File No. SJM-25-2018

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

CITATION NUMBER: 2024 NBKB 105

BETWEEN:

MAZIN LOUIS NAEEM

Applicant

- and –

GRANT THORNTON LIMITED, in its capacity as receiver of the assets, undertaking and property of 669699 N.B. Ltd., MP Atlantic Wood Ltd. and New Future Lumber Ltd.,

Intended Defendant

DECISION

BEFORE: Justice Darrell J. Stephenson

AT: Saint John, N.B.

DATE OF HEARING: March 1, 2023 and December 4, 2023

DATE OF DECISION: May 20, 2024

COUNSEL:

Andrew Costin, for the Plaintiff, Mazin Louis Naeem
George L. Cooper, K.C., for the Intended Defendant, GRANT THORNTON LIMITED, in its capacity as receiver of the assets, undertaking and property of 669699 N.B. Ltd., MP Atlantic Wood Ltd. and New Future Lumber Ltd.

Stephenson, J.

INTRODUCTION

[1] This is my decision in the matter of the motion (the "**Motion**") in which Mazin Louis Naeem is the moving party and Grant Thornton Limited ("**GTL**"), in its capacity as receiver and trustee in bankruptcy of 669699 N.B. Ltd., MP Atlantic Wood Ltd. and New Future Lumber Ltd. (collectively, the "**Companies**"), is the respondent.

[2] Under the Motion, Mr. Naeem seeks leave: (1) pursuant to section 7 of the receivership order dated April 26, 2018 (the "**Order**") whereunder GTL was appointed as receiver of the Companies, and (ii) section 215 of the ***Bankruptcy and Insolvency Act*** (Canada) (the "**BIA**"), as applicable, to commence action against GTL for negligent performance of its duties as receiver and trustee in bankruptcy of the Companies.

BACKGROUND

[3] This matter dates back to November 29, 2017 when the Companies were granted protection under the ***Companies Creditors Arrangement Act*** (Canada) (the "**CCAA**") with Powell Associates Ltd. appointed as monitor. The CCAA order provided for the usual administrative and indemnity charges and a debtor-in-possession financing arrangement was later approved. The CCAA restructuring was ultimately unsuccessful, and on April 26, 2018 pursuant to the application of Royal Bank of Canada ("**RBC**"), the Order was put in place appointing GTL as receiver of the Companies.

[4] What followed next, over the period April 2018 – March 2021, was a series of sales approval and vesting orders regarding the real and personal property of the Companies (the "**Property**"). These orders were described in the Ninth Report of GTL to the Court, dated September 7, 2022, as follows:

6. *The Receiver prepared a report to the Court dated August 24, 2018 ("First Report") which, inter alia, reported on the Receiver's sales process and requested an order approving a sale of the Property to 703779 N.B. Ltd.*

7. *On October 9, 2018 the Court issued an Approval and Vesting Order approving the sale of the Property to 703779 N.B. Ltd.*

8. *The Receiver prepared a report to the court dated November 2, 2018 (the "Second Report") which reported changes in circumstances following the Approval and Vesting Order and requested a reduction of the sale price to the 70379 N.B. Ltd.*

9. *On December 11, 2018 the Court issued a Second Approval and Vesting Order approving the sale of the Property to 703779 N.B. Ltd. at a revised price.*

10. *The Receiver prepared a report to the court dated May 22, 2019 ("Third Report") which reported on a fire on site which destroyed the machine shop and the subsequent negotiations with 703779 N.B. Ltd. on a reduced purchase price.*

11. *On May 29, 2019 the Court issued a Third Approval and Vesting Order approving the sale of the Property to 703779 N.B. Ltd. at a revised price.*

12. *The Receiver prepared a report to the court dated April 28, 2020 ("Fourth Report") which reported on the failure to close the transaction approved by the Third Order, and the Receiver's decision to reoffer the assets to the market through a second tender process.*

13. *The Receiver prepared a report to the court dated April 30, 2020 ("Fifth Report") which provided an update to the court on the administration of the estate, reported on the second tender process and the results from that process, and issued a Fourth Order approving the sale of the Property to 703779 N.B. Ltd.*

14. *The transaction contemplated by the Fourth Approval and Vesting Order failed to close. On June 15, 2020, the Receiver, through legal counsel, advised 703779 N.B. Ltd. that the court approved transaction failed.*

15. *This Court heard a motion on July 10, 2020 made by 703779 N.B. Ltd. seeking to vary the Fourth Approval and Vesting Order by extending*

> *the date by which the transaction contemplated by that order, is to close, to on or before September 30, 2020, and otherwise declaring the agreement between 703779 N.B. Ltd. and the Receiver to be in full force and effect.*
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> *16. This Court denied that application.*
>
> *17. On July 16, 2020, 70379 N.B. Ltd. filed a Notice of Motion for Leave to Appeal the July 10, 2020 Court decision. That Motion was heard on the 25th of September 2020. The Motion for Leave was denied.*
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> *18. On October 13, 2020, the Court issued a Sales Process Approval and Vesting Order authorizing and directing the Receiver to take such steps and execute such documents to complete the sale of the public Auction.*
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> *19. On March 15, 2021 the Court issued an Approval and Vesting Order – Real property authorizing and directing the Receiver to complete the transaction contemplated in the Commercial Agreement of Purchase and Sale dated December 17, 2020 among the Receiver and AM & RL Holdings Ltd. for the sale of real property described as PID 70491394.*

[5] Each of the noted approval and vesting orders and the conduct of GTL in advancing same was approved by this Court. As detailed in the November 28, 2023 Affidavit of Phillip Clarke, Senior Vice-President of GTL, sworn in response to the Motion (the "**Clarke Affidavit**"):

a) The initial offer from 703779 N.B. Ltd. ("**703779**") (the subject matter of the First Report) was for a purchase price of $3,100,000 which was reduced to $2,900,000 (the subject matter of the Second Report) because "certain software and equipment was stolen from the premises";

b) thereafter, the purchase price was further reduced to $2,600,000 (the subject matter of the Third Report) to account for "damage due to heavy wind and frost damage to the kilns as well as a fire in the maintenance shop";

c) subsequent to the Third Report, and as outlined in the Fourth Report, the closing date was extended on multiple occasions while the parties worked through various conditions precedent and as a consequence of vandalism to the planer mill and a fire (likely caused by arson) in the gate house;

d) ultimately, 703779 elected not to proceed with the purchase, the parties were unable to agree on a new arrangement and the Property was re-offered for sale;

e) 703779 submitted a further bid in the amount of $2,400,000 through counsel leading to negotiations that resulted in the transaction referenced in the Fifth Report that was thereafter approved by this Court under the Fourth Approval and Vesting Order;

f) 703779's request for judicial intervention to vary the terms of that transaction were denied by this Court and our Court of Appeal and the Property was ultimately disposed of by way of sales processes and arrangements approved by this Court (the consideration received from the sale of the personal property was $78,5717 and from the real property $1,700,000 (total $2,485,717.00)); and

g) ultimately, with Court approval, and after payment of expenses and prior ranking security and lien charges (including the priming charges granted under the CCAA order), $1,201,341.05 was paid to the first ranking secured creditor RBC - GTL continues to hold $160,000 in its trust account as a reserve against future expenses and, as at July 19, 2023, the Companies remain indebted to RBC in the amount of $3,516,717 (paragraphs 23 and 24 of the Clarke Affidavit).

[7] Mr. Naeem was at all relevant times a shareholder and director of the Companies and executed personal guarantees in support of the credit facilities made available by RBC. His involvement with the Companies, nexus to the above-referenced CCAA and

BIA proceedings and efforts to escape liability under his RBC guarantees was detailed in Justice LeBlanc's June 23, 2022 decision (MC-415-2018 **2022 NBQB 131**) as follows:

> *Mr. Naeem and his business partner, Paul Sibley ("Mr. Sibley"), were shareholders and directors of 669699 NB Ltd. ("669") and New Future Lumber Ltd. ("NFL") as well as another corporation, MP Wood Atlantic Ltd. ("MPW"). In this decision, 669 and NFL will be collectively referred to as the "Debtors".*
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> *4. 669, NFL and MPW were in the business of manufacturing and delivering finished lumber and wood shavings (the "Business") and operated out of premises situated in Dieppe, NB.*
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> *5. On or about October 16, 2014, RBC amended and restated credit facilities it had previously made available to 669 and NFL. On October 22, 2016, Mr. Naeem and Mr. Sibley accepted the terms and conditions set out in the October 16, 2014 Agreement (the "Credit Agreements")*
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> 6. In accordance with the terms of the Credit Agreements, RBC provided secured debt financing for the Debtors' operations pursuant to various credit facilities (the "Loan Instruments"). As security for the repayment of the Debtors' indebtedness, the Debtors granted to RBC various security interests (the "Security").
>
> 7. As additional security for the repayment of the Debtors' indebtedness to RBC, as outlined in the Credit Agreements, Mr. Naeem purportedly executed under seal and delivered to RBC a Guarantee and Postponement of Claim Agreement, in favour of RBC, dated October 22, 2014, in the maximum amount of $500,000 bearing interest at RBC's Prime Rate plus 5.00% with regard to the indebtedness of 669 (the "669 Guarantee"). Mr. Naeem also purportedly executed a further Guarantee and Postponement of Claim Agreement, in favour of RBC, dated October 22, 2014, in the maximum amount of $500,000 bearing interest at RBC's Prime Rate plus 5.00% with regard to the indebtedness of NFL (the "NFL Guarantee"). In this decision the 669 Guarantee and the NFL Guarantee will collectively be referred to as the "Guarantees".
>
> 8. On February 28, 2017, the management of the Debtors' accounts and loans at RBC were transferred to the RBC Special Loans and Advisory Group. This measure was taken due to the Debtors poor financial performance in early 2017 and concerns over the level of risk associated with RBC's advances of funds.

9. On February 28, 2017, Mr. Naeem and Mr. Sibley met with Mr. Brian Anderson, a representative of the RBC Special Loans and Advisory Group, to discuss the Debtors' ongoing financial difficulties and the actions required of the Debtors to resolve such difficulties.

10. Immediately after the February 28, 2017 meeting, Mr. Anderson wrote to Mr. Naeem and Mr. Sibley to confirm their discussion and outlined in writing RBC's expectations regarding the Debtors' financial difficulties. Each of Mr. Naeem and Mr. Sibley acknowledged receipt of RBC's correspondence in their capacities as officers of the Debtors and as personal guarantors of the Debtors' indebtedness to RBC.

11. During the months following the February 28, 2017 meeting, Grant Thornton Limited ("GTL") was retained as a consultant for a review and assessment of the Debtors' operations to establish a restructuring plan aimed at improving the Debtors' financial position to a risk level acceptable to RBC and in compliance with the financial requirements outlined in the Loan Instruments.

12. As at September 6, 2017, the Debtors were indebted to RBC in the aggregate sum of $2,989,778.78. On or about September 18, 2017, RBC demanded in writing that the Debtors repay, in accordance with the Loan Instruments, the sum of $2,989,778.78 then due and owing by the Debtors to RBC.

13. Following RBC's demands, the Debtors and Guarantors entered into a Forbearance Agreement with the Bank. In accordance with its terms, the Forbearance Agreement had an effective date of September 1, 2017 (the "Forbearance Agreement"). Each of Mr. Naeem and Mr. Sibley executed the Forbearance Agreement in their respective capacities as officers of the Debtors and as Guarantors pursuant to the Guarantees. Also, on September 18, 2017, RBC demanded in writing that each of Mr. Naeem and Mr. Sibley honour their respective Guarantees and repay to RBC the Debtors' indebtedness, up to the limit of the Guarantees.

14. Notwithstanding RBC's demands, the Debtors failed to satisfy their indebtedness to RBC and Mr. Naeem failed to honour the Guarantees.

15. On or about November 29, 2017 the Debtors applied for, and were granted, protection from their creditors pursuant to the **Companies' Creditors Arrangement Act,** RSC 1985 c C-36 (the "CCAA Proceedings").

16. On or about April 26, 2018, the stay of proceedings granted during the CCAA proceedings was lifted and the Court issued an order (the

"Receivership Order") appointing GTL as Receiver of all the Debtors' assets and undertakings (the "Receivership Proceedings").

17. On June 14, 2018, RBC filed against each of Mr. Naeem and Mr. Sibley a Notice of Action with Statement of Claim Attached, with respect to the Guarantees and their respective failure to honour their obligations to RBC following RBC's formal written demand.

18. On June 18, 2020, the action against Mr. Sibley was concluded by Consent Order, signed by a Justice of this Court and providing for the payment of $1,000,000 by Mr. Sibley to RBC.

19. On November 25, 2020, RBC filed its motion for summary judgment. Earlier hearing dates were scheduled but the matter was adjourned several times. There was a change of solicitors for Mr. Naeem and filing of new affidavit evidence necessitating time for responses thereto. In response to the RBC motion, there is affidavit evidence from each of Mr. Naeem and Mr. Sibley

20. In his affidavit sworn on February 17, 2022, Mr. Naeem says that from the outset, he clearly made it known to RBC that he would not sign any personal guarantees as part of the financing of the Business and that when asked to sign documents, it was his practice to seek and obtain assurance that none of the documents presented to him for signing was a personal guarantee. Mr. Naeem says that his understanding, at all times, was that documents RBC presented to him for his signature were credit or security agreements for the Debtors, to be signed by him in his capacity as an officer or director of those corporations and not in his personal capacity.

21. On March 24, 2022, RBC filed a motion seeking leave to cross-examine Mr. Sibley and Mr. Naeem as to the contents of their affidavits filed in response to RBC's motion to obtain a summary judgment. On May 5, 2022, the Court heard the parties on the issue of leave to cross-examine and leave was granted for the reasons set out in this decision.

22. On June 3, 2022, RBC proceeded to the cross examination of each of Mr. Naeem and Mr. Sibley on their respective affidavits and the Court heard the parties on the RBC motion for summary judgment.

. . . . . .

50. Thus, in this case, RBC's entitlement to a summary judgment at step one of the process is dependent on whether there is a genuine issue

requiring a trial, the determination of which must be done in accordance with the principles outlined above.

. . . . . .

58. The Guarantees are in the English language; Mr. Naeem can certainly read English. The evidence before me discloses no factual basis to account for Mr. Naeem's failure to take the most elementary of steps to protect his rights such as reading the Guarantees before signing them. It is equally baffling that he would not raise concerns regarding the Guarantees when signing a suite of ancillary documents which specifically referenced the Guarantees, including the Credit Agreements, the RBC correspondence dated February 28, 2017 and the Forbearance Agreement. To the extent that Mr. Naeem relies on the defence of *non est factum*, none of the essential elements thereof have been established.

59. **As for the argument that if bound by the Guarantees, he should be released on the basis that RBC (through the Receiver) failed to properly realize on its security, the evidence shows that all of the Debtors' assets were disposed of as part of the Receivership Proceedings and in accordance with the Receivership Order. Each transaction for the sale of the Debtors' assets was approved by the Court**. (**emphasis added**)

60. While there is no evidence that RBC failed to safeguard the assets comprising the security, in the Guarantees, prepared on RBC's standard form, all rights of the guarantor regarding the bank's obligation to preserve the security are specifically waived, without limiting the guarantor's liability under the Guarantees. Contracting out of the equitable rule requiring preservation of the security is permissible (see ***Bauer v. Bank of Montreal***, [1980] 2 S.C.R. 102). In addition, the Guarantees specifically set out that RBC was not required to exhaust any other recourse against the Debtors prior to demanding payment from Mr. Naeem. Furthermore, in the Forbearance Agreement, Mr. Naeem (and Mr. Sibley) consented to the enforcement of the Guarantees, including consent to judgment upon the Guarantees.

61. In this matter, Mr. Naeem has established no grounds that could discharge any portion of the amount guaranteed, let alone a discharge of the Guarantees as a whole.

[8] 703779's efforts to extend the closing date of the transaction approved under the Fourth Approval and Vesting Order (paragraph 4) were detailed in Justice LeBlond's September 25, 2020 decision of the Court of Appeal (**2020 CanLII 69961**) as follows:

> [5] Grant Thornton was appointed receiver on April 26, 2018. It initiated a sales process for the assets of the debtors and 703779 N.B. Ltd. was the successful bidder. The court below issued the first Approval and Vesting Order confirming the sale on October 9, 2018.
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> [6] The assets subsequently deteriorated because of several factors and there were two more Approval and Vesting Orders confirming the purchase of the assets by 703779, each one for reduced prices to reflect the deteriorations as they became known. The closing date was extended in each Order.
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> [7] On November 29, 2019, while the third Approval and Vesting Order was in place, 703779 advised the receiver it was not prepared to proceed with the transaction. As a result, the sale of the assets was cancelled and the receiver launched a new sales process.
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> [8] In response to this new process, 703779 submitted a new offer on April 3, 2020, which contained a new term not previously contained in earlier offers. The principals of 703779 wished to be released from personal guarantees they had provided to the creditor of the debtors. That creditor, the Royal Bank of Canada, refused to agree to this term and, as a result, negotiations continued between 703779 and Grant Thornton.
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> [9] On April 27, 2020, Grant Thornton sent to counsel for 703779 (not its current counsel) a revised offer to sell the assets with the added condition that one of the principals of 703779, Paul Sibley, one of the aforementioned guarantors, agree to a further deposit consisting of a consent order for judgment against him in favour of the Royal Bank of Canada for the amount of 1 million dollars, which judgment would be held in escrow pending the closing of the transaction. Upon successful completion of the closing, the consent judgment would be returned to Mr. Sibley. If the transaction failed to close, the consent judgment would be filed with the court. Grant Thornton requested an immediate response as it had other viable alternatives which could be pursued without delay. That same day, 703779 and Mr. Sibley, through their previous counsel, agreed to these new terms.

[10] As a result, the court below issued a Fourth Approval and Vesting Order on May 13, 2020, with the closing to take place on or before June 12, 2020. There were no issues raised at this point with respect to financing or the placement of insurance on the assets by 703779 satisfactory to the new lender providing the financing.

[11] It was not until June 10, 2020, two days before the ordered closing deadline, that 703779 advised the placement of insurance had become an issue and an extension of the closing date to June 29, 2020, was requested. The receiver would not agree to this extension.

[12] On June 11, 2020, the receiver agreed to extend the closing to June 19, 2020, provided 703779 agreed to two additional conditions, namely:

> 1) the payment by 703779 of $30,000 to defray the receiver's holding costs in relation to the assets, which amount would not be deducted from the purchase price; and
>
> 2) Mr. Sibley deliver a personal statement of his affairs reflecting a number of particulars.

[13] The receiver made it clear that the breach of either of these two additional conditions would bring the transaction to an end. That same day, June 11, 2020 703779 accepted these terms.

[14] The next day, on June 12, 2020, 703779 requested more time to pay the $30,000 amount and a further extension of the closing date to June 26, 2020. That same day, the receiver again agreed to the new deadlines for payment of the $30,000, deliver of Mr. Sibley's personal statement of affairs and confirmation of insurance coverage. The receiver again confirmed that, if any of these new deadlines was not met by 703779, the transaction would be at an end. Later that day, 703779 accepted these new terms.

[15] By June 15, 2020, the deadline for paying the $30,000 had passed without payment and counsel for the receiver wrote to counsel for 703779 to confirm the court-approved transaction had failed and that the receiver would be pursuing other options for the sale of the assets.

[16] On July 3, 2020, 703779, through its current counsel, filed a motion with the bankruptcy court seeking:

> 1) an extension of the closing date set out in the Fourth Approval and Vesting Order to September 30, 2020; and

> 2) a declaration that the "agreement" between 703779 and the receiver was in full force and effect.

[17] At the hearing of the motion in the court below, there was no evidence before the judge relating to the placement of the insurance coverage nor any evidence as to when it might be secured. Moreover, in Mr. Sibley's affidavit in support of the motion, he deposed he had never agreed to the consent judgment for 1 million dollars relating to his personal guarantee to the Royal Bank of Canada. He further deposed he would have "walked away" from the transaction had he known this was a condition. While there is conflicting evidence as to whether or not Mr. Sibley was aware of this condition, the evidence is quite clear he had agreed to it through his previous counsel.

[18] While the transaction was already at an end for non-payment of the $30,000 amount, it is somewhat disconcerting that Mr. Sibley would be attacking an important condition of the agreement he was now seeking the court declare to be in full force and effect. To his current counsel's credit, he agreed at the hearing before the motion judge below there was no agreement in place and that the receiver would once again have to restart the sale process. My oral denial of the motion for leave to appeal on September 25, 2020, was prompted by information from counsel that another hearing was scheduled for September 29, 2020, before the motion judge to deal with the proposed new sale process. The foremost consideration is the protection of the estate's assets.

[19] Against this contextual backdrop, the motion judge had very little discretion to exercise in refusing to grant the relief sought in 703779's motion. Simply stated, the proposed transaction had come to an end. The motion judge made no errors on his factual findings, let alone any that would attract reversal on the palpable and overriding standard of review.

THE MOTION

[9] The Motion identifies the following grounds for the relief being requested:

> The grounds to be argued are that:
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> 1. The Applicant, at all material times, was a shareholder, either personally or through a controlled corporation, of the Debtors;
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> 2. The Debtors are related persons as contemplated under section 4(2) of the BIA;

3. The Applicant controlled the Debtors in conjunction with his former business partner Paul Sibley;

4. The Applicant provided the capital and financing to the Debtors for the purposes of acquiring and operating a lumber business in Dieppe, New Brunswick and had a passive role in same. Paul Sibley served as the controlling officer and primary contact for each of the Debtors and was in charge of the day-to-day business and affairs of the Debtors;

5. The Applicant made a series of unsecured loans and/or payments to the account or benefit of the Debtors between 2013 and 2017 totalling at, or near, Nine Million Two Hundred Thousand Canadian Dollars (9,200,000.00) (the "**Applicant's Loan**");

6. The Applicant is, and at all material times was, a creditor of the Debtors as contemplated under section 2 of the BIA and the Applicant's Loan has never been repaid in full or in part;

7. The Debtors entered into a credit agreement with Royal Bank of Canada in or about 2016 wherein certain credit facilities were granted by Royal Bank of Canada in exchange for a secured charge against the Debtors' real and personal property (the "**RBC Loan**")

8. The Debtors defaulted on the RBC Laon in, or about, 2017 and Grant Thornton was appointed as receiver of the Debtors' assets, undertakings, and property pursuant to a Receiving Order dated April 26, 2018 (the "**Receivership**")

9. Upon the Receivership, the balance of the RBC Loan was Two Million Nine Hundred and Eighty Nine Thousand Seven Hundred and Seventy eight Canadian Dollars and Seventy Eight Cents ($2,989,778.78);

10. Upon the Receivership, the net book value of the Debtors' assets was Eleven Million Three Hundred and Thirty Three Thousand Two Hundred Canadian Dollars ($11,333,200.00) according to Grant Thornton's Notice and Statement of the Receiver dated May 4, 2018;

11. Grant Thornton, in its capacity as receiver of the assets, undertakings and property of the Debtors, owed a duty of care to the Debtors' unsecured creditors, inclusive of the Applicant, to maintain, call in, and convert the Debtors' assets in a manner that was consistent with the standard of care expected of a competent insolvency professional that was duly licensed to practice, and operate, in Canada;

12. Grant Thornton, in its capacity as the receiver of the assets, undertaking and property of the Debtors, was grossly negligent in carrying out its duties and obligations thereunder as more particularly set out in the draft Statement of Claim appended to this within Motion and, as a result of same, the value of the Debtors' assets diminished significantly;

13. The Debtors assets were eventually sold, after multiple failed attempts and price reductions, stemming from Grant Thornton's grossly negligent handling of same through the course of the Receivership, for One Million Seven Hundred Thousand Canadian Dollars ($1,700,000.00) on or about March 31, 2021;

14. As a result of Grant Thornton's gross negligence, the realization of the Debtors' assets were insufficient to repay the Debtors' secured creditors and specifically the RBC Loan and Royal Bank of Canada subsequently sought, and obtained, a judgment against the Applicant in the Court of King's Bench of New Brunswick on June 26, 2022 in the amount of One Million and Six Thousand Canadian Dollars ($1,006,000.00) in relation to a personal guarantee provision of the RBC Loan (the "**RBC Judgment**")

15. If not for Grant Thornton's gross negligence the RBC Loan would have been satisfied in full or, alternatively, Royal Bank of Canada's action against the Applicant would have been withdrawn or abandoned and the RBC Judgment would never have been obtained or obtainable or, in the further alternative, the RBC Judgment would have been for an amount that was less than One Million and Six Thousand Canadian Dollars ($1,006,000.00);

16. The Debtors' made an assignment in bankruptcy on or about July 4, 2019 with Grant Thornton appointed as trustee of each of the Debtors' bankrupt estates (the **"Bankruptcy**");

17. Grant Thornton failed to reference, or record, the Applicant's Loan in the Debtors' Statement of Affairs despite the Applicant being the largest creditor of the Bankruptcy and same being evident and recorded in the Debtors' financial statements;

18. The Applicant was not notified of the Bankruptcy by Grant Thornton or provided with the opportunity to file a proof of claim as contemplated under section 102(1) of the BIA;

19. Grant Thornton was subsequently discharged as trustee of the Bankruptcy on or about September 26, 2022 (the "**Discharge**") without any knowledge of, or notice provided to, the Applicant;

> 20. As a result of the Discharge, the Applicant lost his ability to seek a remedy under section 38(1) of the BIA;
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> 21. In failing to list, and identify, the Applicant as a creditor of the Debtors' respective estates Grant Thornton was negligent in its capacity as trustee of the Bankruptcy;
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> 22. The Applicant was not afforded the opportunity to oppose the the Discharge under section 40(5) of the BIA;
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> 23. The Discharge was obtained by means of omission or negligent concealment of a material fact, being the omission of the Debtors' largest creditor from the Bankruptcy proceedings, and as such, Grant Thornton cannot rely on, or be protected by, subsections 40(8)(a)(b) of the BIA;
>
> 24. Grant Thornton had a professional and fiduciary obligation to recuse itself from the Bankruptcy, in light of its grossly negligent handling, and diminishment, of the Debtors' assets in the course of the Receivership, to allow for an independent trustee to explore a cause of action, for the benefit of the remaining creditors of the Bankruptcy, in relation to the mishandling of the Receivership;
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> 25. If not for Grant Thornton's gross negligence, the Applicant would have received a dividend, as an unsecured creditor, on the Applicant's Loan as contemplated under section 148(1) of the BIA;
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> 26. If not for Grant Thornton's gross negligence, the Applicant would not have been subject to, or liable for, the RBC Judgment as the value of the Debtors" assets, if properly maintained and cared for in the Receivership, would have far exceeded the balance of the RBC Loan; and
>
> 27. As a result of the gross negligence of Grant Thornton, the Applicant has a cause of action against Grant Thornton as more particularly set forth in the Statement of Claim appended to this within Motion and same is not frivolous, vexatious or without merit.

[10] It was noteworthy that, in support of the Motion, Mr. Naeem filed a September 13, 2021 Affidavit (the "**Ehrhardt Affidavit**") from Edwin Ehrhardt (a senior insolvency lawyer practicing in Moncton) who identified himself as counsel for Mr. Paul Sibley, Mr. Naeem, the Companies and 703779 (paragraph 1 thereof). The Affidavit was originally

filed in cause MC-415-2018 in support of Mr. Sibley's motion to set aside the consent judgment entered against him as part of the arrangement approved under the Fourth Approval and Vesting Order on the grounds that "he never agreed to the additional terms to the agreement and did not instruct counsel to execute the consent judgment". Justice Ouellette of this Court dismissed Mr. Sibley's motion observing that Mr. Ehrhardt represented Mr. Sibley throughout the bankruptcy proceedings (**2021 NBQB 201**).

[11] The same can be said of Mr. Naeem. In the course of the matters referenced in paragraph 4, Mr. Ehrhardt presented himself at various times as counsel for 703779, Mr. Naeem and Mr. Sibley. Most notably, Mr. Ehrhardt filed the defense to the guarantee action against Mr. Naeem referenced in paragraph 7 (MC-415-2018 – the same matter and cause in which the Ehrhardt Affidavit was later filed) in which he plead on behalf of Messrs. Naeem and Sibley, effective December 30, 2019, as follows:

> 2. As to the whole of the Statement of Claim, the Defendants state that the Bank, or the Receiver, Grant Thornton Limited, or both, have failed to protect and preserve the assets of 669699 and New Future, and in particular, through their gross negligence and recklessness have caused a significant depletion and wasting of the assets of 669699 and New Future, so as to result in a serious reduction of the value of the assets, thereby depriving the defendants of same.
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> 3. The Defendants state that the Plaintiff has so impaired the security, as granted by 669699 and New Future to the Plaintiff, that they are relieved of all obligations under any guarantees as alleged or at all, and that any such guarantees are wholly and totally vitiated.

Observations

[12] The thrust of Mr. Naeem's contentions are that, as a consequence of GTL's negligent performance of its duties as receiver, the assets of the Companies were permitted to deteriorate, insufficient value was realized from same and Mr. Naeem was thereby exposed to liability under the personal guarantees he provided to RBC and deprived of the ability to recover any portion of the shareholder loans he advanced in support of the Companies. Under the Motion (subparagraph 10), and in his January 31, 2023 affidavit in support of the Motion (the "**Naeem Affidavit**"), Mr. Naeem states that the net book value of the Companies' assets was $11,333,200 at the time of GTL's appointment as receiver.

[13] During oral argument, the Court drew counsel for Mr. Naeem's attention to the reality that there was an approximate $600,000 difference between the best offer received by GTL for the Property ($3,100,000 – subparagraph 5(a)) and the net proceeds ultimately realized ($2,485,717 – subparagraph 5(f)) and the RBC deficiency, as at July 29, 2023, was $3,516,717 (paragraph 6). Counsel was asked to explain how, even allowing for the possibility of unnecessary administrative expense, holding and/or sales costs, any of this makes a practical difference to Mr. Naeem? In other words, and put more bluntly, if GTL acted negligently or improperly did it not do so at RBC's expense?

[14] Counsel was reminded of the extensive sales and marketing efforts undertaken by GTL with respect to the Property (set out in the reports identified in paragraph 4), that no offer superior to $3,100,000 was received by GTL and all sales arrangements were approved by the Court.

[15] The response from counsel for Mr. Naeem was interesting. He advised the Court that the real issue was because of GTL's negligence the transactions contemplated under the Approval and Vesting Orders in favor of 703779 did not close and those transactions would have resulted in the release of Mr. Naeem's guarantees by RBC. In effect, that is the same argument advanced by Mr. Naeem and rejected by Justice LeBlanc in paragraph 58 of her decision (paragraph 7) to the effect that his guarantees should be released because of the misconduct of GTL. Moreover, we know from the Fourth Report of the Receiver (tab 7 – Clarke Affidavit paragraph 28) "On November 28, 2019 the Purchaser issued a notice they would not be proceeding with the closing", and as observed in Justice LeBlond's decision (paragraph 8), it was the non-performance of the agreed terms on the part of 703779 that resulted in the collapse of the transaction approved under the Fourth Approval and Vesting Order. So it was the actions/decisions of 703779 (as entity with which Mr. Naeem professes no connection – see his affidavit of November 29, 2023 filed in support of the Motion) to terminate negotiations that lead to GTL's further sale of the Property followed by the taking of judgments by RBC against both Mr. Naeem and Mr. Sibley on their guarantee obligations (paragraphs 7 and 10).

[16] Curiously, both Mr. Sibley and Mr. Naeem adopted the same approach in their unsuccessful defences to the RBC guarantee actions (MC-415-2018). Mr. Naeem plead ignorance (*non est factum*) and Mr. Sibley that he did not know what his counsel were doing on his behalf (paragraphs 7 and 10). Mr. Naeem takes the same approach in this matter telling us in the Naeem Affidavit that he never received notification of GTL's appointment as receiver or the assignment of the Companies into bankruptcy or the appointment of GTL as trustee and was unaware of the extent of the damage to the Property until August 2021. This against the backdrop of Mr. Ehrhardt's having filed the Statement of Defence on behalf of Messrs. Sibley and Naeem referenced in paragraph 12. Further, the negligent conduct on the part of GTL as receiver is identified in paragraph 35 of the Naeem Affidavit as being set out in the Ehrhardt Affidavit. The Ehrhardt Affidavit identifies all negligent acts of GTL as having occurred over the period of April 2018 – November 2019, in advance of the filing of the Statement of Defence by Mr. Ehrhardt on behalf of Messrs. Sibley and Naeem on December 31, 2019.

Legal Commentary

[17] GTL was discharged as trustee in bankruptcy of the Companies in September 2022. Pursuant to section 41(8) of the BIA evidence of fraud or a deliberate misrepresentation or concealment of facts by the trustee is required to set aside a discharge. – see **McGibbon v. BDO Canada Limited,** 2021 BCCA 303 at paragraph 63. Counsel for Mr. Naeem candidly acknowledged during oral argument that there are

no assertions of fraudulent behavior on the part of GTL before the Court. Consequently, Mr. Naeem's request that GTL's discharge be set aside and Mr. Naeem granted leave pursuant to section 215 of the BIA to commence action against GTL in its capacity as trustee is refused.

[18] I now move to Mr. Naeem's request for leave to commence action against GTL in its capacity as receiver. Both parties made reference to the same jurisprudence as governing the question of when leave should be granted. In that regard, I note as follows from **Textoon Financial Canada Ltd. v. Beta Ltèe / Beta Brands Ltd.,** [2007] O.J. No. 2998:

. . . . . .

> 1. Leave to sue a trustee or receiver should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to procced.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee or receiver. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave….

36 The threshold for granting leave to commence an action against the Receiver under section 215 "is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact." (GMAC Commercial Credit Corp. – Canada at para. 55). In determining whether to grant leave, the Court should not make an assessment based on the merits. Rather, leave should be granted if the evidence arguably supports the cause of action being asserted (GMAC Commercial Credit Corp. – Canada at para. 57) The

> court's gate-keeping function is to protect receivers from frivolous and vexatious actions or claims that disclose no cause of action.
>
> 37 The test for leave from a court-ordered stay is similar to the test for leave under section 215 of the BIA. See Third Generation Realty Ltd. v. Twigg Holdings Ltd., 1992 CarswellOnt 473 (Ont. Gen. Div.), in which Farley J. stated, "[l]eave to commence proceedings against a Receiver appointed by the court is to be granted, unless it is clear there is no foundation for the claim or the action is frivolous or vexatious."
>
> 38 In this case, the receivership order instituted a stay of proceedings against the Receiver and limited the Receiver's liability. Application of the above principles establishes that leave under s. 215 should not be granted unless Local 242 submits evidence clearly disclosing that there is merit to the proposed proceedings. This evidence must establish a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

[19] So given that the threshold is not a high one, I must now address if the intended action is frivolous or vexatious or does not disclose a cause of action: if not, applicable jurisprudence dictates that leave to commence action against GTL must be granted to Mr. Naeem under the Motion. Hence, I turn to the question of whether the evidence filed in support of the Motion arguably supports the contention that a cause of action exists against GTL in its capacity as receiver. Regrettably for Mr. Naeem, on the basis of factual narrative set out above, it is clear that this is not the case.

[20] To the extent that the proposed action relates to the quantum of the proceeds realized from the sale of the Property all sales and the marketing efforts associated therewith were approved by the Court (paragraph 4). Furthermore, to the extent there was any diminution in the value of the Property as a consequence for the conduct or

neglect of GTL as receiver, any such loss of value occurred at the sole expense of RBC (paragraph 13).

[21] Secondly, to the extent Mr. Naeem's cause of action relates to the liability he incurred as a consequence of the non-return of his personal guarantees, the record reflects that it was the actions and decisions of 703779 that resulted in the termination of the transaction approved under the Fourth Approval and Vesting Order and the subsequent sale of the Property by GTL to other parties (paragraph 4). The appropriateness of GTL's conduct in refusing to modify the terms of the transaction approved under the Fourth Approval and Vesting Order was confirmed by both this Court and the Court of Appeal. (paragraph 8). Moreover, Mr. Naeem's efforts to escape liability under his personal guarantees as a consequence of the actions of GTL was specifically rejected by this Court (paragraph 7) which decision was also confirmed by the Court of Appeal. Put bluntly, the issue of Mr. Naeem's exposure to RBC under his personal guarantees, and the circumstances leading to same, has been the subject matter of multiple prior judicial determinations, and it is difficult to think of a circumstance to which the doctrine of *res judicata* is more applicable.

[22] However, even leaving all of that aside, all acts of negligence on the part of GTL alleged by Mr. Naeem occurred over the period April 2018 – November 2019 in advance of Mr. Ehrhardt's filings of the Statement of Defence on behalf of Messrs. Sibley and

Naeem in M/C/415/18 on December 30, 2019 (paragraph 11). The Motion was filed on February 7, 2023 over three years subsequent to the last act of negligence alleged by Mr. Naeem. Counsel for Mr. Naeem tells us that Mr. Naeem did not become aware of the full scope of GTL's negligence until August 2021 when meeting with new counsel.

[23] That may well be, but a claim is discoverable for purposes of triggering the two-year limitation period under section 5(1)(a) of the **Limitation of Actions Act** (New Brunswick) (the "**Limitations Act**") when a plaintiff has knowledge of the material facts upon which a plausible inference of liability on the defendant's part can be drawn – see **Grant Thornton LLP v. New Brunswick,** 2021 SCC 31 at paragraph 3.

[24] In this instance, all acts of negligence alleged by Mr. Naeem under the Motion occurred by November 2019 and Mr. Ehrhardt entered what would ultimately prove to be unsuccessful defences on behalf of both Mr. Naeem and Mr. Sibley on December 30, 2019 alleging "gross negligence and recklessness on the part of GTL". In the circumstances, it is nonsensical to suggest that Mr. Naeem did not have knowledge of the material facts upon which an inference of liability on the part of GTL could be drawn by December 2019 – again all alleged negligent acts on the part of GTL occurred prior to that time. To suggest otherwise, would be to conclude that a party can somehow disassociate himself from the representations and knowledge of his solicitor of record. I

would have thought that Mr. Naeem would have realized that was not the case following Justice LeBlond's decision with respect to the transaction approved under the Fourth Approval and Vesting Order (paragraph 8). Consequently, Mr. Naeem's proposed action is also barred by operation of the Limitations Act.

Disposition

[25] By reason of the foregoing, it is apparent that the Motion cannot support a finding that Mr. Naeem has an arguable cause of action against GTL and, even if that were the case, any such cause of action would be barred by operation of the Limitations Act. Given Mr. Naeem's previous efforts to escape liability under his personal guarantees, the Motion can only be viewed as a collateral attack on previous decisions of this Court and the Court of Appeal (recall the advice from Mr. Naeem's counsel (paragraph 15) that the Motion was really about Mr. Naeem's liability under his personal guarantees).

[26] Consequently, the Motion is dismissed. This has been a time-consuming matter which necessitated the preparation of a voluminous and comprehensive response on behalf of GTL. Costs of $7,500 plus taxable disbursements are therefore awarded against Mr. Naeem.

DATED at the City of Saint John, N.B. this _____ day of May, 2024

_____

Mr. Justice Darrell J. Stephenson
Court of King's Bench – Trial Division