. v. Minister of National Revenue*, [1995] 3 SCR 453, 35 C.B.R. (3d) 1.
3. *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44.
4. *Plotnick Brothers Ltd., Re*, [1961] B.R. 523, 2 C.B.R. (N.S.) 126 (Que. Q.B).
5. *Moore, Re*, 2013 ONCA 769.
6. *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282.
7. *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500.
8. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225.
9. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611.
10. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581.
11. *L-Jalco Holdings Inc. v. MacPherson*, 2018 ONCA 488.
12. *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

2. *Mortgages Act, R.S.O. 1990, c. M.40*

Obligation on mortgagee to transfer instead of reconveying

2 (1) Despite any stipulation to the contrary, where a mortgagor is entitled to redeem the mortgagor may require the mortgagee, instead of giving a certificate of payment or reconveying and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs, and the mortgagee is bound to assign and convey accordingly.

Idem

(2) The right of the mortgagor to require an assignment belongs to and is capable of being enforced by each encumbrancer or by the mortgagor, despite any intermediate encumbrance; but a requisition of an encumbrancer prevails over that of the mortgagor, and as between encumbrancers a requisition of a prior encumbrancer prevails over that of a subsequent encumbrancer.

Exception

(3) This section does not apply if the mortgagee is or has been in possession.

3. ***Courts of Justice Act, R.S.O 1990, c. C.43***

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection **(1)** may include such terms as are considered just.

4. ***Land Titles Act, RSO 1990, c L.5***

As between chargor and chargee

(4) Every transfer of a charge is subject to the state of account upon the charge between the chargor and the chargee.

B & M HANDELMAN INVESTMENTS LIMITED et al.
Applicants (Respondents in Appeal)

-and- **CHRISTINE DROTOS**
Respondent

Court File No. CV-18-594590-00CL
Court File No. C66196

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANTS
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