CITATION: Continental Bank of Canada and Sprott Continental Holdings Ltd. v. Continental Currency Exchange Canada Inc., 2024 ONSC 5287
COURT FILE NO.: CV-16-0011306-00CL
CV-10011661-00CL
DATE: 20240924

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SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: CONTINENTAL BANK OF CANADA and SPROTT CONTINENTAL HOLDINGS LTD., Plaintiffs

AND:

CONTINENTAL CURRENCY EXCHANGE CANADA INC., Defendant

AND BETWEEN:

CONTINENTAL CURRENCY EXCHANGE CANADA INC., SCOTT PENFOUND, TRACIE PENFOUND, KYLE PENFOUND, KOURTNEY PENFOUND, MADISON PENFOUND, ANGELA PENFOUND and TRACIE & COMPANY LIMITED, Plaintiffs

AND:

ERIC SPROTT, SPROTT INC., SPROTT CONTINENTAL HOLDINGS LTD., CONTINENTAL BANK OF CANADA, SHARON RANSON, JOHN TEOLIS, JIM RODDY, LARRY TAYLOR, JOHN JASON, JOHN LAHEY and PHIL WILSON, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Paul J. Pape and Mitchell McGowan*, for Continental Currency Exchange Canada Inc., Scott Penfound, Tracie Penfound, Kyle Penfound, Kourtney Penfound, Madison Penfound, Angela Penfound, and Tracie & Company Limited, Counsel,

Paul Le Vay, Samuel M. Robinson and Edward Marrocco, for Eric Sprott, Sprott Inc., Sprott Continental Holdings Ltd. and Continental Bank of Canada

HEARD: June 7, 2024

ENDORSEMENT

Introduction

[1] This motion is brought in two consolidated actions.

[2] One action, the "Sprott action", was commenced on March 3, 2016 by Continental Bank of Canada and Sprott Continental Holdings Ltd. against Continental Currency Exchange Canada Inc. ("CCEC"). CCEC has counterclaimed in this action.

[3] The other action, the "Penfound action", was commenced on January 11, 2017 by CCEC, Scott Penfound, his wife and four children, and Tracie & Company Limited, a company incorporated to hold the shares of Scott Penfound and his family members in Continental Bank of Canada. These parties are referred to as the "Penfound Parties".

[4] The defendants in the Penfound action are, among others, Eric Sprott, Sprott Inc., Sprott Continental Holdings Ltd. and Continental Bank of Canada. These parties are referred to as the "Sprott Parties".

[5] The Sprott action and the Penfound action were consolidated by order dated October 3, 2017.

[6] The moving parties on this motion are the Penfound Parties. The responding parties are the Sprott Parties.

[7] By order made on January 28, 2022, the claims in the consolidated proceeding by the Penfound Parties were permanently stayed. It was held that the Penfound Parties had obtained access to privileged documents belonging to the Sprott Parties, the Penfound Parties had not rebutted the presumption of prejudice, and a permanent stay of the claims of the Penfound Parties in the consolidated proceeding was, in the circumstances, the only appropriate remedy.

[8] On January 27, 2023, an appeal by the Penfound Parties to the Court of Appeal for Ontario from this order was dismissed. An application by the Penfound Parties for leave to appeal to the Supreme Court of Canada was dismissed on August 31, 2023.

[9] The Penfound Parties bring this motion for an order:

a. appointing F. Paul Morrison as receiver and manager of the claims of the Penfound Parties in the Penfound action and the counterclaim of CCEC in the Sprott action on terms set out in the draft order appended to the Notice of Motion; and

b. lifting the permanent stay of these claims and counterclaim in accordance with the draft order.

[10] For the following reasons, the motion by the Penfound Parties is dismissed.

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Procedural background

[11] The procedural background to the motion that resulted in a permanent stay of the claims of the Penfound Parties in the consolidated action and the appeal proceedings is set out in those decisions. See *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 ONSC 647 and *Continental Currency Exchange Canada Inc. v. Sprott*, 2023 ONCA 61.

Analysis

[12] The issue on this motion is whether this Court should lift the permanent stay of the Penfound Parties' claims and counterclaim in the consolidated action and appoint a receiver and manager over these claims.

[13] The Penfound Parties move to appoint F. Paul Morrison as receiver and manager of the Penfound Parties' litigation claims and counterclaims. The proposed order requested by the Penfound Parties provides that the receiver and manager would independently represent the litigation interests of the Penfound Parties. The receiver and manager would receive the claims and counterclaims of the Penfound Parties and prosecute these claims and counterclaims with full discretion. Under the proposed order, the Penfound Parties would be prohibited from contacting, communicating with, or interfering with the receiver and manager without leave of the court unless expressly provided for in the proposed order.

[14] The proposed order provides that all productions be delivered to an independent third party to remove all privileged materials. Subject to consultation with the Sprott Parties, and upon approval from the court that all privileged communications have been removed, the receiver and manager would be granted access to the productions to proceed with his litigation mandate. Under the proposed order, the Penfound Parties are to pay the fees of the third party and secure the costs of litigating the consolidated action.

[15] The Penfound Parties submit that appointing a receiver and manager on these terms materially changes the circumstances of this case such that it is unjust to continue the stay. They submit that the presumed prejudice to the respondents is rebutted and trial fairness is restored. They submit that an objective observer would be confident that no use of confidential information would occur. The Penfound Parties submit that this Court should exercise its inherent jurisdiction to lift the stay because in these materially changed circumstances, it would not be an abuse of process for the action to continue. They submit that to leave the stay in place would punish the Penfound Parties for no good reason and permanently foreclose a final resolution of their claims and counterclaim on the merits without justification.

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Would the appointment of a litigation receiver and manager qualify as a change in circumstances?

[16] The Penfound Parties submit that the court has inherent jurisdiction to lift a stay where circumstances later develop that make it unjust to continue the stay.

[17] In support of this submission, the Penfound Parties cite *Micevic v. Johnson and Johnson*, 2019 ONSC 665 where, at paras. 39-40, Morgan J. held:

> Of course, even a permanent stay can be lifted on order of the court granting it. As Cox J. of the Supreme Court of South Australia has put it: “A stay may mean forever, but not forever no matter what”. *Director of Public Prosecutions v. Polyukhovich* (No. 2), No. S 4067 (Sup. Ct. S. Aus.), ruling on new evidence, 3 March 1992.
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> The difference is that with a permanent stay the onus is on the Plaintiff to lift the stay in the event circumstances make that appropriate, rather than on [the Defendant] to seek an outright dismissal after a temporary stay expires.

[18] I accept that this court has the inherent jurisdiction to lift a stay of proceedings imposed by court order.

[19] The Penfound Parties submit that the appointment of Mr. Morrison as receiver and manager of the litigation claims of the Penfound Parties on the terms of the proposed order would materially change the circumstances of this case such that, in the materially changed circumstances, it would no longer be an abuse of process for the Penfound Parties’ claims to continue. They submit that the stay of the claims and counterclaims should be lifted to allow the receiver and manager to proceed with the litigation in detoxified form.

[20] The Penfound Parties cite several cases which I review to determine whether they support these submissions of the Penfound Parties.

[21] The first case upon which the Penfound parties rely is *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62. In *Boehringer*, the Saskatchewan Court of Appeal addressed whether an action commenced in Saskatchewan under its class actions statute should be stayed in light of a parallel proceeding involving the same parties and the same subject matter in Ontario. The Court of Appeal, at para. 54, held that the Saskatchewan action should be stayed on the basis of abuse of process, but the stay should not be unconditional. The Court of Appeal held that there would be no rationale for the stay to remain in place if the plaintiffs discontinue the Ontario action. The Court of Appeal also held that it is appropriate that the plaintiffs be entitled to apply to the court to have the stay lifted if a class proceeding is certified in Ontario and no provision is made for it to include Saskatchewan residents because in that situation, as well, there will be no reason to hold the Saskatchewan proceedings in abeyance.

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[22] The Penfound Parties also cite *Tresoro Mining Corporation v. Mercer Gold Corp*. (B.C.), 2018 BCCA 160. In *Tresoro*, on application by the corporate defendant to a counterclaim, the application judge stayed the issues raised in the counterclaim pending arbitration of issues relating to the agreement at issue, finding that the issues between the original parties to the litigation and the added personal defendants by way of counterclaim were "inseparable". The arbitration proceedings stalled and eventually they were terminated when the plaintiff by counterclaim failed to pay its share of the arbitration fees. During this period, the corporate defendant to the counterclaim became insolvent, leaving only the personal defendants to the amended counterclaim in the litigation. The plaintiff by counterclaim moved to lift the stay order. The Court of Appeal set aside the application judge's order refusing to lift the stay order, holding that the individual parties were not parties to the agreement that was subject to arbitration and were not applicants for the stay order. The Court of Appeal, at para. 45, held that the application judge, in refusing to lift the stay order in the face of material changes to the circumstances in which it was granted, effectively gave the individual defendants to the counterclaim (i) the benefit of the arbitration clause in the agreement to which they were not parties, and (ii) a permanent stay order of the claims against them when the arbitration tribunal could not have granted them that or any remedy as they were not parties to the agreement. The Court of Appeal allowed the appeal and granted the application to lift the stay order.

[23] In *Kaynes v. BP P.L.C*., 2016 ONCA 601, the moving party sought an order lifting the stay of proceedings granted by the Court of Appeal that was based on the Court's conclusion that Ontario should decline to exercise jurisdiction over a claim relating to securities purchased on foreign stock exchanges on the ground of *foreign non conveniens*. The moving party argued that the stay should be lifted to allow him to proceed with a proposed class action for certain claims on account of post-stay developments, namely, facts surrounding the moving party's unsuccessful attempt to pursue a class action for the specified claims in the U.S. District Court. The Court of Appeal, at para. 11, noted that a stay granted on grounds of *forum non conveniens* is not necessarily permanent and the court has inherent jurisdiction to lift the stay where circumstances develop that make it unjust to continue the stay. The Court of Appeal, at para. 16, held that the developments involving the position taken by the defendant in the U.S. litigation (in comparison with its position before the Court of Appeal which led to the stay order) and the decision of the U.S. District Court dismissing the plaintiff's class action, taken as a whole, were sufficient to justify lifting the stay.

[24] In *Quadrangle Holdings Ltd. v. Coady*, 2013 NSSC 416, aff'd 2015 NSCA 13, a judge of the Supreme Court of Nova Scotia declined to exercise jurisdiction over the plaintiff's claim in favour of Alberta on the basis of *forum non conveniens*. The plaintiff sued in Alberta and the defendant obtained summary judgment on the basis of the limitations statute in Alberta that applied to claims before the Alberta courts even if the substantive law of another place applies. The plaintiff commenced a second action in Nova Scotia, asked that the stay of the first action be terminated,

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and sought to consolidate its first action with the second one. The Supreme Court of Nova Scotia, at paras. 49 and 52, held that the case is not one of proposed relitigation and that the plaintiff moves to lift the stay on the ground that newly discovered circumstances make it unjust that the stay continue. The Court ordered that the stay of proceedings is terminated.

[25] The Penfound Parties also rely on rule 59.06(2) of the *Rules of Civil Procedure* which provides that a party who seeks to have an order set aside or varied on the ground of facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed.

[26] The cases upon which the Penfound Parties rely where a stay order was set aside are based on changes in circumstances that arose after the stay order was made and involved changes that were external to the party seeking to lift the stay. None of the cases cited by the Penfound Parties involved a change in circumstances that followed from new relief sought and obtained from the court by the party seeking to have the stay lifted, after the stay was imposed.

[27] Rule 59.06(2) applies where there is evidence of facts arising or discovered after an order was made. The change in circumstances upon which the Penfound Parties rely on this motion is that they have now moved for an order appointing a receiver and manager of their litigation claims on terms that, if granted, will, they submit, detoxify their claims. The evidentiary record upon which this motion is brought does not differ from the evidentiary record that was before this Court, and before the Court of Appeal, when the permanent stay order was made. The Penfound Parties have not shown that there is evidence of facts arising or discovered after the stay order was made that justifies lifting the stay order.

[28] I conclude that the Penfound Parties have not shown that there are any new circumstances that arose after the decision of the Court of Appeal that would make it unjust to continue the stay of proceedings. On this motion, the Penfound Parties advance a new argument in opposition to the original stay motion that was available to them on the same evidentiary record when the original motion was heard and decided and when the appeal was argued. This new argument is not a change in the circumstances that existed when the original stay motion was heard.

[29] The Penfound Parties submit that the onus on the original stay motion of raising the possibility of a litigation receiver as an appropriate remedy rested with the Sprott Parties. I address this submission below when I address the application of the doctrines of abuse of process and issue estoppel.

Are the Penfound Parties precluded from bringing this motion by the doctrines of abuse of process or issue estoppel?

[30] The Sprott Parties submit that the motion by the Penfound Parties should be dismissed as an abuse of process or based on the doctrine of issue estoppel.

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[31] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at paras. 51-52, the Supreme Court of Canada explained the proper focus of the doctrine of abuse of process:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, that can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
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> In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original result; or (3) when fairness dictates that the original result cannot be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, supra, at para. 80.

[32] In *C.U.P.E.*, at para. 23, the Supreme Court of Canada, citing *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at para. 25, stated the three preconditions which must be met for issue estoppel to be successfully invoked: (1) the issue must be the same as the one decided in the prior decision; (2) the prior decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.

[33] Even if the essential elements for issue estoppel are present, the court retains discretion to not apply issue estoppel when its application would work an injustice. See *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, at para. 29. In *Penner*, the majority confirmed, at para. 30, citing *Danyluk* and *C.U.P.E.*, that the principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice".

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[34] The Penfound Parties submit that their motion does not offend the principles of judicial economy, consistency, finality, and fairness to the parties which are engaged by the doctrines of abuse of process doctrine and issue estoppel. The Penfound Parties submit that unlike a judgment or an order dismissing a claim, the action in a stayed proceeding subsists and remains pending and, therefore, it was always open to them to come back to Court and seek to lift the stay, provided that there is a change in circumstances which makes it unjust for the stay to continue. The Penfound Parties submit that the appointment of a litigation receiver, which, they submit, would remove them from the litigation and completely remedy the prejudice to the Sprott Parties, is such a material change in circumstances.

[35] In response, the Sprott Parties submit that the elements of issue estoppel are satisfied and no injustice would flow from applying this doctrine that would warrant the exercise of judicial discretion to decline to apply it.

[36] The Sprott Parties rely on the conclusion by the Court of Appeal, at para. 51 of its reasons, that "no remedy short of a stay would cure the problem". This is the same issue that is raised by this motion because the Penfound Parties contend that the appointment of a litigation receiver is a remedy short of a stay that would cure the problem of the Penfound Parties' access to privileged information. The decision of the Court of Appeal was a final decision (and leave to appeal to the Supreme Court of Canada was denied). The parties to this motion are the same as those who were before the Court of Appeal. The preconditions for issue estoppel to be successfully invoked are satisfied.

[37] The Penfound Parties submit that even if they could have raised the appointment of a litigation receiver as a remedy on the original motion to stay the proceedings, the Sprott Parties had the onus to raise this possible remedy and failed to do so. The Penfound Parties submit that to require them to have raised the possibility of appointing a litigation receiver would impermissibly reverse the onus on the Sprott Parties at the remedy stage. They submit that they should not be punished for the failure of the Sprott Parties to discharge their onus.

[38] I do not accept that in order for the Sprott Parties to have discharged their onus of showing that a stay of proceedings was the only appropriate remedy, they were obliged to raise every conceivable alternative remedy, including the possibility of the judicial appointment of a receiver and manager of the litigation claims of the Penfound Parties who would be authorized to prosecute these claims without consultation with Scott Penfound and other persons who may be tainted through access to privileged information.

[39] At the hearing of the original motion, the Sprott Parties submitted, on the evidentiary record before the court, that a stay of proceedings was the only appropriate remedy. The Penfound Parties opposed this submission. If the Sprott Parties had failed to consider and address an appropriate alternative remedy, it was open to the Penfound Parties to raise this alternative remedy as a possibility and

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submit to the court that the Sprott Parties had failed to discharge their onus. Having failed to raise the appointment of a receiver and manager of the litigation claims as an appropriate remedy at the initial hearing, it is not open to the Sprott Parties, after exhausting appeals from the decision on the original motion, to raise this new argument on this motion.

[40] I conclude that by bringing this motion for the appointment of a litigation receiver and seeking an order that such an appointment would be an appropriate remedy short of a stay of proceedings, the Penfound Parties are seeking to relitigate on this motion an issue that was already decided on the original motion and by the Court of Appeal, that is, whether a permanent stay of the claims of the Penfound Parties in the consolidated action is the only appropriate remedy. The preconditions which must be met for issue estoppel to apply are satisfied. Although the court retains residual discretion not to apply issue estoppel when its application would work an injustice or where relitigation will enhance rather than impeach the administration of justice, the discretion must not be exercised so as to, in effect, undermine the integrity of the administration of justice. See *Penner*, at para. 31.

[41] I conclude that to allow the Penfound Parties to relitigate the issue of whether a stay of proceedings is the only appropriate remedy would undermine the interests of judicial finality, economy, and fairness which are engaged by the doctrine of issue estoppel, the objective of which is to promote the orderly administration of justice. The integrity of the judicial process would be diminished if the Penfound Parties were to be permitted to relitigate this issue. In these circumstances, I decline to exercise discretion not to apply the doctrine of issue estoppel.

Appointment of a litigation receiver

[42] Given my conclusion that the Penfound Parties are precluded from bringing this motion by the doctrine of issue estoppel, it is not necessary for me to address whether a litigation receiver should be appointed to address the prejudice to the Sprott Parties from the unauthorized access to privileged documents. I go on, nevertheless, to address this issue.

[43] The Penfound Parties move pursuant to s. 101 of the *Courts of Justice Act* which provides that a judge of the Superior Court of Justice may, where it appears just or convenient to do so, appoint a receiver and manager by interlocutory order on such terms as are considered just. A receiver may be appointed over an asset, including causes of action and claims in a proceeding, where the court authorizes the receiver to take proceedings in respect of the causes of action.

[44] The Penfound Parties seek the appointment of Mr. Morrison as receiver of their claims and counterclaims on the terms set out in the proposed order. As I have noted, the proposed order contemplates that the receiver is appointed with the mandate to independently represent the litigation interests of the Penfound Parties in the actions. The receiver would discharge its mandate by receiving the claims

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and counterclaim of the Penfound Parties and prosecuting the claims and counterclaims with full discretion. The Penfound Parties propose that unless expressly provided for in the proposed order, they are prohibited from communicating or interfering with the receiver without leave of the court. The proposed order provides that the receiver is also authorized to defend CCEC in the Sprott action on these terms.

[45] The proposed order provides that all productions will be delivered to an independent third party to remove all privileged and confidential materials. Subject to consultation with the Sprott Parties, and upon completion of such removal, the independent third party is to deliver the productions to this Court for the full that all privileged and confidential communications have been removed. Only upon such approval is the receiver to be granted access to the productions to proceed with his litigation mandate. Under the proposed order, the Penfound Parties are to pay the fees of the third party.

[46] The Penfound Parties submit that the appointment of a receiver in accordance with the terms of the proposed order removes the toxicity from the litigation by purifying the productions and quarantining the Penfound Parties until the litigation is finally resolved.

[47] In *2177546 Ontario Inc. v. 2177545 Ontario Inc.*, 2023 ONCA 693, the Court of Appeal addressed the question of the appropriate remedy for accessing an opposing party's privileged information. In that case, the appellant on appeal gained access to the opposing party's privileged information. Upon discovering this access, the respondent on appeal commenced an application for a stay in a pending application for partition. On the stay application, the appellant (the responding party on the motion) did not address the issue of what remedy was appropriate, except to say that no remedy was warranted. Because the appellant did not address other possible remedies, the application judge did not address the specific remedies raised on the appeal. The application judge struck out the appellant's Notice of Appearance in the respondent's partition application and ordered it to proceed undefended, subject to leave being granted by the judge hearing the matter.

[48] On the appeal, the appellant argued that the application judge erred, including by failing to consider that lesser remedies such as appointing a litigation trustee to act on behalf of the appellant could cure the prejudice. The Court of Appeal, at para. 53, held that the appointment of a litigation trustee would not obviate the fact that the appellant's affidavits have already been prepared in the context of the appellant knowing the respondent's litigation strategy which prejudice cannot be cured by the appointment of a litigation trustee. The Court of Appeal noted that even if the affidavits are struck, the appellant's representative and his experts could prepare new affidavits without which the trustee would have no witnesses to oppose the application. The appeal was dismissed. In my view, similar concerns arise on this motion.

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[49] The proposed order provides that the Penfound Parties would give access to the receiver to productions and other relevant records and, apart from this, shall not otherwise contact or communicate with the receiver. The difficulty with this is that Scott Penfound, having had access to privileged documents of the Sprott Parties, would have participated in the preparation of pleadings in both actions. The Fresh as Amended Statement of Claim in the Penfound action consists of 179 paragraphs, many of which are allegations of fact made by Scott Penfound.

[50] The existing pleadings must be considered to be contaminated by the knowledge of the Penfound Parties of information from privileged documents to which they had access. It would be impossible for a receiver to know how the pleadings may have been influenced through knowledge by the Penfound Parties of privileged information and, therefore, the receiver would be unable to amend the pleadings in such a way that would sanitize them from the effect of the unauthorized access to privileged documents. Where the pleadings of the Penfound Parties are contaminated by access to privileged information, and where a receiver would be unable to effectively cleanse their pleadings, the spectre of unfairness to the Sprott Parties, from the perspective of a reasonable person with knowledge of the relevant facts, would not be removed if the litigation were allowed to proceed.

[51] In addition, at some point during the litigation, at discovery or at trial, some or all of the Penfound Parties will, almost certainly, need to give evidence. The Sprott Parties are entitled to examine the Penfound Parties for discovery. When they are examined for discovery, Scott Penfound and other members of his family will be asked questions about matters that are relevant to the issues in the litigation and, when answering, they will have knowledge gained from access to privileged documents that, presumably, will inform their truthful responses to some questions. Counsel for the Sprott Parties should not be expected to tailor the examinations to avoid questions which may call for answers informed by access to privileged information.

[52] Although the Penfound Parties contend that the consolidated action would, largely, be decided by evidence of documents, it is, nevertheless, difficult to conceive of how a receiver would be able to effectively defend the claim against CCEC or prosecute the claims and counterclaim of the Penfound Parties without tendering evidence from Scott Penfound or his family members who have knowledge of the relevant events and whose evidence would be needed to prove some of the factual allegations pleaded in the consolidated action. If the receiver does not call Scott Penfound or members of his family as witnesses at trial, the Sprott Parties would have the right to compel them to testify at trial and their truthful testimony would, from the perspective of a reasonable person with knowledge of the relevant facts, and in unknown and unknowable respects, be influenced by knowledge gained from access to privileged documents. Counsel for the Sprott Parties should not have to consider the risk of admission of such contaminated evidence when deciding what evidence to tender at trial.

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[53] The Court of Appeal, at paras. 86-87 of its reasons on the appeal, noted that the Penfound Parties chose not to identify which documents were accessed and reviewed, putting me as the motion judge in the "invidious position" of being unable to assess the extent of the documentary review, the nature of the information accessed, and the subsequent prejudice that results from the unauthorized access. The Court of Appeal held that in the absence of such evidence, the Penfound Parties "will now have to shoulder the consequences" of having adverse inferences drawn against them at the remedy stage.

[54] In these circumstances, I conclude that the appointment of a receiver on the terms of the proposed order would not be effective to remove from the litigation the toxicity arising from access by the Penfound Parties to privileged documents belonging to the Sprott Parties or to quarantine the Penfound Parties until the litigation is finally resolved.

[55] Given this conclusion, it would not be just or convenient to appoint a litigation receiver on the terms of the proposed order.

[56] The Sprott Parties submit that the conduct of the Penfound Parties who knowingly accessed privileged documents is misconduct which poisoned the prosecution of their own claims. They submit that, in these circumstances, it would be unjust to allow the Penfound Parties to seek access to the equitable power of the court to cure the self-inflicted wounds which directly affects the fairness of the litigation. Given my conclusion that it is not just or convenient to appoint a receiver, it is not necessary for me to address this submission.

Disposition

[57] For these reasons, the motion by the Penfound Parties is dismissed.

[58] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable, and with reasonable page limits, to be agreed upon by counsel and approved by me.

Cavanagh J.

Date: September 24, 2024

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