

COURT OF APPEAL FOR ONTARIO

CITATION: Buduchnist Credit Union Limited v. 2321197 Ontario Inc., 2024
ONCA 190
DATE: 20240314
DOCKET: C70898

Roberts, Trotter and Sossin JJ.A.

BETWEEN

Buduchnist Credit Union Limited

Applicant (Respondent/
Appellant by way of cross-appeal)

and

2321197 Ontario Inc., Carlo Demaria, Sandra Demaria,
2321198 Ontario Inc., Sasi Mach Limited, Vicar Homes Ltd. and
Trade Capital Finance Corp.*

Respondents (Appellant/
Respondent by way of cross-appeal*)

Peter Carey, Christopher Lee and Kiren Purba, for the appellant/respondent by
way of cross-appeal

Barbara Grossman and Sara-Ann Wilson, for the respondent/appellant by way of
cross-appeal

Heard: June 12, 2023

On appeal from the order of Justice Michael A. Penny of the Superior Court of
Justice, dated June 17, 2022, with reasons reported at 2022 ONSC 3414.

ENDORSEMENT

[1] Further to our January 26, 2024 disposition of the appeal, we have received and reviewed the parties' written costs submissions with respect to the appeal, the cross-appeal and the motion below.

[2] On its own initiative, Buduchnist Credit Union Limited ("BCU") included in its costs submissions suggestions for minor revisions to our January 26, 2024 reasons. While BCU should have made this request in the form of a motion rather than including it in its costs submissions, as the suggested revisions that we propose to adopt are minor and do not affect the outcome of the appeal, cross-appeal or the costs disposition, and as we permitted Trade Capital Finance Corp. ("Trade Capital") to respond, we shall determine BCU's request.

Costs

[3] The principal focus of the appeal, cross-appeal and the motion below was the issue of whether BCU had breached the *Mareva* Order and, if so, the consequences flowing from that breach; by its cross-appeal, BCU challenged the motion judge's findings of breach and loss of its status and priority as secured creditor. Trade Capital was successful on the issue of BCU's breach of the *Mareva* Order here and below. It prevailed on appeal with respect to the ambit of the consequences that flowed from that breach, specifically, that because of its breach, not only did BCU lose its priority as a secured creditor as the motion judge determined, but it could also not immediately enforce its judgment and was

required to enforce *pari passu* with Trade Capital in the event the latter obtains judgment.

[4] Much less time was taken up by the parties on the appeal and the motion below with respect to the question of whether the Woodland Property advances were made contrary to the *Mareva* Order. Moreover, Trade Capital reframed its submissions on appeal to specify that the time period in issue with respect to the alleged repayment of the pre-*Mareva* Order advances was July 2015 rather than December 2015/January 2016. Although the evidentiary record was before the motion judge, Trade Capital's submissions were focussed on the December 2015/January 2016 time period and not on the July 2015 time period. As a result, we declined to determine this issue and remitted it to the Superior Court of Justice for adjudication.

[5] Trade Capital achieved substantial success on the appeal and cross-appeal. As a result, it is entitled to its costs from BCU in the amount of \$83,736.97.

[6] With respect to the motion, we note that the motion judge ordered that there be no order as to costs because of the mixed results. The parties agreed that, if Trade Capital were successful on the motion, it would receive partial indemnity costs of \$95,726.42. This was based on complete success. Given Trade Capital's substantial success on the breach and remedy issues on the appeal and cross-

appeal, we conclude that it is entitled to its costs of the motion with respect to those issues from BCU. We fix those costs in the all-inclusive amount of \$80,000.

[7] With respect to the motion costs related to the issue remitted to the Superior Court of Justice, we order that those costs be fixed in the amount of \$15,000 and be to the successful party in the cause of that issue.

Revisions

[8] In its costs submissions, BCU submits that there are factual errors in this court's January 26, 2024 reasons respecting the appeal and cross-appeal, that this court "may wish to correct with edits".

[9] Trade Capital consents to the first proposed revision. It concerns the timing of the consent and receivership proceedings referenced in our reasons as part of the overall narrative. Nothing turns on this. Accordingly, we amend paras. 29 and 30 of our January 26, 2024 reasons in tracked changes as follows:

[29] Following receipt of the *Mareva* Order, BCU made monetary advances to Mr. De Maria and his related corporations on the Puccini, Woodland, and Elm Grove mortgages. Though the Puccini mortgage and the second Woodland mortgage pre-dated the *Mareva* Order, further advances were made under these mortgages by BCU after the *Mareva* Order was put into place. The mortgage on the Elm Grove Property was entered into, with advances made, after BCU's receipt of the *Mareva* Order. All these mortgages went into default. ~~BCU commenced an action and obtained judgment against Mr. De Maria and his related companies with the latter's consent.~~

[30] ~~BCU then sought and obtained the appointment of a receiver over the mortgaged properties owned by Mr. De Maria and his related corporations. BCU sought and obtained the appointment of a receiver and obtained judgment against Mr. De Maria and his related companies with the latter's consent.~~ The Receiver sold the properties and BCU moved for an order directing the Receiver to distribute to it the net proceeds of sale after payment of the Receiver's fees and expenses.

[10] Next, BCU points to footnote 6, at page 28 of our January 26, 2024 reasons and argues that the reference to the motion judge's finding that cheques were deposited in The Cash House account should be to the CHATS account. We are not persuaded that any change need be made.

[11] First, BCU did not pursue this issue in oral submissions, and it is of no consequence to the result. In any event, there is no error to correct. As part of the narrative, we stated that the motion judge made this finding, which is correct. Importantly, the motion judge's finding reflects the earlier finding of Mackenzie J., at para. 47 of his January 21, 2016 decision (upheld by this court: *Trade Capital Finance Corp. v. Cook*, 2017 ONCA 281), to which the motion judge referred in para. 52 of his reasons (and to which we make brief reference in para. 25 of our January 26, 2024 reasons), that The Cash House, 2454904 Ontario Inc. ("245")¹ and Mr. Khan intentionally breached the *Mareva* Order and that they were

¹ BCU refers to "CHATS" as being the registered trade name of 245.

operating The Cash House through account(s) held by 245 in breach of the *Mareva* Order, as follows:

I find Cash House and Mr. Khan have intentionally operated the business of Cash House on an ongoing basis since the inception of the *Mareva* Order on May 5, 2015 utilizing the bank account(s) of 245. As noted above, Mr. Khan as the sole officer and director of 245 exercised control over 245 in respect of Cash House's banking needs, resulting in 245 facilitating, aiding and abetting Cash House's business and assets, in contravention of the prohibitions in the *Mareva* Order.

[12] As the motion judge also noted in para. 53 of his reasons, this court held at para. 27 of its reasons upholding Mackenzie J.'s January 21, 2016 order that:

A review of the 245 account statements provided revealed there were significant sums deposited and paid out of that account commencing in March 2015 and continuing well after the *Mareva* Order was issued. It appears that any business that Cash House was conducting, including the collection of its receivables, was occurring from 245's account. [Mackenzie J.] made no error in finding that the 245 account was "directly or indirectly" an asset of Cash House. The use of this asset constituted a breach of the *Mareva* Order, and [Mackenzie J.] made no error in so concluding.

[13] Third, BCU states that the source of the evidence that the Vicar Homes account was never paid down in para. 84 of our reasons comes from the June 18, 2021 affidavit sworn by Ms. Prociuk and not her cross-examination. We disagree. While Ms. Prociuk does indicate in her affidavit that the monies were still owing, she also makes the statement that the account was not paid down in her cross-examination. While no changes are strictly necessary, for completeness, we

amend para. 84 to remove the reference to the cross-examination as the only source of Ms. Prociuk's evidence, in tracked changes as follows:

[84] BCU contends that the instances of positive balance in July 2015 were due to accounting errors and corrections, but BCU adduced no evidence in support of this contention. The only evidence that monies were still owing ~~is~~ are the bald statements ~~from the cross examination of~~ BCU's President and Chief Executive Officer, Oksana Prociuk, that the account was never paid down.

[14] Finally, with respect to para. 85 of our January 26, 2024 reasons, BCU appears to take issue with our reference to the motion judge's January 17, 2019 endorsement in which he addressed dishonoured cheques deposited into a DYKI account, which it says are different from the dishonoured cheques payable by DYKI and deposited into the CHATS account in December 2015 and January 2016. However, BCU agrees that the referenced principle is the same, namely, that dishonoured cheques were the reason for the brief zero balance in December 2015/January 2016, which was the point of our reference. As a result, we are not persuaded that there is any error requiring correction.

[15] Nevertheless, as there appears to be some confusion about the meaning of para. 85, we amend it for clarification in tracked changes as follows:

[85] The issue of the December 2015 and January 2016 transfers was addressed ~~earlier in the proceedings by the motion judge. This is reflected in the motion judge's January 17, 2019 endorsement on BCU's motion for the appointment of a receiver over Mr. De Maria's properties.~~ In his January 17, 2019 endorsement on BCU's

application for the appointment of a receiver over Mr. De Maria's properties, the motion judge concluded that the transfer of monies to reduce the Vicar Homes line of credit "was really nothing more than an accounting error on the part of BCU" and "[h]ad it waited for the [dishonoured] cheques to clear, no funds would have been transferred and there would never have been a credit of \$800,000 to the Vicar account." He ~~was referring to~~ referenced this past finding in the context of the transfers that occurred in December 2015 and January 2016 and the dishonoured cheques that had been deposited to the DYKI account by Mr. De Maria.

Disposition

[16] We order that BCU pay Trade Capital its costs in the amount of \$163,736.97.

[17] We amend paras. 29, 30, 84 and 85 of our reasons dated January 26, 2024 in the manner noted above.

"L.B. Roberts J.A."
"Gary Trotter J.A."
"L. Sossin J.A."