

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*,
R.S.O. 1990, C. C30**

B E T W E E N:

**QUINCY INVESTMENTS LIMITED, 969592 ONSTIO LIMITED,
969593 ONTARIO LIMITED, 3701271 ONTARIO LIMITED,
SASSO AUTO CONSULTING INC.,
DAVID MARK DOUBILET AND GUS STAMATIOU**

Applicants

- and -

**SUNRISE ACQUISITIONS (BOND HEAD) INC.,
AMAL FINANCIAL INC. AND GALAXY HOLDING INC.**

Respondents

FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.
*(Receiver's Discharge Motion returnable December 9, 2020 via Zoom videoconference at
10:30 am)*

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TO: ATTACHED SERVICE LIST

FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.

PART I – OVERVIEW

1. The Receiver files this factum in support of its motion for, *inter alia*, an order authorizing and directing it to distribute the sum of \$805.09 to Sugarcrest Developments Inc. (“**Sugarcrest**”) and approving the Receiver’s disallowance of Sugarcrest’s claim for \$28,250 against the Holdback (hereinafter defined). This Order is being sought in connection with the Receiver’s motion for, *inter alia*, an Order discharging and releasing Rosen Goldberg Inc. (the “**Receiver**”) as receiver of the undertaking, property and assets of the Debtors and from any and all liability as set out in the proposed Order attached to the Receiver’s notice of motion.

PART II – SUMMARY OF FACTS

2. By Order of Justice O’Marra dated July 23, 2019 Rosen Goldberg Inc. was appointed the Receiver over lands and premises registered in the name of Sunrise Acquisitions (Bond Head) Inc. (“**Sunrise**”), beneficially owned by Amal Financial Inc. (“**AFI**”) and Galaxy Holding Inc. (“**GHI**”) (Sunrise, AFI and GHI are collectively referred to as the “**Debtors**”), municipally known as 2875 Highway 27, Bond Head, Ontario (the “**Property**”), and the remaining property, assets and undertakings of the Debtors acquired for and used in relation to the Property.¹

3. The Applicants held the second mortgage over the Property and Sugarcrest held a first mortgage over the Property.²

¹ Appointment Order, **Appendix “A”**, Receiver’s Third Report dated December 3, 2020 (“**Report**”).

² Report at paras 2 and 8.

4. On February 3, 2020, Justice Conway granted an Approval and Vesting Order approving the Receiver's sale of the Property (the "**Transaction**") to Gal Real Four Holdings Ltd. ("**Gal**").³

5. The Transaction was contemplated to be a partial credit bid on the part of the Applicants under the second mortgage whereby, on closing, prior ranking claims, including the first mortgage held by Sugarcrest, would be paid in cash, and the balance of the purchase price would be satisfied, without physical circulation funds, by the partial reduction of the indebtedness owing under the second mortgage.⁴

6. The Applicants requested a number of extensions of the closing date that was originally scheduled for February 22, 2020. As Sugarcrest was unwilling to consent to the payment of the first mortgage being delayed, on February 28, 2020, the Applicants paid Sugarcrest the sum of \$8,178,325.38 as a protective disbursement under the second mortgage.⁵

7. A dispute arose between the Applicants and Sugarcrest over \$29,055.09 in relation to the administrative fee claimed by Sugarcrest under the first mortgage, in the amount of \$28,250.00 and 3 days of interest, totalling \$805.09, which the Receiver is holding in escrow from the proceeds of sale (the "**Holdback**"). Subject to the dispute over the Holdback, the first mortgage has been paid out in full. The Transaction was ultimately completed on May 12, 2020.⁶

³ Report at para 6.

⁴ Report at para 8.

⁵ Report at para 9.

⁶ Report at paras 10-11 and 20.

8. In response to the Receiver's request for substantiation of the administration fee claimed by Sugarcrest, it received an email from Sugarcrest's counsel on February 21, 2020 and a summary invoice from Sugarcrest for \$25,000 plus HST.⁷

9. The invoice does not substantiate how the \$25,000 fee administration is calculated. The email from Sugarcrest's counsel purports to suggest that the standard charge terms under the first mortgage provide for the payment of administration fees.⁸

10. The Receiver reviewed the first mortgage.⁹ On its face the first mortgage is silent with respect to payment of administration fees. The Receiver also reviewed standard charge terms 200033 incorporated by reference into the first mortgage.¹⁰ The standard charge terms make no reference to administration fees.

11. In view of Sugarcrest's failure to substantiate the basis for its claim for an administration fee, the Receiver recommends that the \$25,000 plus HST component of the claim by Sugarcrest against the Holdback be disallowed.¹¹

12. With respect to Sugarcrest's claim for three days of interest totalling \$805.09, the Receiver does not consider the claim to be sufficiently substantial to warrant consideration and recommends that it be paid to Sugarcrest.¹²

⁷ Email from Sugarcrest's counsel attached summary invoice, **Appendix "I"**, Report.

⁸ Report at para 22.

⁹ Sugarcrest's first mortgage, **Appendix "J"**, Report.

¹⁰ Standard charge terms 200033, **Appendix "K"**, Report.

¹¹ Report at para 24.

¹² Report at para 25.

PART III – ISSUE

13. The central issue on this motion is whether the Receiver's disallowance of Sugarcrest's claim against the Holdback should be approved.

PART IV – LAW AND ARGUMENT

14. The Receiver submits that Sugarcrest's claim for \$28,250 as an administrative fee under the first mortgage against the Holdback should be disallowed on two bases:

- (a) There is no contractual entitlement to an administrative fee under the first mortgage or in standard charge terms 200033; and
- (b) Even if Sugarcrest had a contractual entitlement to the administrative fee, the collection of such a fee is contrary to s. 8 of the *Interest Act* because it has failed to adduce any evidence that the administrative fee reflects a real cost legitimately incurred by Sugarcrest in the recovery of the debt, in the form of actual administrative costs or otherwise.¹³

15. Section 8 of the *Interest Act* provides:

No fine, etc., allowed on payments in arrears

8 (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

Interest on arrears

(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

¹³ [*P.A.R.C.E.L. Inc. v. Acquaviva*](#), 2015 ONCA 331 at para 96.

16. In *P.A.R.C.E.L. Inc. v. Acquaviva* (“*Acquaviva*”), the Court of Appeal for Ontario addressed the issue of whether late payment charges and default fees offend s. 8 of the *Interest Act*:

[93] The Mortgage provides that the respondents are entitled to a late charge of \$10 per day in the event of their late receipt of monthly payments due under the Mortgage. It also provides for the payment of a \$300 “Missed [P]ayment Fee” if payments under the Mortgage are missed or late or returned for payment. The appellants submit that the Late Payment Charges and the Default Fees awarded by the motion judge, which are based on these provisions of the Mortgage, constitute “fine[s]” or “penalt[ies]” prohibited under s. 8 of the *Interest Act*.

[94] I agree.

[95] The respondents point to no evidence on the record before this court demonstrating that they incurred any actual losses as a result of late or missed payments under the Mortgage, apart from the amount of the non-payment itself. This is not a case where it is alleged that payments made by or on behalf of Parcel under the Mortgage were returned “NSF” or otherwise rejected for payment, giving rise to administrative costs for the respondents.

[96] In the absence of evidence that the charges in question reflect real costs legitimately incurred by the respondents for the recovery of the debt, in the form of actual administrative costs or otherwise, the only reason for the charges was to impose an additional penalty or fine, apart from the interest otherwise payable under the Mortgage, thereby increasing the burden on the appellants beyond the rate of interest agreed upon in the Mortgage [emphasis added].

17. In *Lee v. He*, a mortgagee brought an action against the mortgagors for, *inter alia*, for recovery of a \$21,000 mortgage administration fee charged on account of purported litigation and enforcement services and property management fees totalling \$16,950. Boswell J. dismissed the mortgagee’s claim for those amounts, citing *Acquaviva*:

53 I have no doubt that Mr. Lee spent time on the collection of this mortgage that went into default. His time is worth something. But his evidence is neither credible nor reliable on what his time and costs actually were. I find his claims to be inflated, wholly unsupported and, frankly, an attempt to deceive the court. I reject his evidence about these costs entirely. Without a reliable basis for concluding what his reasonable costs actually were, I am in a position where I am unable to award anything for administrative costs.

...

66 The Court of Appeal made it very clear, in *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331 (Ont. C.A.) , "that in the absence of evidence that the charges in question reflect real costs legitimately incurred by the [mortgagee] in the recovery of the debt, in the form of actual administrative costs or otherwise," then the costs are nothing more than an additional penalty or fine, imposed contrary to s. 8 of the Interest Act and are not recoverable.¹⁴

18. In the case at bar, Sugarcrest has similarly failed to adduce any evidence to demonstrate that its claim for a \$25,000 administrative fee plus HST was legitimately incurred in connection with the recovery of debt. The extent of Sugarcrest's evidence to substantiate its claim for an administration fee as a legitimate expense incurred to recover its debt is as follows:

INVOICE 20200210		FEBRUARY 10, 2020	
BILL TO		INSTRUCTIONS	
SUNRISE ACQUISITIONS (BOND HEAD) INC.		Due on February 22, 2020	
QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
1	Administration Fee	25,000	25,000.00
	Re: Mortgage default/Receivership		
	- Review the application record and providing instructions		
	- Reporting to individual investors of the lender		
	- Review receivership proceedings		
	- Determining the amounts owed		

¹⁴ *Lee v. He*, 2018 ONSC 5932 at paras 53 and 66.

19. The Receiver therefore submits that Sugarcrest's claim against the Holdback for \$25,000 plus HST should be disallowed.

PART V - ORDER REQUESTED

20. The Receiver respectfully requests its motion be granted and an Order issued disallowing Sugarcrest's claim for \$28,250 against the Holdback.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2020.

per:



David P. Preger

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SCHEDULE A

1. [P.A.R.C.E.L. Inc. v. Acquaviva](#), 2015 ONCA 331
2. [Lee v. He](#), 2018 ONSC 5932

**SCHEDULE “B”
RELEVANT STATUTES**

Interest Act, RSC, 1985, c. I-15

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(2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

QUINCY INVESTMENTS LIMITED et al.
Applicants

-and-

SUNRISE ACQUISITIONS (BOND HEAD) INC. et al.
Respondents

Court File No. CV-19-622161-00CL

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PROCEEDING COMMENCED AT
TORONTO

FACTUM OF ROSEN GOLDBERG INC.

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