CITATION: Re Nicholson, 2025 ONSC 1069
COURT FILE NO.: Court No. 31-3060322
DATE: February 18, 2025

2025 ONSC 1069 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
RICHARD NICHOLSON (AKA RICHARD MILLHOUSE NICHOLSON)
OF THE TOWN OF CONCORD, IN THE REGION OF YORK,
IN THE PROVINCE OF ONTARIO

BEFORE: Associate Justice Ilchenko, Registrar in Bankruptcy

Craig Aitken ("**Aitken**") for the Creditors Antoine Dwyane Small ("**Antoine**") and Whayne Small ("**Whayne**")(collectively, the "**Creditors**")

Bankrupt Richard Nicholson appears on his own behalf (the "**Bankrupt**")

Ilan Kibel, LIT ("**Kibel**") for the for BDO Canada Limited, Trustee in Bankruptcy of the Bankrupt, (the "**Trustee**")

Superintendent of Bankruptcy (the "**OSB**") not appearing, but providing Notice of Opposition and Exhibits as evidence on this Motion

HEARD: Initial Motion heard on July 25, 2024, by AJ Rappos and adjourned *sine die* at request of Bankrupt. Motion adjourned again by AJ Ilchenko on September 18, 2024 to allow Bankrupt to file a responding affidavit with properly commissioned exhibits. Motion heard on October 16, 2024. Revised S.170 Report ordered to be filed by Trustee by December 15th, 2024 along with any Notices of Opposition by any creditors prior to the Automatic Discharge date of December 27, 2024. This Report was uploaded to Caselines by the Trustee on January 9, 2025 despite my Order. OSB served a Notice of Opposition to Discharge on December 20, 2024 which was filed with the Court for use in these reasons on January 9, 2025. Revised Proofs of Claim filed by Antoine and Whayne provided to Court on February 3, 2025, for use in these reasons.

ENDORSEMENT

[1] The Creditors seek an Order pursuant to section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), lifting the automatic stay and declaring that the

stay imposed by section 69.3 of the BIA no longer operates in respect of the action bearing the Toronto Court File No. CV-22-00681963-0000 (the "**Fraud Action**").

[2] The basis of this request for leave is that the Creditors in the Fraud Action are seeking damages against the Bankrupt of approximately $500,000 for fraud, fraudulent misrepresentation, negligent misrepresentation, misappropriation and conversion, unjust enrichment, breach of contract, and breach of fiduciary duty in relation to the Bankrupt's financial advice and alleged misrepresentations made by the Bankrupt to the Creditors as their financial advisor, and seeking a declaration under s.178 of the BIA that any order for discharge will not release the Bankrupt from such resulting debts and liabilities.

[3] The Bankrupt opposes the Motion.

[4] The Trustee does not oppose the Motion, and the OSB did not intervene on the Motion.

[5] This Motion has urgency as Counsel for the Creditors has advised that there is a Summary Judgment Motion in the Fraud Action scheduled for hearing by the Order from Civil Practice Court of Dow, J. dated October 11, 2023 which reads:

> "The parties seek a date for summary judgment in this civil fraud action. This matter shall proceed on **April 3 2025** for 3 hours. The parties have filed their agreed upon timetable (see page 4)."

[6] The Additional context for this Motion is that counsel for these Creditors, are also counsel for another group of 10 creditors of the Bankrupt in Toronto action CV-23-00698211-000 (the "**Group Action**") in which the plaintiffs in that Action (that do not include these Creditors Whayne and Antoine) claim that the Bankrupt guaranteed them monthly interest payments of 5-6% of their initial investments if they invested in Legacy Investors Group ("**Legacy**") along with a co-defendant Anthonie Ruinard ("**Ruinard**"). Ruinard is not a co-defendant in this Fraud Action.

[7] This alleged relationship between these Creditors, the Bankrupt, Ruinard and Legacy is also central to the relief sought by these Creditors on this Motion.

[8] In *Ahsan et al v. Nicholson et al*, 2023 ONSC 3146, Chalmers J. granted a *Mareva* Injuction and a *Norwich* Order, on an *ex-parte* basis, making the following findings of fact from the evidence provided, including an Affidavit of Antoine Small, one of the Creditors on this Motion:

> "[1] The Plaintiffs bring this motion, without notice and on an urgent basis for a *Norwich* order and *Mareva* injunction.
>
> [2] The Defendant, Richard Nicholson (Nicholson) and his company, Nicholson Wealth and Risk Solutions Inc. operating as NWR Financial Group (NWR) recommended that the Plaintiffs invest in a hedge fund operating in the United States called Legacy Investors Group Inc. (Legacy). Control and oversight was to be carried out by Ruinard Inc., Anthonie Ruinard Jr. and Petrian Orreathia Ruinard.

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[3] Nicholson represented to the Plaintiffs that he was the operations manager for the Canadian division of Legacy and that he had personally invested in Legacy. He stated that Legacy is a hedge fund that operated in Arizona. He guaranteed that the Plaintiffs would receive monthly interest payments in the amount of 5 or 6% for their investment. He also represented that Legacy had never lost any investor money and had been profitable for 18 years. The Plaintiffs state that in reliance of the representations, they sent Ruinard and Legacy a total of USD $670,000 between August 2021 and October 2022. The contractually agreed to interest on this amount was USD $345,000.

[4] Nicholson arranged for the Plaintiffs to wire the funds to Ruinard Inc. or Anthonie Ruinard Jr. Initially some of the Plaintiffs received monthly interest payments. The payments were sent directly from a bank account at the Royal Bank of Canada and not from Legacy. The monthly interest payments eventually stopped. After the monthly payments stopped the Plaintiffs asked Nicholson to return their initial investment and the interest owed to them. Nicholson made promises to repay the Plaintiffs but did not do so.

[5] Nicholson admitted to one investor Antoine Small that he had not invested funds with Legacy but instead with Nicholson personally. He promised to repay Mr. Small but did not do so.

[6] The Plaintiffs retained U.S. counsel. They sent correspondence to Legacy at the address set out in the investment documents and the corporate entity address indicated in an Arizona search for Legacy. It was returned to sender. There is no operating business located at the address indicated for Legacy. The Plaintiffs tried to contact Nicholson by phone but have been unsuccessful.

[7] Nicholson posted pictures and videos of luxury purchases on social media websites including photographs of a $400,000 Lamborghini sports car and a $100,000 luxury watch. Nicholson has sold his home in Ontario. The proceeds of the sale were intercepted. The net proceeds of the sale are in a solicitor's trust account."

And

"[17] I am satisfied that the Plaintiffs have established a strong *prima facie* case of fraud. The evidence that supports fraudulent activity is as follows:

- Nicholson stated that the funds would be invested with Legacy;
- The funds were wired to the United States with Ruinard Inc. or Anthonie as the beneficiary recipient;
- The initial investment returns were not paid from the United States but instead from an RBC account in Mississauga that is close to the NWR office;
- After the advance of funds, Nicholson purchased expensive luxury items;

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- In February 2023, Anthonie accused Nicholson of "embezzling money from investors" and severed his relationship with Nicholson;

- Nicholson admitted to Antoine Small that he had not deposited funds paid by Small with Legacy. Although he promised to repay the funds he did not do so and instead sold his house, (the proceeds from the same are in a solicitor's trust account in Ontario); and

- The demand letter sent to Legacy at its last known address was returned to sender. Legacy, Ruinard inc. and Anthonie Ruinard have failed to accept correspondence and have stopped communicating with the Plaintiffs.

and

> "[28] The Plaintiffs have established a reasonable claim. Nicholson made representations to encourage the Plaintiffs to enter into the investor agreements. The representations made were false in that the Plaintiffs were told that Legacy was a bona fide company that had never lost an investor's money. The interest payments that were initially received were not paid by Legacy but instead from an RBC branch close to Nicholson's office. Nicholson purchased luxury vehicles and goods. The funds were sent to Ruinard Inc. by wire transfer. It is not clear on the evidence how Nicholson obtained the funds sent to Ruinard to allow him to purchase the luxury goods. Nicholson admitted to Mr. Small that he had not put the money Mr. Small invested to Legacy. The demand letter to Legacy was returned to sender and Nicholson stopped communicating to the Plaintiffs."
>
> [29] The evidence supports a claim in intentional fraud."

[9] Also relevant to this Motion are the findings of Associate Justice Brown on an urgent motion by the Creditors to obtain Certificates of Pending Litigation ("**CPL**") against two properties known municipally as 78 Regent Drive, St. Catharines, Ontario L1R 3C2 (the "**St. Catharines Property**") and 397 East 28th Street, Hamilton, Ontario L8V 3J9 (the "**Hamilton Property**" (collectively, the "**Properties**").

[10] Those Properties are of relevance on this Motion as well because the motion materials filed to obtain the CPLs is based on many of the same allegations, and the same pleadings, in the very same Fraud Action that the Creditors seek to obtain leave to continue under s.69.4 of the BIA on this Motion.

[11] In his June 7, 2022 endorsement granting the requested CPL on each of the Properties, AJ Brown states:

> "…
>
> [2] In their Statement of Claim issued on May 31, 2022, the plaintiffs, Antoine and Whayne Small, make serious allegations of fraud against the defendant, Richard Millhouse Nicholson. The defendant had been recommended to the plaintiffs as an

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investment advisor. The claim alleges that the plaintiffs gave the defendant a total of $337,000 USD by way of bank drafts made out to the defendant personally, which the parties had agreed would be invested by the defendant in a U.S. hedge fund recommended by the defendant.

[3] For each of the three bank drafts given to the defendant, the plaintiffs allege that the defendant signed a promissory note in favour of one of the plaintiffs. Each of the promissory notes (the "Notes") (copies of which are appended to the affidavit of Antoine Small filed on this motion) was for a term of one year. The Notes came due and payable (principal and interest) between February 11, 2022 and April 13, 2022. Each of the Notes also provides that the Lender (Antoine Small on two of the Notes, and Wayne Small on the third) may register a security interest against one of the Properties owned by the defendant as security for the loan.

[4] The Note for $77,000 USD, due February 11, 2022 (the "February Note") with Antoine Small as Lender provides for the registration of a security interest on the Hamilton Property:

> "As security for this loan, the Lender may register a security interest or lien on the property municipally known as 397 East 28th St. Hamilton ON LBV 3J9. The Borrower [the defendant] is responsible for any legal fees associated with this promissory note, including, but not limited to the registration of lien and discharge of a property lien."

[5] Similarly, the Notes for $100,000 USD, due March 8, 2022 with Whayne Small as Lender (the "March Note"), and $160,000 USD, due April 13, 2022 with Antoine Small as Lender (the "April Note"), both provide for the registration of a security interest on the St. Catherines Property:

> As security for this loan, the Lender may register a security interest or lien on the property municipally known as 78 Regent Dr. St. Catharines ON L2M 3L7. The Borrower [the defendant] is responsible for any legal fees associated with this promissory note, including, but not limited to: the registration of lien and discharge of a property lien.

[6] The plaintiffs allege that the defendant made interest payments on the Notes between February and November 2021 but that these payments stopped in November 2021 with no explanation. They allege that none of the Notes were paid when they became due and all remain outstanding despite repeated demands they be repaid. In April 2022, the plaintiffs determined that none of the funds provided to the defendant had been invested in the U.S. hedge fund as agreed. In his affidavit, Antoine Small states that he spoke with the defendant on April 21, 2022 and that the defendant admitted that none of the funds had been invested with the U.S. hedge fund and instead had been invested with the defendant "personally".

[7] The plaintiffs allege that instead of investing the funds in the U.S. hedge fund and honouring the terms of the Notes, the defendant diverted the plaintiffs' funds

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to himself for other unknown purposes. The plaintiffs claim damages for fraud, fraudulent misrepresentation, negligent misrepresentation, misappropriation and conversion, unjust enrichment, breach of contract and breach of fiduciary duty. The plaintiffs further claim equitable tracing, disgorgement and a constructive trust in respect of funds received from the plaintiffs and any profits earned.

[8] Relying on the security interests granted in the Notes, in paragraphs 57-60 of the Statement of Claim the plaintiffs seek certificates of pending litigation against the Hamilton Property (based on the February Note) and the St. Catharines Property (based on the March and April Notes). The claim states that the St. Catharines Property is currently listed for sale and that such a sale could jeopardize the plaintiff's security for the Notes.

[9] Many of the allegations in the Statement of Claim are supported by evidence filed on this motion. Both plaintiffs swore affidavits in support of the motion recounting many of the facts pleaded. In addition to copies of all three Notes, the affidavit of Antoine Small attaches copies of two of the bank drafts and the related deposit receipts, screen shots of text messages exchanged between Antoine Small and the defendant, the MLS listing for the St. Catharines Property and a Teranet property report for the Hamilton Property.

[10] In a February 11, 2021 text message exchange that is attached to the affidavit, the defendant coaches Antoine Small on how to get obtain a bank draft made out to the defendant from the plaintiffs' bank. The defendant goes on to state "They [the bank] will ask you a bunch of questions let them know it's for investment purposes". Other text exchanges appear to substantiate the plaintiffs' repeated demands to be paid on the Notes, the defendant's repeated unfulfilled promises to pay and the excuses given for such non-payment. In one text exchange in April 2022, the defendant states to Antoine Small "You will be paid in full as soon as possible. I've been red flagged by cra and anti money laundering in doing extensive wiring of large amounts. Hence why my transfers were blocked. This is why I have to go to the States so that I can send your money little by little." This is not the response one might expect from an investment adviser engaged in bona fide investment transactions on behalf of a client. In my view, these text messages support the plaintiffs' underlying allegations of fraud.

…

[16] I am persuaded by the allegations of fraud and the evidence filed in support of those allegations that balancing the equities in this case favours granting the CPL to ensure that the plaintiffs have recourse to the security in the Notes if the fraud is proven. I am concerned that damages would not be an adequate remedy as there appears to be a significant risk that a damages award would not be collectable as against this defendant. On the equities as reflected in the record before me, I find that the risk of permanent harm to the plaintiffs of an unrecoverable judgment for fraud outweighs the risk of harm to the defendant from the imposition of a CPL."

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[12] The Bankrupt did not appeal the Order of AJ Brown.

[13] Much of the evidence mentioned in these reasons of Chalmers, J. and A.J. Brown were filed by the Creditors on this Motion.

[14] As will be discussed below, the test for granting leave under s.69.4 of the BIA requires a lower standard of proof than the tests for granting a *Mareva* Injunction, as granted by Chalmers, J. or for granting the CPLs, as granted by AJ Brown.

[15] Also very relevant to this motion was that according to a press release issued on November 26, 2024 by the U.S. Attorney's Office for the District of Arizona:

> "Last week, a federal grand jury in Phoenix returned a 19-count indictment against Anthonie Ruinard, Jr., 39, of Chandler, for Wire Fraud and Transactional Money Laundering.
>
> The indictment alleges that Ruinard scammed at least 54 victims out of more than $5.6 million through an investment fraud scheme operated under the guise of a business called Legacy Investors Group Inc. Ruinard falsely portrayed himself as a successful investor worth over $470 million. He promised victim-investors guaranteed rates of return—generally 5% to 6% per month—through investments in venture capital, private equity, and real estate. While some of the early victim-investors received some initial payments to perpetuate the fraud, others lost their entire investment. Ruinard largely used the victims' money for himself, including on luxury vehicles (for example, the purchase of an armored vehicle for $344,000), general living expenses, casino gambling, credit card payments, and rental expenses.
>
> A conviction for wire fraud carries a maximum penalty of 20 years in prison and a fine of up to $250,000, or both. A conviction for transactional money laundering carries a maximum penalty of 10 years in prison and a fine of up to $250,000, or both."

[16] Ruinard was easily arrested on these federal charges by the FBI, as he was already in pre-trial custody in Arizona, as on March 13, 2024 a Maricopa County Arizona State Grand Jury indicted Ruinard for second degree murder, as well as for charges that Ruinard allegedly killed, and then dismembered, burned and abandoned the body of an 18 year old tourist in a debris burn pile in an area known as "The Pit" in the Tonto National Forest. Ruinard's trial for these charges may begin as early as February 2025.

THE BANKRUPTCY PROCEEDINGS

[17] The Bankrupt made an Assignment into Bankruptcy on March 26, 2024.

[18] The Bankrupt is a first time Bankrupt.

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[19] On this Motion the Trustee has filed a s.170 Report dated (as amended) on December 23, 2024 (the "**s.170 Report").**

[20] The Trustee has also filed the Creditors Package sent to all creditors (the "**Creditors Package**") which included the Trustee's Preliminary Report to Creditors (the "**Preliminary Report**") and the Statement of Affairs sworn by the Bankrupt (the "**Statement of Affairs**").

[21] Filed on this Motion as an exhibit to the Opposition to Discharge filed by the OSB on December 20, 2024 (the "**OSB Opposition**") is a claims Register prepared by the Trustee dated April 30, 2024 (the "**Claims Register**") indicating secured creditors totalling $422,821.00 - chiefly mortgages by Equitable Bank in the amount of $342,820 and Wellington Hathshire in the amount of $80,000 (the "**2nd Mortgage**") on the Hamilton Property. It does not appear from the Claims Register, dated April 30, 2024, that any secured creditors have filed claims with the Trustee. However the Trustee did not provide an updated Claims Register with the amended s.170 Report.

[22] The Claims Register also lists $236,164.00 in declared unsecured creditors. It appears that creditors have filed additional unsecured claims totalling $2,072,040.89, of which the Trustee has admitted only $119,430.19 to date.

[23] In addition on the Claims Register are listed 40 contingent creditors, including these Creditors Antoine and Whayne, whose claims are listed in the Claims Register as filed, but not admitted, and contingent, with a valuation of $1.00. The largest of these is David Hope with a claim of $450,070.22. Several of these creditors listed with contingent claims also appear to be Plaintiffs in the Group Action.

[24] As grounds of opposition to the Bankrupt's automatic discharge the OSB lists in the OSB Opposition s.173(1)(a),(d),(e), and (k) facts. I note that the following is stated in the OSB Opposition:

> "3. On December 17, 2024, the Senior Bankruptcy Analyst ("SBA") **referred the estate to the Special Investigations Unit (SIU)** based on transcripts and information contained in the July 2024 Motion to Lift Stay of Proceedings."

[25] Obviously, as the SIU referral was in December, 2024 there is no information yet as to the outcome of that SIU investigation, or whether the Crown is proceeding with a prosecution of the Bankrupt under the BIA, the *Criminal Code*, or other legislation.

[26] Also appended to the OSB Opposition, supporting the grounds of the OSB's opposition to discharge are:

1) The Creditors Package;

2) The Motion Record for this Motion by the Creditors, which includes as exhibits to the Affidavit of Antoine Dwayne Small (the "**Small Affidavit**") the Statement of Claim of the Creditors in the Fraud Action (the "**Statement of Claim**"); the Statement of Defence of the Defendant in the Fraud Action (the "**Statement of Defence**"), the Examination for

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Discovery Transcript in the Fraud Action conducted on February 24th, 2023 (the "**Discovery Transcript**"); the Chalmers, J. Endorsement; and a Notice of Sale under Mortgage by Wellington Hathshire Mortgage Investment Corporation ("**WHMIC**") dated December 23, 2023 (the "**WHMIC Notice of Sale**") for the Hamilton Property.

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[27] The Creditors have filed proofs of claim in the Bankruptcy, but they were not appended to the Small Affidavit. The Trustee provided the following information requested in my October 16, 2024 Endorsement to be provided by December 15, 2024, on January 20, 2025:

> "Further to the endorsement of Associate Justice Ilchenko, after follow up and discussion with Ms. Tianna Porter, the spouse of Mr. Antoinne Small, who is assisting both Antoinne and Whayne Small with their Proof of Claim. Ms. Porter is proceeding with amending the Proof of Claim originally filed and will be filing two separate claims, one for Mr. Antoinne Small and one for Whayne Small that should indicate an amount relating to secured debt and a portion of the debt that is unsecured for both claims."

[28] The Trustee provided these amended proofs of claim for the Creditors to the Bankruptcy Court Office on January 29, 2025. In the Proof of Claim of Antoine Small (the "**Antoine Proof of Claim**") Antoine makes a secured claim in the amount of CAD$359,511, with the unsecured portion of the claim valued at $241,115. In the Proof of Claim of Whayne Small (the "**Whayne Proof of Claim**")(collectively the "**Proofs of Claim**") Whayne makes a secured claim in the amount of CAD$152,302, with the unsecured portion of the claim valued at $18,925 and the secured portion $133,377.

[29] Once I received the Proofs of Claim on February 3, 2025, providing evidence of the standing of the Creditors to bring this Motion, I could complete these reasons.

[30] The Creditors claim that the 2nd Mortgage may have been obtained by the Bankrupt after the registration of the CPL on the Hamilton Property. It is not clear why WHMIC would make an advance under the 2nd Mortgage in the face of a CPL.

[31] The WHMIC Notice of Sale states that the 2nd Mortgage was granted on December 7, 2020. The CPL's were granted by AJ Brown in June of 2022. No Abstract of Title to the Hamilton Property was filed in evidence on this Motion showing evidence of dates of registration, or dates of advances under the 2nd Mortgage. The Creditors are listed on the Schedule A to the WHMIC Notice of Sale, but there is no evidence whether the Notice of Sale was properly served, or what other steps WHMIC has taken to enforce on the Hamilton Property. It is also not clear whether this action taken by WHMIC is in breach of the terms of the *Mareva* Injunction granted by Chalmers, J. on May 19, 2023.

[32] The Trustee states the following with respect to the realizable assets of the Bankrupt, an in particular the Properties, in the Preliminary Report as at March 28, 2024:

> " II. Cash on Hand
>
> There is $266,754.50 in trust with Zaire Lorne Professional Corporation, which the bankrupt believes he is entitled to receive $133,377. These funds were received after selling

the property at 78 Regent Drive, St. Catherines, Ontario. The property was bought as an investment property. Due to there being a dispute between the Bankrupt and his business partner regarding how the funds should be split, Zaire Lorne Professional Corporation is still holding the funds. The trustee will be dealing with the lawyer in order to settle the amount the estate is entitled to receive.

III. Real Property

The property located at 397 E 28th St, Hamilton ON (the "Property") is owned by the Bankrupt and is currently being foreclosed by the second mortgagee, Wellington Hathshire. Based on the opinion of value the bankrupt received from Search Realty Corporation the value of the property is approximately $705,000.

There is a mortgage registered against the Property in the amount of $342,820, and a second mortgage registered against the Property in the amount of $80,000.

The Bankrupt's equity interest in the Property after mortgages and other closing costs is approximately $239,523.

[33] It is not at all clear whether the Trustee has assessed the various secured claims, registered and unregistered, including those made by the Creditors against the Properties.

[34] There is no evidence before the Court who the alleged "business partner" making a claim to the proceeds of the St. Catharines Property is, the nature of their claim, or how the *Mareva* Injunction affects the claim.

[35] Similarly, with respect to the Hamilton Property, the Creditors are claiming proprietary interests to that property, as will be detailed below, but there is no mention of that proprietary or secured claim by the Trustee.

[36] At best, there will be a priority dispute to the proceeds of the Properties between the competing secured claims of the registered mortgagees, the alleged secured claims of these Creditors Antoine and Whayne, and the Trustee on behalf of the other creditors.

[37] Unhelpfully, the Trustee did not provide an update on creditor claims, realizations by the Trustee, and an updated claims register in the s.170 Report it filed, late, on January 9, 2025. The Trustee also reports that it is not opposing the Bankrupt's discharge, which is extremely surprising given the evidence previously provided to the Court for this Motion, and contained in the OSB Opposition. This s.170 Report is unacceptable.

[38] It is also unclear whether the Bankrupt was operating a corporation as an investment business, was acting as a sole proprietor, or both. The Trustee states in the Preliminary Report:

> "The Bankrupt was self-employed at NWR Financial Group, where he was the sole director, but recently resigned."

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[39] In the Group Action in which Chalmers, J. issued the *Mareva* Injunction, there is a defendant "Nicholson Wealth and Risk Solutions Inc. carrying on business as NWR Financial Group". ("**NWR**"). NWR is not a defendant to the Fraud Action.

[40] If the Bankrupt was a shareholder of this NWR entity, he did not declare this shareholding on his Statement of Affairs. There is nothing in any of the Reports of the Trustee as to whether there are amounts payable to the Bankrupt from this NWR entity, like shareholder loans, or deferred management income, that would be the property of the Trustee. There is also no information whether NWR, if it is a corporation, had retained earnings that the Trustee could extract from the apparent sole shareholding owned by the Bankrupt.

[41] There is no evidence whether this NWR entity is also Bankrupt, but it does appear from the Chalmers, J. Endorsement to be subject to the *Mareva* Injunction as a defendant in that Group Action.

[42] This is relevant to this Motion, as the Statement of Claim of the Creditors in the Fraud Action is only against the Bankrupt in his personal capacity, and this NWR entity does not appear to be a party defendant to the Fraud Action.

[43] However, if the Bankrupt was dealing with the Creditors personally, and not through this entity, then there could be personal tax and HST implications, and CRA to date has not been put on notice from the statement of affairs, and has not filed a claim.

[44] Of note, from the evidence filed it appears that the Properties were income properties, so their sale could result in significant capital gain income attributable to the Bankrupt, and a significant CRA claim in this Bankruptcy.

[45] There could also be directors liability implications for HST and Source Deductions owing by this NWR entity if a corporation, and deemed trust issues if corporate assets or funds were transferred to the Bankrupt, or deposited in the accounts of the Bankrupt, while the corporate entity was a tax debtor, particularly for source deductions owing to any employees.

[46] To date the OSB has opposed the Bankrupt's automatic discharge, and counsel for these Creditors has also advised that they will also oppose, but to the knowledge of the Court, have not done so yet.

[47] The asset values reported by in the s.170 Report, including the $1800 in voluntary fee payments made to the Trustee, are:

Asset	**Value as per Statement of Affairs**	**Estimated Realizable Value**
Cash on hand – Trust Account of Zaire Lorne Professional	$266,754.00	$133,377.00

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Corporation- Proceeds of sale of St. Catharines Property		
Furniture	$1000.00	$0 – claimed statutory exemption
Hamilton Property	$705,000.00	$239,523.00
Voluntary Payments	$1800.00	$1800.00
Total	**$974,554**	**$374,700**

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THE STATEMENT OF CLAIM AND EVIDENCE OF THE CREDITORS ON LEAVE MOTION

[48] The Statement of Claim in the Fraud Action that the Creditors are requesting leave to continue was issued by the Creditors in Toronto on May 31, 2022 (the "**Statement of Claim**") and is attached at Exhibit A to the Small Affidavit.

[49] The jurisprudence as set out below, and in particular, the decision of Penny, J. in *Global Royalties*, and Chief Justice Morawetz in *Ieluzzi* (both as defined below) require the Court on a leave motion to analyze the claims made by the Moving Party, and the response by the Bankrupt, in their respective pleadings in the action for which leave is sought.

[50] Of relevance to this leave motion, the Statement of Claim asks for the following relief:

> "damages for fraud, fraudulent misrepresentation, negligent misrepresentation, misappropriation and conversion, unjust enrichment, breach of contract and breach of fiduciary duty in the amount of $500,000, plus further sums, the particulars of which will be provided prior to trial;"

[51] The following paragraphs of the Statement of Claim set out the nature of the misrepresentations alleged, relevant to this leave motion:

> "…
>
> 8. Antoine and Whayne jointly owned a property at 7 Red River Dr, in Brampton, Ontario, that was sold February 2, 2021 (the "Red River Property").
>
> 9. With Nicholson's advice and assistance, Antoine invested his portion of the proceeds of sale of the Red River Property in certain Manulife of Canada mutual funds.

10. In addition, Nicholson assisted Antoine and Porter in establishing trust funds for their infant children, born in 2019 and 2021.

11. Nicholson was aware of the sale of the Red River Property and Australia Drive Property, and was aware that the funds sent pursuant to the promissory notes described below, were sourced from the proceeds of sale of those properties.

12. Antoine handled his father Whayne's financial affairs, a fact know to Nicholson.

13. On or about February 11, 2021, approximately one week following the sale of the Red River Property, Nicholson recommended to Antoine that he move some of his investments to a hedge fund operating out of the United States.

16. Nicholson issued a promissory note to Antoine, evidencing the alleged $77,000 USD investment. The terms of the note are described in more detail below (the "February Note").

17. On March 4, 2021, Nicholson asked Antoine to invest another $100,000 USD.

18. Following insistent demands from Nicholson, Antoine agreed to invest $100,000 USD of Whayne's funds through Nicholson. A promissory note, described in more detail below, was issued by Nicholson evidencing the alleged $100,000 USD investment (the "March Note").

19. Finally, on April 13, 2021, Antoine provided $160,000 USD to Nicholson for an alleged investment. A promissory note, described in more detail below, was issued by Nicholson evidencing the alleged $160,000 USD investment (the "April Note").

The Promissory Notes

20. The terms of the Promissory Notes were as follows:

i. The February Note in the amount of $77,000 USD would earn interest of 6% per month, payable upon maturity, along with payment of principal, on February 21, 2022.

ii. The March Note in the amount of $100,000 would earn interest of 6% per month. Interest on half of the principal amount would accrue and be paid out lump sum on December 15, 2021, and interest on the remaining half, plus principal, would be paid out in full on April 6, 2022.

iii. The April Note in the amount of $160,000 USD would learn interest of 6%, per month, payable in lump sum, along with principal repayment, on April 21, 2022.

21. None of the principal amounts of the Notes have been repaid.

22. Interest payment totaling $150,000 USD were paid between February and November 2021. These stopped in November 2021, without explanation.

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The Promissory Note Scheme

23. Nicholson was the Plaintiffs trusted financial advisor. In February 2021 he advised Antoine to invest his and Whayne's funds in a hedge fund operating out of the United States named Legacy Investors Group Inc. ("Legacy").

24. According to Nicholson, the Legacy investment would be very profitable, and Nicholson stated that he was invested in it himself. However, Nicholson told Antoine that Antoine did not qualify to invest in Legacy directly, but that Nicholson would do so on his behalf.

25. Nicholson told Antoine that his and Whayne's funds had been invested with Legacy, and that a contract evidencing the investment would be provided to him. Despite months of demands for same, the alleged Legacy contract has never been provided.

26. On April 19, 2022 Antoine contacted Legacy and spoke to the Chief Executive Officer, Anthonie Ruinard ("Ruinard") who advised him that none of his funds had been invested with Legacy.

27. On April 21 2022, Antione spoke with Nicholson, who admitted that the Plaintffs' funds had not been invested with Legacy, and had only been invested with him personally. The Plaintiffs had never agreed to such an investment and this was the first the Plaintiffs had heard of such an investment with Nicholson personally.

28. Shortly thereafter, Nicholson called Antoine and advised him that he would send him a bank draft for all amount owing by April 26, 2022. No such draft was ever received by the Plaintiffs.

29. Nicholson has made repeated promises to repay the Plaintiffs funds for a number of months. None of those promises have been fulfilled.

30. On May 6, 2022, the Plaintiff discovered that one of the residential properties that is owned by Nicholson and that was pledged as security for the March and April, 2022 Notes, has been listed for sale.

31. The Plaintiffs plead that they have been defrauded by Nicholson, who is now dissipating assets in an attempt to render himself judgment proof.

…

Negligent Misrepresentation

35. In addition and/or the alternative, the Plaintiffs plead negligent misrepresentation against the Defendant.

36. The Defendant owed the Plaintiffs a duty of care to provide full and accurate disclosure regarding the Note Scheme and his ability to repay the Notes when due.

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37. Nicholson represented to the Plaintiffs that the investment was a genuine one, would be made with Legacy, and that it was safe and would yield guaranteed returns.

38. In fact, the investment was fraudulent and never intended to be made and was not made which rendered the representations made to the Plaintiffs about the investment strategy false and misleading.

39. The Plaintiffs relied on Nicholson's misrepresentations, to their detriment, by advancing funds pursuant to the Notes, and have suffered loss as a result.

Fraud, Fraudulent Misrepresentation, Misappropriation and Conversion

40. Further or in the alternative, the Defendant perpetrated a fraud against the Plaintiffs by establishing a scheme to induce them to advance funds for a non-existent investment that he knew to be fraudulent.

41. Nicholson's misrepresentations to the Plaintiffs as part of the Note Scheme induced them to forward their funds to Nicholson, which he then misappropriated.

42. The Defendant knew he was engaged in a fraudulent scheme, and specifically knew that:

i. The Legacy investment did not existed and/or was never intended to be completed;

ii. That he did not have the means to make the 6% interest payment owing and repay the principal by the required date; and

iv. That the Plaintiffs' funds would be diverted by Nicholson to family and friends and for the purchase of personal luxury goods, including high performance automobiles and jewelry.

43. The Plaintiffs relied on the Defendant's misrepresentation described above to their detriment. Had the Plaintiffs known that the Defendant did not intend to and was not able to make their investment with Legacy, and that Legacy is likely a fraudulent scheme, they would never have forwarded their funds to the Defendant.

44. The Defendant misappropriated and converted the Plaintiffs' funds for his own use and benefit. Full particulars of the misappropriation and conversion are within the knowledge of the Defendant. As a result of advancing the funds, the Plaintiffs suffered damages, as described.

…

Breach of Fiduciary Duty

46. The Defendant undertook to act with loyalty and in the best interests of the Plaintiffs when agreeing to accept their funds for the investment scheme.

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47. Nicholson was the Plaintiffs trusted financial advisor, and knew the Plaintiffs were relying on him for advice regarding their investments.

48. The Plaintiffs trusted the Defendant to be honest, transparent, and to put the Plaintiffs'

interests ahead of his own when dealing with the Funds and to use the Funds solely for the purpose of the Legacy investment. This trust made the Plaintiffs vulnerable to the Defendant's exercise of control or discretion. That discretionary power affected the Plaintiffs' legal and substantial practical interests.

49. The Defendant owed the Plaintiffs the following duties:

i. a duty of loyalty, which required the Defendant to avoid putting himself in a position where the Plaintiffs' best interests may be compromised due to his own self-interest or his relationship with a third party;

ii. a duty of honesty and good faith;

iii. a duty to disclose any conflict of interest; and

iv. a duty to exercise tasks with prudence, care and skill.

50. The Defendant breached his fiduciary duties to the Plaintiffs by the conduct described above, including

i. making misrepresentations regarding the use of the Plaintiffs' Funds;

ii. recommending the Plaintiffs advance the Funds to him to place into the Legacy investment; and,

iii. misappropriating the Funds for his own benefit and refusing to return the Funds.

51. As a result of the Defendant' breach of fiduciary duty, the Plaintiffs have suffered loss and damage equal to the amount of the Funds they advanced to the Defendant, unpaid inteest and associated fees and expenses.

52. Further, pursuant to the reasonable expectations between the parties, the Defendant was required to disclose to the Plaintiffs that:

i. funds were being used for personal purposes, and to account for those uses;

ii. funds were never intended to be returned.; and

iii. the Defendant never invested the Plaintiffs' funds with Legacy or with anyone else.

53. In relying on the Defendant' misrepresentations, the Plaintiffs has lost more than $500,000."

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[52] I note that despite the Bankrupt admitting to issuing promissory notes to the Creditors, and the Bankrupt's failure to make payment under the promissory notes is one of the grounds for the claims by the Creditors, there is no specific claim made by the Creditors in the Statement of Claim in the Fraud Action under the provisions of the *Bills of Exchange Act*, RSC 1985, c B-4 per *Bank of Montreal v. Abrahams,* 2003 CanLII 37259 (ON CA).

[53] In the Small Affidavit, whose wording generally follows the Statement of Claim, the alleged misrepresentations by the Bankrupt that the Creditors are seeking leave to pursue as a s.178 debt are described as follows:

> "10. Specifically, Richard advised me to invest in Legacy Investors Group ("Legacy"), a hedge fund operating in Arizona. I am now aware that the director of Legacy is Anthonie Ruinard ("Ruinard").
>
> 11. Richard told me that Legacy would be very profitable, and he stated that he was invested in it himself. However, Richard told me that I did not qualify to invest in Legacy directly and that Richard would invest in Legacy on my behalf.
>
> 12. Relying on these representations from Richard, I agreed to invest in Legacy.
>
> 13. On February 11, 2021, Richard provided me with instructions on how to prepare my bank draft to make my investment in Legacy and advised that it should be payable to Richard personally in the amount of $77,000 USD
>
> 14. In addition, Richard advised me that I would be asked many questions by the bank, and to answer that the funds were being deposited for "investment purposes."
>
> …
>
> 25. After transferring my funds to Richard, he told me that my funds had been invested with Legacy, and that a contract supporting the investment would be provided to me.
>
> 26. I demanded to receive this alleged Legacy contract for months from both Richard and Ruinard, but it was never provided. Copies of requests to Richard and Ruinard for the investment contract dated May 17-19, 2021, are attached hereto as Exhibit "H".
>
> 27. Finally, on April 21, 2022, Richard admitted that my funds had not been invested with Legacy and had only been invested with him personally.
>
> 28. Shortly after, Richard called me and said that he would send me a bank draft for the total amount owing by April 26, 2022.
>
> 29. Despite this promise, and repeated others after this, I still have not received any payment as of today's date. A copy of text messages is attached hereto as Exhibit "I".
>
> …

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Luxury Purchases and Other Assets

35. I have since learned that at the same time I was providing funds for the Legacy investment to Richard, he was purchasing luxury products for himself and his family.

36. From May to December 2021, Richard posted several pictures on Facebook of a Mercedes he purchased for his mother, an Audemars Piaget watch worth approximately $100,000, and a Lamborghini he purchased for himself valued at approximately $400,000. Copies of the Facebook posts attached hereto as Exhibit "N".

37. I believe that Richard used the funds that Whayne and I transferred him for these luxury purchases.

38. Further, when asked about his assets during the examination, Richard disclosed certain assets but would not provide any details about them. For example, Richard stated he owned a restaurant in Arizona, but claimed he did not know the address or city of said restaurant. A copy of the transcript from Richard's examination for discovery dated February 24, 2023, is attached hereto as Exhibit "O".

39. Since this action was commenced, I have become aware that Richard and Ruinard had a long-standing personal relationship.

40. I have also learned of several others who have been defrauded by Richard and Ruinard through their "investments" in Legacy.

41. In April 2023, ten plaintiffs commenced a group action against Richard and Ruinard bearing court file number CV-23-00698211-0000 in which the plaintiffs claimed that Richard guaranteed them monthly interest payments of 5-6% of their initial investments if they invested in Legacy (the "Group Action"). A copy of the endorsement of the Honourable Justice Chalmers dated May 19, 2023, is attached hereto as Exhibit "P".

42. With Richard's assistance and relying on his representations, the plaintiffs in the Group Action transferred their funds directly to Legacy.

43. Similarly, the interest payments for these plaintiffs ceased and they asked Richard to return their initial investments. Richard made promises to repay them but did not do so.

44. From the Group Action, I also learned that there is no operating business located at the corporate entity address indicated in an Arizona search for Legacy.

45. It is my understanding that the Group Action obtained an order called a Mareva Order, which froze all assets of Richard, Ruinard, and Legacy.

51. Richard has since admitted that the principals under the notes are immediately due and payable. A copy of the transcript from Richard Richard's examination for discovery dated February 24, 2023, is attached hereto as Exhibit "O".

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…

54. The automatic stay imposed by way of section 69.4 of the BIA has, and will continue to, cause material prejudice to the Plaintiffs for the reasons set out above."

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STATEMENT OF DEFENCE AND EVIDENCE OF THE BANKRUPT ON LEAVE MOTION

[54] The Bankrupt defended the Fraud Action in the Statement of Defence dated September 8, 2022, which proceeded to the Examination for Discovery of the Bankrupt on February 24th, 2023. (I have noted which paragraphs of the Statement of Defence prepared by counsel for the Bankrupt at the time have paragraph numbering that is not consecutive, for some reason).

[55] The paragraphs of the Statement of Defence, containing both broad general denials and specific denials, relevant to this leave motion state:

"…

[7] The Defendant states that he has been a financial advisor for fourteen (14) years, and specifically, a financial advisor with NWR Financial Group for four (4) years. Antoine became Richard's client in or around September 2020, after Antoine was introduced to him as a function of Richard's employment with NWR Financial Group.

[8] The Defendant understood that Antoine and his father were in the business of purchasing and reselling residential properties, also known as "flipping" houses. Antoine advised Richard that he was interested in diversifying his investments, through investing in various stocks and mutual funds. As such, Richard took him on as a client and began educating him and assisting him in planning how to invest his finances based on his short and long-term goals.

[9] During this planning process, Richard was not aware that Antoine was in the process of selling a property located at 63 Australia Drive., Brampton, Ontario ("Australia Drive Property").

[10] On or around early December 2020, Antoine advised the Defendant that he intended to utilize the Defendant's services to invest some of his funds. The Defendant states that throughout these discussions, he explained to Antoine the importance of long-term investing and of having a five-year plan for his investments. The Defendant further provided Antoine with financial literature on this area and suggested he place his funds in secure, long-term investments. The Defendant further states that he explained to Antoine that all investment carries some manner of inherent risk.

[11] The Defendant states that in order to further educate Antoine, he provided him with a book titled “Keeping it in the Family” by James Hughes Jr. that discusses how to create intergenerational wealth and the risk of investing.

[12] The Defendant states that acting on Antoine’s instructions, he assisted him in investing some of his funds in Manulife of Canada Segregated funds.

[13] The Defendant admits that he also assisted Antoine in setting up trust funds for Antoine’s young children.

[14] The Defendant was not aware that these funds were sourced from the proceeds of the sale of the Australia Drive Property.

[15] In or around early 2021, Antoine began expressing his desire to increase his investment returns. Specifically, Antoine advised the Defendant that he had intended to purchase a new home valued between $2 million to $4 million, within a year and required a quick return on his investment in order to be able to afford this purchase.

[16] The Defendant states that because of Antoine’s stated intentions, Richard discussed an investment opportunity with him that Antoine would not typically qualify for. This would involve Antoine investing his funds with Richard personally, who would in turn, invest the funds on his behalf in a private equity fund. The funds would then be invested in pattern day traded funds as well as in pre-existing businesses. Given the track record of the businesses typically invested in, a high range of returns were anticipated.

[17] The Defendant states that Antoine was interested in this opportunity and agreed to invest his funds in the manner the Defendant had explained. The Defendant was aware that Antoine had jointly owned a property with Whayne, located at 7 Red River Drive., Brampton, Ontario (“Red River Property”), which he sold on or around February 2021. The Defendant states that he was further aware that Antoine’s plan was to utilize his share of the proceeds of the sale of the Red River to invest in this opportunity.

[18] The Defendant states that like any investment, any transactional agreement between the Plaintiffs and Defendant involved a certain level of risk. Before entering into the agreement, with the Plaintiffs, the Defendant informed them of the potential risks including but not limited to the following (i) that the invested sums would not provide a return and; (ii) that the principle amount invested was also subject to market fluctuation/volatility. The Defendant states and pleads that the Plaintiffs were aware of and understood these risks and had ample opportunity to consult with any necessary advisors they saw fit in order to mitigate the said risk to them. In spite of these potential risks, the Plaintiffs transferred funds to the Defendant and directed him to complete the agreed upon transaction. The Plaintiffs knew or ought to have known that advancing the Defendant a sum of money was an action taken at their own risk.

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[19] The Defendant further states that he encouraged the Plaintiffs to make safer investments, but that the Plaintiffs were interested only in large, short term financial gain.

[20] On or around February 11, 2021, Antoine withdrew the sum of $77,000.00 USD from his bank account and deposited into Richard's personal TD Bank Account. At this time, Antoine had knowledge that the funds were deposited into Richard's personal account rather than an investment.

[21] At the time of the deposit, Richard admits that he issued a promissory note (the "February Note") to Antoine for the $77,000.00 USD. The terms of the promissory note included that the sum would accrue interest of up to 25% per month payable on maturity along with the principal of $77,000.00 USD on February 21, 2022. The parties also decided that 6% interest was anticipated to be paid each month from November 15, 2021 until maturity. However, the Defendant states that it was made clear in the language of the note that no returns were guaranteed.

[22] On or about March 4, 2021, Whayne contacted Richard to invest another $100,000.00 USD and Richard provided Whayne with a promissory note (the "March Note"). The March Note memorialized that the understanding between the parties was that the borrower would provide a 15% return per year but that the amount was not guaranteed. Interest of 6% on the principal amount would accrue from November 15, 2021 and be paid out in a lump sum on December 15, 2021. Interest on the remaining half, plus principal, would be paid out in full on April 6, 2022.

[23] On or around April 13, 2021, Antoine further provided the Defendant with the sum of approximately $160,000.00 USD to invest in the same manner. In exchange, Mr. Nicholson provided an additional promissory note (the "April Note") which included that interest would be accumulated at a rate of up to 25% per month which was to be paid in a lump sum with the repayment of the principal on April 21, 2022. However, the parties also decided that 6% interest was anticipated to be paid each month from November 15, 2021 until maturity. It was made clear in the language of the note that no returns were guaranteed.

[24] The Defendant pleads and states that paragraph 20 of the Statement of Claim is substantially true, save and except that the promissory note also stipulated that the monthly returns were not guaranteed.

[25] Between February 2021 and November 2021, the Defendant fulfilled the terms of respective notes by providing the Plaintiffs with monthly interest totalling approximately $159,930.00 USD. The payments made to the Plaintiffs are particularized as follows:

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Date Provided	Amount (USD)
June 2, 2021	$28,875.00
June 2, 2021	$3,750.00
July 9, 2021	$16,875.00
October 19, 2021	$16,000.00
October 20, 2021	$3,750.00
September 3, 2021	$10,680.00
November 8, 2021	$35,000.00
November 15, 2021	$27,000.00
November 16, 2021	$3,000.00
December 15, 2021	$3,000.00
January 15, 2022	$3,000.00
February 20, 2022	$3,000.00
March 18, 2022	$3,000.00
April 5, 2022	$3,000.00
TOTAL	**$159,930.00**

[26] The Defendant states that in or around November 2021, the financial markets experienced an unexpected downturn, and the value of the Plaintiffs' investment decreased. As such, the Defendant was unable to continue making the interest payments.

[27] The Defendant states that as the respective maturity dates neared, Antoine became anxious for his funds to be returned, and indicated that he wanted to instead utilize the funds to flip houses in British Columbia.

[28] Between November 2021 and February 2022, the Defendant states that he was unable to distribute the monthly investment returns but indicated to the Plaintiffs that he would provide the returns as a balloon payment at the time of maturity provided the markets recovered.

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[29] As the maturity dates passed, the Defendant states that the markets had not recovered, and he was not able to repay the principal amount to the Plaintiffs. He explained that the markets had taken a downturn, and that his own investments had also been affected. However, the Plaintiff, Antoine, became increasingly aggressive with the Defendant and threatened him and his family.

[30] The Defendant states that at no point, did he represent to the Plaintiffs that the funds were invested with Legacy Investors Group. The Plaintiffs understood that the funds were to be invested with by the Defendant personally, into a business, whereby his own properties would be utilized as collateral.

[31] The Defendant states that he also invested approximately $150,000.00 USD of his own funds in this opportunity, which failed to materialize into the financial gains projected.

[32] The Defendant denies that he attempted to sell the properties located at 78 Regent Drive, St. Catharines ON L2M 3L7 ("St. Catharines Property") and 397 East 28th Street, Hamilton, ON L8V 3J9 ("Hamilton Property"), respectively, in order to deprive the Plaintiffs of their security interests in the properties.

[33] The Defendant states that in or around March 2022, he attempted to sell the St. Catharine's Property in order to obtain the funds required to repay the principal of the Plaintiff's investment. The decision to list this property, arose out of the continued demands for repayment by the Plaintiffs. As the investment of the Plaintiffs' funds did not materialize as anticipated, selling the property was the only way the Defendant could obtain the funds to satisfy the repayment of the principal amounts.

[34] However, the Plaintiffs prevented the sale of the St. Catherine's Property by obtaining a CPL against it as well as the Hamilton Property.

[35] Mr. Nicholson denies having listed the Hamilton Property or ever having tried to sell the Hamilton Property.

LIABILITY

a) No Breach of Contract

[36] 36. The Defendant denies that there was any contract between the parties save and accept the agreement to return the $337,000.00 USD which the Plaintiffs advanced to the Defendant. The Defendant puts the Plaintiffs to the strict proof of any other alleged agreements, which are not admitted and are expressly denied.

[37] While the Defendant admits that he has been unable to return the principal amount referred to in paragraph 36 herein to date, he continues to make best efforts to do so. The Defendant has not resiled from this agreement.

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[38] The Defendant denies that the Plaintiffs are entitled to interest on their principal amounts and states that as the Plaintiffs understood and as was referenced in the promissory notes, all investment returns were not guaranteed.

[39] Further or in the alternative any contract between the parties was frustrated by virtue of the turbulent financial markets arising after the investment of the funds. The Defendant pleads and relies on the doctrine of frustration of contract.

b) No Liability for Negligent Misrepresentation

[40] The Defendant expressly denies any liability for the tort of fraudulent misrepresentation and puts the Plaintiff to the strictest proof thereof.

[41] The Defendant states that he did not misrepresent the nature of the financial transaction, and states that the Plaintiffs were fully informed of the nature of the agreement and the risks associated.

[42] The Defendant states that the Plaintiffs were aware that the returns on their investments were projected and not guaranteed. The Defendant provided a recommendation based on his industry expertise and the goals and intentions of the Plaintiffs.

c) No Liability for Fraud and Fraudulent Misrepresentation

[43] The Defendant expressly denies any liability for the torts of civil fraud and fraudulent misrepresentation and puts the Plaintiff to the strict proof thereof.

i) No Civil Fraud

[44] The Defendant denies having invested the Plaintiffs' funds in a fraudulent manner and maintains that he invested the funds in a manner agreed to by the Parties.

[45] The Defendant states that the anticipated returns were projected using a reasonable degree of care, based on the market realities at the time of investment, and the failure of the returns to fully materialize was outside of the Defendant's control.

[46] The Defendant expressly denies that any of the funds advanced to him by the Plaintiff were diverted to the Defendants' family and friends and puts the Plaintiffs to the strict proof thereof.

ii) No False Representation by the Defendant

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[47] The Defendant specifically denies making any false representations to Antoine or Whayne with respect to the investment funds. The Defendant states that the return quoted was the *projected* [Emphasis Added] return on investment, and the Defendant satisfied the monthly return payments until or around November 2021. The Defendant states that the returns were not guaranteed, and the fact that the investment did not materialize as anticipated was not within his control.

[48] The Defendant states the funds were deposited into the TD Canada Trust USD Chequing accounts, at the direction of, and with the knowledge and consent of the Plaintiffs.

iii) Not Knowingly False

[49] Further or in the alternative, the Defendant states that if any false representation was made to the Plaintiffs, the said representation was not known by the Defendant to be false.

iv) No Intent to Deceive Plaintiffs

[50] The Defendant denies that there was any intention on his part to deceive the Plaintiffs.

v) No Material Inducement to Act

[33] The Defendant denies that his conduct towards the Plaintiff at any time induced the Plaintiff to act with respect to any transaction or dealings, actual or intended, between them. [Paragraph Numbers in Statement of Defence incorrect]

[34] Further or in the alternative, if the Plaintiffs were induced in any way by any act or omission of the Defendants, the inducement was de minimus, inconsequential and/or immaterial. [Paragraph Numbers in Statement of Defence incorrect]

d) No Liability for Unjust Enrichment

[51] The Defendant denies that he has been unjustly enriched by the Plaintiffs and puts the Plaintiffs to the strict proof thereof.

[52] Any investments made by the Defendant for or on behalf of the Plaintiffs were professional services provided pursuant to a contract, express or implied, between

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the Plaintiffs and Defendants. The Defendants actions with respect to the investments were made with the consent and at the direction of the Plaintiffs and in satisfaction of the obligation to the Plaintiffs pursuant to the contract. Further or in the alternative, the Defendant states that any money received from the Plaintiff constituted proper remuneration for services rendered to the Plaintiff.

[53] Further or in the alternative, the Defendant pleads and relies on the defence of change of position. The Defendant states that stock market decline and unpredictability resulted in the Plaintiffs' investment not providing the returns anticipated.

[54] Recovery on the entirety of the sums claimed would result in a financial windfall for the Plaintiffs which would be contrary to the interests of justice.

e) No Liability for Misappropriation and Conversion

[55] The Defendant, Richard, expressly denies any liability for the tort of conversion and puts the Plaintiff to the strict proof thereof.

[56] The Defendant states and the fact is that he did not convert any property or funds of any of the Plaintiffs for his own benefit.

[57] Property and funds were at all times received from, utilized for the benefit of, and where applicable, liquidated with the knowledge, consent and or approval of the Plaintiffs.

f) No Liability for Breach of Fiduciary Duty

[58] The Defendant denies that he breached the alleged fiduciary duty owed to the Plaintiffs.

[59] The Defendant states that at all times, he acted on the Plaintiffs instructions and with their best interests in mind.

[60] The Defendant states that at all times, he was honest and transparent with the Plaintiffs and ensured they were advised of the risks of this investment. While the Defendant admits that he provided them with the projected returns, it was clear to the Plaintiffs that these returns were not guaranteed.

[61] The Defendant further states that he did not use the funds for his own personal purposes or otherwise in a manner other than which was agreed upon by the parties.

[62] The Defendant denies that there was ever an agreement to invest the Plaintiffs' funds in the Legacy investment. Rather the Defendant disclosed to the Plaintiffs at the outset that they were not eligible to take part in this type of investment.

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[63] The Defendant states that at all times, he exercised the prudence, skill and care required of a reasonable financial advisor.

[64] The Defendant denies that he failed to disclose any conflict of interest.

[65] The Defendant states that at all times, he has acknowledged the debts owed to the Plaintiffs, except as herein denied, and has made best efforts to return the funds which he acknowledges are owed. The Defendant has not refused to return the funds.

[66] The Defendant denies that the Plaintiffs have suffered a loss and puts them to the strict proof thereof.

g) No Constructive Trust, Equitable Tracing and Disgorgement

[51] The Defendant maintains that all funds were invested pursuant to the agreement between the parties and denies having utilized the funds for fraudulent or inappropriate purposes. [Paragraph Numbers in Statement of Defence incorrect]

DAMAGES

[50] The Defendant pleads that the Plaintiffs have failed to suffer damages and/or have failed to prove their damages. [Paragraph Numbers in Statement of Defence incorrect]

[51] Except as herein admitted, the Defendant expressly denies that the Plaintiffs are entitled to damages or relief as alleged in the Statement of Claim or at all including any punitive or aggravated damages. Further and in particular denies that the Plaintiffs are entitled to any equitable, interlocutory, injunctive or declaratory relief as alleged in the Statement of Claim and Puts the Plaintiff to the strict proof thereof. [Paragraph Numbers in Statement of Defence incorrect]

[52] Further or in the alternative, if the Plaintiffs are entitled to damages, the Defendant pleads that the Plaintiffs by their own acts or omissions caused or otherwise contributed to their own losses. [Paragraph Numbers in Statement of Defence incorrect]

[53] The Defendant pleads and relies on the doctrine of contributory negligence and further pleads and relies on the *Negligence Act*, R.S.O. 1990 c. N.1 as applicable. [Paragraph Numbers in Statement of Defence incorrect]

[54] The Defendant pleads and relies on the doctrine of set-off. [Paragraph Numbers in Statement of Defence incorrect]

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[55] Further or in the alternative, the Defendant pleads that the Plaintiffs have failed to mitigate their damages. [Paragraph Numbers in Statement of Defence incorrect]

[56] If the Plaintiffs are entitled to damages, the Defendant pleads that those damages are excessive, remote and/or otherwise not recoverable at law. [Paragraph Numbers in Statement of Defence incorrect]

[57] <u>The Defendant admits liability for the amount of a sum equivalent to $177,000.00 USD but asks that all additional claims in this action be dismissed with costs." [Paragraph Numbers in Statement of Defence incorrect]</u>

[56] On this Motion the Bankrupt also swore an affidavit dated September 27, 2024 (the "**Bankrupt's Affidavit**"). Unfortunately that affidavit did not have properly commissioned exhibits, despite my adjourning this motion in September to October 16, 2024 for the Bankrupt to provide one. To avoid adjourning this Motion for a third time as a result of the Bankrupt's inability to properly file properly sworn affidavit materials when that opportunity was granted, I had the Bankrupt identify under oath the exhibits as exhibits to the Bankrupt's Affidavit for this Motion.

[57] The Bankrupt's Affidavit reads, in its entirety (there are no paragraph numbers)(emphasis added by me):

> "Onus of Proof in Civil Fraud
>
> While the plaintiff is not required to establish full proof at this stage of the proceedings for allegations of civil fraud, I respectfully submit that the plaintiff's claim fails to meet the requisite standard of probability to lift the stay.
>
> The Four Elements of Civil Fraud
>
> The tort of civil fraud consists of four essential elements, each of which must be proven on a balance of probabilities:
>
> a. False Representation by the Defendant
>
> In reference to the promissory notes signed by both parties, attached hereto as Exhibit A, it is clearly stated that the funds provided were loans in exchange for a non-guaranteed rate of return. The plaintiffs, Mr. and Mrs. Smalls, were experienced investors, particularly in real estate, and fully aware of the inherent risks, including potential loss, associated with such investments.
>
> b. Knowledge of the Falsehood of the Representation
>
> At the time of the Smalls' investment, I had no knowledge or reason to suspect that the Legacy Investors Group ("LIG"), with whom the funds were invested, was experiencing any financial difficulties. The company's financials were robust, as demonstrated by

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Exhibits D and E, and it held an "A+" rating with the Better Business Bureau (Exhibit C). The company's financial standing and its market position were communicated to the plaintiffs prior to their investment.

c. The Representation Caused the Plaintiff to Act

The plaintiffs were made aware of the nature of the investment, including that the rate of return was variable and not guaranteed. The promissory notes and verbal agreements further outlined that their funds would be invested in LIG's private equity firm, with specific properties listed as part of the security for the loans. Therefore, no false representation was made that could have influenced the plaintiffs' decision to invest.

d. The Plaintiff's Actions Resulted in a Loss

While the plaintiffs did suffer a loss, they knowingly assumed the risks outlined in the promissory notes. The Smalls were given full discretion over the amount to invest and proceeded to make multiple deposits, thereby accepting the terms and risks associated with their investment.

Money from the Smalls sent to Legacy Investors Group
Additionally, it is hereby affirmed that a total sum of $298,000 was transferred to LIG between February and April 2021, during the period in which the promissory notes were executed.

Furthermore, an additional sum of $39,000, representing a portion of the invested funds, was retained as a reserve for payment obligations, as evidenced by the transaction records attached hereto as Exhibit B. All funds were transferred voluntarily and in full compliance with the contractual agreement between the Smalls and LIG, thereby satisfying the agreed-upon terms of the transaction.

It is further stated that no fraudulent misrepresentation was present in this transaction.

Under Canadian law, fraud requires the intentional misrepresentation of a material fact for the purpose of inducing another party to act to their detriment. In this case, no such misrepresentation occurred, as the funds were sent with full knowledge and consent of all parties involved, in line with the established contractual obligations. The Smalls were aware of the nature and purpose of the payment, and the transfer of funds was consistent with their agreement with LIG, thereby negating any claim of fraudulent intent or wrongdoing.

Attempts to Settle

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There were two separate attempts to settle the dispute with the plaintiffs, both of which were declined by them. These settlement offers were made in May 2022 and November 2023, as evidenced by Exhibit G.

Furthermore, an executive representative of LIG initiated communication with legal counsel for the Smalls, expressly acknowledging that the funds at issue were due and payable to the investors. The executive further represented that LIG possessed the requisite financial resources to satisfy the outstanding obligation and assured that the investors would be duly compensated in accordance with their entitlements.

Bankruptcy and Insolvency Act (BIA)

I respectfully submit that lifting the stay would prejudice other creditors involved in the bankruptcy proceedings and disrupt the equitable distribution of assets, which is a core principle of the Bankruptcy and Insolvency Act (BIA). It is important to note that the plaintiffs, like other creditors, have the opportunity to file proof of claim during the creditors' meeting. Allowing one creditor to proceed independently, particularly in the absence of exceptional circumstances, would undermine the bankruptcy process.

Case Law in Support of Maintaining the Stay

I cite the following case law to support my position that the stay should be maintained:
a. Kenwood Hills Inc. (2015 ONSC 4481)

The court upheld the stay, emphasizing the importance of the bankruptcy process in distributing assets equitably.

b. Portus Alternative Asset Management Inc. (2007 ONSC 5089)

The court refused to lift the stay, finding that the plaintiffs had not demonstrated that continuing the lawsuit would materially benefit them beyond what could be achieved through the bankruptcy process.

c. Patterson v. Kingsway Financial Services Inc. (2006 ONCA 384)

The court maintained the stay, noting that bankruptcy protections apply unless creditors can demonstrate exceptional circumstances.

Automatic Stay of Proceedings under the BIA

Section 69 of the BIA automatically stays all legal proceedings, including those for collection of debts, upon the filing of bankruptcy. This stay is essential to ensure the

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orderly distribution of assets under the supervision of the trustee and to maintain fairness among all creditors.

Conclusion

Given the information and exhibits provided, I respectfully submit that the request to lift the stay does not meet the required legal standards. I ask the Court to maintain the stay in accordance with the principles of the Bankruptcy and Insolvency Act and relevant case law."

THE PROMISSORY NOTES

[58] One of the central factual issues on this motion is the granting of the promissory notes by the Bankrupt to the Creditors. The terms of those notes (collectively the "**Notes**") can be summarized as follows:

Note	**Amount**	**Lender**	**Due date**	**"Not Guaranteed" interest rate**	**Default interest Rate**	**Date of fund Advance to Bankrupt**
February 11, 2021 (Exhibit C to Small Affidavit) (the "**February Note**")	US$77,000	Antoine	February 11, 2022	25% per month	10% per annum	February 12, 2021 Bank Draft - (exhibit B to Small Affidavit)
March 4th (no year) (Exhibit E to Small Affidavit)(the "**March Note**")	US$100,000	Whayne	March 8 or March 10, 2022	15% per annum	10% per annum	March 9, 2021 – Bank Draft- (Exhibit D to Small Affidavit)
April 13, 2022 [sic] (should read 2021) (Exhibit G to Small Affidavit)(the "**April Note**")	US$160,000	Antoine	April 13, 2022	25% per month	10% per annum	April 13, 2021 – Credit Transfer – (Exhibit F to Small Affidavit)

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	US$337,000	**Whayne – US$ 100,000** **Antoine US$237,000**				

[59] The Bankrupt admitted in the examination that he prepared the Notes himself from online precedents.

[60] In the Discovery Transcript the Bankrupt makes the following admissions relating to the US$159,900 plead in the Statement of Defence as having been paid to the Creditors, and its application to interest owing and not principal:

> "282. Q. Thank you. And so, what flows from that, sir, is that, yes, you may have made these payments, and we don't dispute that you made a series of payments. I think the numbers between us differ marginally, but there is no dispute you made these payments. The issue that is in dispute is, these payments were part of your, in the case of promissory note one, 25 percent per month payment. They have nothing to do with your obligation to repay the principal amounts you have borrowed, and now the default interest that is accrued on those amounts since default. Do you agree with me?
>
> A. Correct.
>
> 283. Q. Thank you. And you agree with me, of course, that those notes are still in default?
>
> A. Yes."

[61] The advances that the Bankrupt states he made to Ruinard and/or Legacy (from the TD Bank printout at Exhibit B to the Bankrupt's Affidavit), using funds obtained from the Creditors, could be summarized as follows:

Date of transfer	**Transferor**	**Amount**	**Recipient**
February 4, 2021	Ms. Shawnette R. Reid 40 River Heights Drive	US$38,010.00	Ruinard Inc.
February 9, 2021	Ms. Shawnette R. Reid 40 River Heights Drive	US$130,000.00	Ruinard Inc.
February 17, 2021	Ms. Shawnette R. Reid 40 River Heights Drive	US$70,000.00	Ruinard Inc.
March 16, 2021	Ms. Shawnette R. Reid 40 River Heights Drive	US$25,000.00	Ruinard Inc.

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Total		US$263,010.00	

[62] When questioned by me regarding the identity of “Shawnette R. Reid” (“**Reid**”) the Bankrupt advised that she was at the time his girlfriend. When questioned as to how she could have been sending the wire transfers to Ruinard Inc. on behalf of the Bankrupt, the Bankrupt advised that the Bank account that the funds were being sent from was a joint personal bank account for him and Reid.

[63] The Bankrupt did not provide any evidence that “Ruinard Inc.”, being the alleged direct recipient of the funds advanced by the Creditors to the Bankrupt personally, then further advanced the monies to the Legacy corporate entity.

[64] The Bankrupt could not provide me with the cogent explanation as to:

1) why he was depositing the Creditor’s investment funds in a jointly held personal bank account, which would usually give ownership of the funds in the account to both of the Joint account holders- in other words making Reid the co-owner of the Creditors’ funds being deposited in the account; or

2) why Reid was sending these wire transfers in her name and not the Bankrupt’s, if these funds were from “personal loan” to the Bankrupt by the Creditors to enable them to qualify for the “hedge fund” Legacy investment. Would Reid not have the same “qualification” problem as the Creditors? How would Reid have the legal authority to deal with the Bankrupt’s funds in this way?

[65] The Bankrupt explained to me he used his and Reid’s personal bank account to deposit the Creditors’ funds and wire them to Ruinard because it would provide a “better rate” of interest to the Creditors.

[66] This make no sense as an explanation for several reasons. Firstly depository bank accounts tend to charge the lowest rates of interest as opposed to GIC’s or term deposits. No evidence was provided about the rate of interest paid on that account, and the rate differential for other types of accounts or GIC’s/term deposits.

[67] More importantly, if this personal joint bank account with Reid was merely being used as a conduit for the Bankrupt to invest the Creditors’ funds under his own name in Legacy in order to get around Whayne and Antoine’s inability to “qualify” for the Legacy investment, why would the rate even matter, if the monies were not meant to spend any time in the conduit account before being wired to Ruinard by Reid?

[68] The only explanation anywhere in the materials as to the $73,900 discrepancy between the total advances made to the Bankrupt by the Creditors under the Notes, which the Bankrupt does not deny, and the amounts sent to Ruinard Inc. by Reid in Exhibit B to the Bankrupt’s Affidavit, was this statement in the Bankrupt’s Affidavit:

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"Furthermore, an additional sum of $39,000, representing a portion of the invested funds, was retained as a reserve for payment obligations, as evidenced by the transaction records attached hereto as Exhibit B. All funds were transferred voluntarily and in full compliance with the contractual agreement between the Smalls and LIG, thereby satisfying the agreed-upon *terms* of the transaction."

[69] In *Giles v. Westminster Savings Credit Union* 2010 CarswellBC 1378, 2010 BCCA 282, [2010] 11 W.W.R. 622, [2010] B.C.W.L.D. 5079, [2010] B.C.W.L.D. 5085, [2010] B.C.W.L.D. 5087, [2010] B.C.W.L.D. 5364, [2010] B.C.W.L.D. 5365, [2010] B.C.W.L.D. 5367, [2010] B.C.W.L.D. 5368, [2010] B.C.W.L.D. 5372, [2010] B.C.W.L.D. 5374, [2010] B.C.W.L.D. 5375, [2010] B.C.W.L.D. 5377, [2010] B.C.W.L.D. 5380, [2010] B.C.W.L.D. 5386, [2010] B.C.W.L.D. 5387, 287 B.C.A.C. 281, 485 W.A.C. 281, 5 B.C.L.R. (5th) 252, 89 C.P.C. (6th) 41 the BC Court of Appeal defined a "Ponzi scheme" as:

"(at para. 44) A "Ponzi scheme" is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. It takes its name from Charles Ponzi, who used this method to dupe a large number of people in the 1920s."

[70] One of the hallmarks of such a scheme is the creation of a fund from advances made by investors for the purpose of investing, and then using that fund of investor monies to instead pay purported "returns" back to investors using their own money, instead of paying the investors from actual returns made from their investments.

[71] I cannot find as a term of the Notes, or in the materials before the Court, any mention of the agreement by the Creditors to the creation or retention of this US$39,000 "fund" by the Bankrupt from the advances made by the Creditors, to pay them their interest, using their own funds. There is also no documentation at all in evidence from Legacy/Ruinard that required the creation, retention and utilization of such a fund.

[72] In any event, as set out above, it appears that the amounts allegedly sent by Reid to Ruinard at Exhibit B to the Bankrupt's Affidavit cannot include the amounts advanced by the Creditors under the February Note or the April Note, by the dates of the advances made by the Creditors, and dates of the wire transfers made by Reid.

[73] Also, nothing in evidence before the Court on this Motion explains:

1) the missing amount of $34,900 between the $39,000 that the Bankrupt says he set aside "as a reserve for payment obligations" and the US$73,900 discrepancy between the $337,000 amounts advanced by the Creditors under the Notes and the US$263,010.00 the Bankrupt says Reid then sent to Ruinard;

2) how the first transfer by Reid in Exhibit B to the Bankrupt's Affidavit on February 4 2021 could relate to first advance by the Creditors under the February Note made 8 days later on February 12, 2021 at Exhibit B to the Small Affidavit; or

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3) why the amounts of the advances made by the Creditors to the Bankrupt and deposited in the account do not match the advances sent by Reid to Ruinard by date or amount; or

4) whether the $160,000 advanced by Antoine on April 13, 2021 under the April Note was ever sent to Ruinard Inc., as the last wire transfer in Exhibit B to the Bankrupt's Affidavit was sent by Reid to Ruinard on March 16, 2021. If the monies advanced by Antoine under the April Note were not sent to Ruinard -where did they go?

5) even if there was $39,000 set aside by the Bankrupt "as a reserve for payment obligations", the Bankrupt plead that these Creditors were paid US$159,930 in interest, so from what source and account was the differential of $120,930 of interest actually paid to the Creditors?

[74] There are no banking records put in evidence by the Bankrupt on this Motion from the Joint Bank TD account held by the Bankrupt and Reid from which Exhibit B to the Bankrupt's Affidavit shows advances by Reid to Ruinard Inc, that provides evidence that:

1) the all of the advances made by the Creditors under the Notes to him personally were actually deposited in that TD account;

2) that funds belonging to other parties were not deposited in the TD account and commingled with the advances made by the Creditors under the Notes;

3) that no other payments to other parties, or for ordinary living expenses, were paid out of the funds deposited in that TD account by the Creditors;

4) that the funds advanced by the Creditors under the Notes were the same funds that Reid then wired to Ruinard from the TD account, and

5) what Ruinard then did with those funds; and

6) that any "interest" payments were made to the Creditors from that TD account.

[75] Reid is not declared as a creditor on the Statement of Affairs, nor does the Bankrupt disclose any transactions involving Reid, including what appear to be, at minimum, these wire transfers from his jointly held bank account with Reid. This is concerning as at the time of these transactions she could have fit within the definition of a party "related to" the Bankrupt, and as a participant in these transactions could be subject to the remedies at s.95-101 of the BIA to recoup payments made by her, as being a person "privy to" the transactions under the jurisprudence interpreting s.96 of the BIA.

[76] The 40 River Heights Drive, Brampton address for Reid listed on these transactions at Exhibit B to the Bankrupt's Affidavit also appears nowhere in the Statement of Affairs, the s.170 Report or the Claims Register as an address for the Bankrupt, or as a property the Bankrupt may have an interest in.

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[77] The Bankrupt in the Statement of Defence and in the Bankrupt's Affidavit denies that the Creditors were mislead regarding the investments and states that "…the transfer of funds was consistent with their agreement with LIG".

[78] There is no such agreement between the Creditors and Legacy in evidence before the Court that substantiates that statement, and there is no evidence there ever was any direct agreement signed between the Creditors and Legacy, or what the terms of that agreement were, and I cannot locate in the evidence any direct communications between the Creditors and Legacy.

[79] This is particularly acute in light of the text messages appended at Exhibit H to the Small Affidavit where the Creditors are repeatedly demanding their written investment agreement with Legacy, and the Bankrupt is providing an assortment of prevarications as to why one has not been provided and makes multiple promises to provide one.

Representations regarding investments and rates of return

[80] These allegations of misrepresentation are central to the Creditors claims, both in the Bankruptcy and the Fraud Action.

[81] The Bankrupt states in the Statement of Defence that the Creditors were advised of the risks of the form of investment that the Bankrupt recommended, and that the choice of investment was tailored by him to meet the investment needs requested by the Creditors. One key issue is the Bankrupt's assertion that returns were not "guaranteed".

[82] There are no "Know Your Client" forms signed by the Creditors, typically obtained by investment advisors to document such knowing acceptance by the investor of investment risk appropriate to the investor, entered into evidence by the Bankrupt that would support that assertion.

[83] Attached as exhibit "O" to the Small Affidavit is the Discovery Transcript, is the Bankrupt's sworn testimony on these issues:

> "83. Q. Back to your Statement of Defence, sir:
>
> > "...The Defendant states that, because of Antoine's stated intentions, Richard discussed an investment opportunity with him that Antoine would not typically qualify for. This would involve Antoine investing his funds with Richard personally, who would, in turn, invest the funds on his behalf in a private equity fund..."
>
> And then you go on:
>
> > "...The funds would then be invested in pattern day-traded funds, as well as in pre-existing businesses. Given the track record of the businesses typically invested in, a high range of returns were anticipated..."

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So, I am just going to break this down with you sir. You say you discussed an investment opportunity that Antoine would not typically qualify for. What would he not typically qualify for this investment opportunity?

A. At the time it was presented to him, it would be based on net worth.

84. Q. And this investment opportunity what kind of net worth did it require in order to invest?

A. A minimum of 250,000.

85. Q. And he didn't have a sufficient net worth?

A. Not until he sold the property.

86. Q. In December 2020, he sold a property that would have qualified him to invest directly?

A. Correct.

87. Q. And so, this initial investment since Antoine wouldn't qualify, you could qualify, so you would make it for him; do I understand that?

A. Correct.

88. Q. And this investment that you are describing in paragraph 16, is this the investment to which the promissory notes in this matter relate?

A. Sorry, could you pull up the document? I am pretty sure it is, but if you could pull that up.

89. Q. Yes, sir.

A. Thank you.

90. Q. So, what you are describing here as "the investment opportunity", is this what the promissory notes relate to?

A. Yes.

91. Q. Okay. And this is why you are investing personally, and borrowing the money for the investment personally, pursuant to the promissory notes; do I understand that?

A. Yes.

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92. Q. Okay. And was it your understanding that the FSRA rules allowed you to borrow funds from clients, personally?

A. I was not acting in the capacity under FSRA rules. It was a personal loan.

93. Q. So, you are telling me, at paragraph 16, that, "because of Antoine's stated intention", so, his intentions to invest, and to have you invest for him as his financial advisor, do I understand that, his "stated intentions"?

A. His stated intentions were that he wanted to retire and increase his returns.

94. Q. And you were his financial advisor to help him reach that goal?

A. Correct.

95. Q. And you discussed with him investment opportunities in order to reach that goal?

A. As it relates to the segregated funds and trust funds, and things of that nature, yes.

96. Q. Okay. Well, you say here: "...Richard discussed an investment opportunity with him that Antoine would not typically qualify for..."

[84] To summarize:

-the Bankrupt was acting as a financial advisor to the Creditors, but

-not when he was borrowing money from them, and

-the Bankrupt was borrowing money from the Creditors and personally providing promissory notes, as part of

-his investment advice to them to fulfill their goals, but

-the personal borrowing was not part of this investment advice.

Utterly circular.

[85] The Bankrupt's testimony is that the personal borrowing by him was necessary so that the Creditors could make investments they did not "qualify" for the Legacy investment because their net worth was too low. But despite this restriction, the Bankrupt engaged in these transactions to obscure the source of money so that the Creditors could participate in this restricted investment in "segregated funds and trust funds and things of that nature" despite not qualifying, presumably because they were risky investments.

[86] The nature of the investments the Bankrupt recommended to the Creditors, despite Mr Small Sr's stated intention to retire, was in a "private equity fund" investing in:

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> "…pattern day-traded funds, as well as in pre-existing businesses. Given the track record of the businesses typically invested in, a high range of returns were anticipated..."

which would include some of the riskiest types of investments.

[87] In a text message at Exhibit I to the Small Affidavit, in the context of the Creditors demanding repayment under the Notes, the Bankrupt states:

> "1) Its important in building wealth to not let your emotions get the best of you
>
> 2) I've been 100% honest with you the entire way. Quite shocked that you think I'm lying to you. <u>However it may be that you are new to investing and cant make sense of what I'm explaining to you</u>"

[88] If that was the case, that the Creditors were clients "new to investing", why did the Bankrupt convince the Creditors to invest in a "private equity fund" in the United States that engaged in "pattern day traded funds as well as pre-existing businesses", some of the riskiest types of investments?

[89] Also, if the Bankrupt's testimony is truthful, that he convinced the Creditors to enter into these investments in the United States with Legacy/Ruinard through the Creditors loaning the Bankrupt money to make these investments on their behalf, but in the Bankrupt's own name, then why did the Bankrupt state in the Statement of Defence:

> "30 The Defendant states that at no point, did he represent to the Plaintiffs that the funds were invested with Legacy Investors Group. The Plaintiffs understood that the funds were to be invested with by [sic] the Defendant personally, into a business, whereby his own properties would be utilized as collateral"

[90] But at paragraph 15-16 of the Statement of Defence the Bankrupt pleads:

> "15. In or around early 2021, Antoine began expressing his desire to increase his investment returns. Specifically, Antoine advised the Defendant that he had intended to purchase a new home valued between $2 million to $4 million, within a year and required a quick return on his investment in order to be able to afford this purchase.
>
> 16. The Defendant states that because of Antoine's stated intentions, Richard discussed an investment opportunity with him that Antoine would not typically qualify for. This would involve Antoine investing his funds with Richard personally, who would in turn, invest the funds on his behalf in a private equity fund. The funds would then be invested in pattern day traded funds as well as in pre-existing businesses. Given the track record of the businesses typically invested in, a high range of returns were anticipated."

[91] The Bankrupt's Testimony on the possible returns from this recommended investment, was:

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“120 Q. Yes, but in discussing these investments with Mr. Small, you told him that the potential upside was huge, quadruple his profits?

A. As a possibility

121. Q. You are saying here, in a text, that...as your counsel had pointed out, these are, inconveniently, not dated, most of them. This is the one at paragraph 28 of our Affidavit of Documents, and this is you writing: "...Every four months, you get half of your profits. To simplify everything, you quadruple your money after one year..."

This is you writing to Mr. Small?

A Yes.

…

127. Q. And so, here, I was asking you, Mr. Nicholson, you are telling Mr. Small that there is this chance he has...you don't mention there is a chance here, but, in fairness to you, this is cut off, so maybe you do, earlier. You say: "...To simplify everything, you quadruple your money after one year..."

You do recall saying that to him; is that right?

A. Correct.

128. Q. And I am curious, as an investment advisor, how many investments have you had that have quadrupled in one year?

A. Myself, personally?

129. Q. Yes.

A. I have had a few.

130. Q. Which ones?

A. Real estate.

131. Q. Investments, sir. He is investing with you for securities. Let's not play word games with each other.

A. No, that note...let me clarify it. He is investing with me to reach his goals. Those are some of the options that were mentioned.

…

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132. MR. MILOSEVIC: No, my question was whether he has been involved with, or had experience, himself, with any investments that have quadrupled. So, he is a financial advisor. Has he quadrupled an investment for...let me be more specific. Thank you for assisting, Mr. Reporter.

BY MR. MILOSEVIC:

133. Q. Mr. Nicholson, have you had any clients of yours for whom the investments you recommended, the investment services you provided through your corporation, quadrupled their investment in one year?

A. Yes.

134. Q. Okay, which investments were those?

A. Leveraging.

…

136. Q. Mr. Nicholson, which investments quadrupled in a year?

A. Leveraging.

137. Q. Names? I want names. Which investments?

A. That is the name of the investment.

138. Q. The name of the investment is "leveraging"?

A. That is the strategy, yes.

139. Q. I didn't ask you for a strategy. I want the name of a security, an investment, a bond, a stock. Give me the name of an investment, please, sir.

A. I think we are going back and forth on terms.

140. Q. Yes. My terms are, I would like to know the name of the stock, the bond, the security, that quadrupled in a year.

A. I am going to explain to you how the strategy is...

141. Q. I am not asking for an explanation of a strategy.

A. Well, I am trying to answer your question.

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142. Q. You are not. I am asking you for the name. You can refuse to answer it, but I am asking for the name of the security that quadrupled.

A. Okay. I refuse."

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[92] In other words, a possible 400% per annum return, which by any standard is an extraordinary promised return on investment. However, even assuming that having the personal Notes issued by the Bankrupt to the Creditors was a legitimate way of conducting these investments, that 400% per annum return is not in accord with the interest payable under the actual terms of the Notes, "guaranteed" or not.

[93] It is also very unclear as to whether the tax implications, and other US law implications of making these investments with Legacy in the United States were ever explained to the Creditors by the Bankrupt under tax treaties between the US and Canada. There are no W-8 forms in evidence declaring the residency of the Creditors for investment purposes in a US "hedge fund".

[94] Also, it appears clear that the Bankrupt was instructing the Creditors in the text messages excerpted in the Chalmers, J. Endorsement and the AJ Brown endorsement (at Exhibit B to the Small Affidavit):

> "Go to RBC and ask them to write you a bank draft for $77,000USD to me Richard Nicholson. They will ask you a bunch of questions let them know its for investment purposes. Go to any TD Bank an provide them the draft and say you wish to deposit the funds into the account"

And at Exhibit H to the Small Affidavit regarding repayment of the investment:

> "4)You will be paid in full as soon as possible. Ive been red flagged by cra and anti money laundering in doing extensive extensive wiring of large amounts. Hence why my transfers were blocked. **This is why I have to go to the States so that I can send your money little by little**. **Taxes also need to be paid on your amounts for both cra and irs and that takes time to complete**"

[95] Given that the effect, if not the intention, of the Creditors giving money to the Bankrupt personally to invest on their behalf in US based investments, in what appears the Bankrupt's name, thus disguising the beneficial ownership of the funds for both tax and anti-money laundering purposes, there is no evidence before me that the Bankrupt explained to the Creditors the possible grave tax and criminal implications of participating in these transactions, in the way that the Bankrupt was suggesting in these text messages.

[96] The practice of sending money "little by little", as described by the Bankrupt above, to get around having financial institution transaction reporting requirements triggered, particularly where the Bankrupt is knowingly doing so because he states he has been "red-flagged" by "cra and anti money laundering" is colloquially known as "smurfing" or "structuring" and can be both evidence, and an actual prohibited act, under both US and Canadian money laundering legislation.

[97] It is not known to the Court on this Motion specifically what specific money laundering activities Ruinard has been indicted for by the US Attorney, but these texts by the Bankrupt are extremely concerning in that additional factual context.

[98] It is also not known whether taxes were ever actually paid to CRA or the IRS either by the Bankrupt on his own behalf, or on behalf of the Creditors, with respect to this "investment" in his name with Ruinard, which adds yet another level of strangeness and complexity to these transactions, even if they actually were conducted exactly in the manner that the Bankrupt described in his Discovery testimony.

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Due Diligence conducted by Bankrupt on Ruinard/Legacy

[99] At many places detailed above in the Bankrupt's Affidavit and the Statement of Defence the Bankrupt pleads or testifies that he conducted due diligence on Ruinard and had no reason to suspect he was a fraud.

[100] In fact, in the Discovery Transcript, the Bankrupt testified to the totality of the due diligence conducted as follows:

> "295. Q. Where did these funds go, Mr. Nicholson? What were they invested in?
>
> A. They were invested in a private equity firm, specifically in pre-existing businesses, pattern day trading, and real estate, three or four locations.
>
> 296. Q. Okay. So, I presume, being an investment professional, and being personally liable for repayment of the amounts that were borrowed, I presume that you were very familiar with where the funds would be going, what specific investments they would be placed in; do I have that right?
>
> A. Specifically, no, no.
>
> 297. Q. Okay. What did you know?
>
> A. I know that they were invested in these different categories, but not specifically.
>
> 298. Q. So, you would hand the funds to somebody, who would then invest them in these specific categories?
>
> A. Correct.
>
> 299. Q. Who did you hand the funds to, to do that?
>
> A. Anthonie Ruinard of Legacy Investors Group.
>
> 300. Q. How long had you known Mr. Ruinard and Legacy?

A. Three-and-a-half years.

301. Q. How did you know him?

A. Through my girlfriend.

302. Q. How?

A. She introduced me to him.

303. Q. Where?

A. Such a long time ago. I can't recall.

304. Q. You have known him for three-and-a-half years. It doesn't seem that long. Where did you meet him?

A. I can't recall.

305. Q. Did you meet him in person?

A. Yes, I met him in person.

306. Q. Where?

A. In Arizona.

307. Q. What took you down to Arizona? Specifically to meet him?

A. Vacation...

308. Q. Was it specifically to...

A. ...to meet him.

309. Q. That's what I was asking. You went to Arizona to meet Mr. Ruinard?

A. Correct.

310. Q. Who arranged the meeting?

A. It was done mutually.

311. Q. Through who?

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A. Through my girlfriend.

312. Q. How did she know him?

A. She knows him through her tenant.

313. Q. Who is her tenant?

A. I don't know the name of the tenant.

314. Q. So, her tenant introduced her to Mr. Ruinard, and she introduced him to you?

A. Correct.

315. Q. What led to the introduction? Whydid she say, "Hey, here is this person you need to meet"? Why did she introduce you to him?

A. Because he is in investments.

316. Q. What kind of investments is he in?

A. I just shared with you the types. Private equity.

A. Besides Mr. Small's monies, did you invest anybody else's monies with him?

A. Yes.

317. Q. Have those clients recovered their funds?

A. No.

318. Q. What did you do to do any due diligence into Mr. Ruinard, before you handed him Mr. Small's money?

A. I looked at previous returns. I was provided financials. I was...I have seen some of the businesses, myself, personally. I checked the Better Business Bureau. I checked, you know, see if there was any complaints. And then I also, too, have my own money invested with him, too.

…

320. Q. Who provided you the financials?

A. The director.

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321. Q. Which director?

A. Anthonie. I saw them. He let me see them.
…

323. Q. Previous returns? What did you see about previous returns?

A. That they were in the positive. There was a consecutive period of time where they were in the green.

324. Q. What form did you see these previous returns in? What were you looking at?

A. Trade account.

325. Q. A trade account?

A. Right."

[101] The Bankrupt provided as exhibits to the Bankrupt's Affidavit documentation that he stated supported his due diligence. At Exhibit D to the Bankrupt's Affidavit is a document that:

1) states at the top "Ruinard Inc. Financial Statement as of 12-31-2021", but in a different font than the rest of the document;

2) Just above "Financial Statements" is a copyright notice "Corporate Finance Institute, all rights reserved";

3) The document appears to incorporate a Balance sheet showing total assets in 2021 of $488,254,974 with total liabilities of $1,333,094, with shareholders equity of $486,921,880;

4) On the "Cash flow statement" the operating cash flow has cash from operations of $85,518,122, but "investments in property and equipment" is only $15,000 and there is no debt repayments of any kind in 2021;

5) On the Working capital schedule there is $1,707,547 ascribed to "Inventory" and has a depreciation schedule, and only $3,104,632 ascribed to "Accounts Receivable", with no real explanation as to why a "private equity" or "hedge fund" in the investment business would have either of those kinds of working capital requirements;

6) There are categories in the assumptions and income statement for "costs of goods sold" of $12,465,097 for 2021, again, unusual for a hedge fund;

7) In the income statement "Revenue" is misspelled "Reveneue" [sic];

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8) Surprisingly for a Half-Billion US$ company, in the investment industry, the "financial statements" do not appear to be prepared by any accounting firm, and appear to be self generated, have no signature page indicating approval of these financial statements by Ruinard Inc. or any of the expected Notes to Financial Statements setting out the assumptions and methods of calculation of the various schedules to the Financial Statements;

9) Make no mention of "Legacy Investors Group Inc." or any other subsidiary or related party whose financial results were consolidated with "Ruinard Inc." which would again be surprising given that these Creditors appear to have believed they were investing in that Legacy entity and not "Ruinard Inc.".

[102] It is unclear whether any accounting expert has been retained by the Creditors, or whether the Trustee, an accountant, has had the opportunity to review this document, and draw any conclusions as to its accuracy and authenticity.

[103] Another document provided at Exhibit E to substantiate the Bankrupt's due diligence undertaken is a letter on TD Ameritrade letterhead from a "Jordan Baker Resource Specialist" dated April 20, 2021 to "Anthonie Ruinard" personally, and not in any corporate capacity, like Ruinard Inc. or Legacy, regarding a TD Ameritrade Account that is crudely blanked out with a black sharpie, confirming something else also crudely blacked out with a black sharpie, and stating that:

> "April 19, 2021 - $437,649,554.18
>
> April 20, 2021 -$437,749,554.18"

[104] This appears to be approx. $50 million less than the shareholders equity in the abovementioned "Financial Statements" for "Ruinard Inc. A "Jordan Baker" does seem to exist in the "BrokerCheck by FINRA" database, and he did seem to work at TD Ameritrade in 2021.

[105] Ruinard does not appear in that national database, at all, ever. There is no evidence before Court that the Bankrupt consulted that national database established by the US Financial Industry Regulatory Authority, Inc. a self-regulatory organization for member broker-dealers that is responsible under US federal law for supervising broker-dealer member firms, under the oversight of the US Securities and Exchange Commission (the "**SEC**").

[106] Similarly, there is no evidence before the Court that the Bankrupt ever checked whether either Ruinard or Legacy ever made any filings with the SEC in the SEC's public EDGAR database. Neither appear in that database either.

[107] The Bankrupt also provided at "Exhibit E part 2" to the Bankrupt's Affidavit what appear to be cell phone screenshots from a T Mobile account one page stating "Individual account-Traded funds portfolia" for Q2 2020 that has "$1,511,325.31 (28.34%+)" but other information crudely scrawled out with a black sharpie, in what would appear to be TD Ameritrade accounts, at other pages having context free "+638.41%" and "+241.61%" compared to a series of performance

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benchmarks, without stating what investments presumably generated that return, over what period, for what amount invested.

[108] The only actual security identified is at page 16 of 20 of that exhibit "Exhibit E part 2" to the Bankrupt's Affidavit that states "EWLL – today's gain/loss +$5,627,879.44". EWLL was the trading symbol of Ewellness Healthcare Corporation, whose registration as a publicly traded company was terminated on July 25, 2022 by the SEC.

[109] What all of this means, or what the Bankrupt wanted these documents to show in terms of due diligence, is not clear, but none of the usual documentation one would expect a Half-Billion US$ value purported hedge fund would have provided to potential "qualified" investors and advisors, like a comprehensive trading history and reported returns, or proper audited financial statements, is in evidence on this Motion.

[110] In the fullness of time, in the course of the prosecution of Ruinard by the US Attorney for Arizona, further clarity about Ruinard's operations and whether there actually was a "hedge fund" operated by Ruinard that the Bankrupt sent the Creditors' funds to will likely become clearer. But it has not been entered into evidence on this Motion.

[111] Significantly, if Ruinard was the bad actor, and the Bankrupt had invested "his monies" with Ruinard as well, then the Bankrupt, and by extension the Trustee due to the assignment into Bankruptcy, could also have a claim against Ruinard/Legacy. No such third party claim was made by the Bankrupt in the Fraud Action, not even for contribution and indemnity, and no such asset was declared by the Bankrupt on his Statement of Affairs.

The Lamborghini, the Restaurant, Mom's Mercedes and the Watch

[112] The allegations made by the Creditors in relation to the Bankrupt's alleged misappropriation of the funds they provided to him to invest, and that he allegedly used them for personal purposes instead, are a central part of the Fraud Action for which leave is sought.

[113] In a social media post made by the Bankrupt on December 17, 2021 at Exhibit N to the Small Affidavit, the Bankrupt states the following:

> "Through all my journeys highs and lows this year I am truly grateful to celebrate another year. I am proud of the person I've become far from perfect but out of all my accomplishments I am most thankful for friends and family and the special person who has always been by my side. Its been a scary years [sic] for most. **<u>Buying my first restaurant, a new home and buying my dream vehicle for my Mom and myself</u>** I'm reminded everyday that through god all things are possible! This journey of life continues to reach me so much…I'm blessed beyond belief and continue to be the best person of myself that God wants me to be! One Love! Bday celebrations! My Mantra let your investments count for what matters most."

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[114] Attached by the Bankrupt to this post are 17 photographs, including of a Lamborghini Urus automobile, a Audemars Piquet watch, the façade of a restaurant called "Pastiche", and a Mercedes automobile.

The Watch

[115] The Bankrupt stated the following in the Discovery Transcript regarding his ownership of the Audemars Piquet watch (Q.331-332):

> "Q. Page 68 of our Affidavit of Documents. Your watch?
>
> A. No
>
> Q. Well "Richard Nicholson, May 9 2021" photo of Audemars Piquet watch. I cant tell which model. It starts at 60,000, goes up to about 200,000. So, not your watch? You are just posting a picture of one on your wrist?
>
> A. And its fake.
> …
>
> A It is not my watch
>
> Q333 Well now he is telling me that it is fake. First he told me it is not his watch, now he is telling me it's a fake.
>
> Q334- Why are you posting a picture of a fake Audemars Royal Oak on your wrist?
>
> A I need a reason?
>
> Q. Yes I am asking you the reason, sir. You are here to testify. I am asking you the reason.
>
> A I thought it was cool"

The Lamborghini

[116] After reading his above Facebook post, the Bankrupt testified:

> "Q 337 Your Lamborghini Urus here?
>
> A Yes
> …
> Q351 And the Lamborghini Urus, that is the dream car you bought yourself?
>
> A Correct

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Q The Urus, about…well in full carbon, it is about $400,000. I cant tell from this photo. What did you pay for the Urus?

A I don't know the exact amount

Q I didn't ask you for the exact amount. More than $300,000 is that right?

A I cant remember.

Q You cant remember if you paid more than $300,000 for a vehicle; is that what you are telling me sir ?

A Correct"

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The Restaurant

[117] The Bankrupt has stated various things about his ownership of a restaurant, after being questioned at the Discovery about the above social media post. This was one of the grounds for the opposition by the OSB to the Bankrupt's discharge.

[118] No restaurant ownership is declared as an asset in the Bankrupt's Statement of Affairs.

[119] The Bankrupts Testimony regarding his ownership of a restaurant was:

"Q 338 And a photo of the restaurant you purchased?

A Yes. I am invested in it, yes.

Q What is the name of the restaurant?

A Pastiche

Q Where is it?

A Arizona

Q Where?

A The State of Arizona

[After a page and a half of obfuscation and attempted refusals by counsel for the Bankrupt at the Discovery, with no proper grounds for refusal of a simple factual question]

Q 348 What city in Arizona is it in, sir?

A I don't remember."

[120] Significantly, it appears that Ruinard also made representations that he owned a restaurant, named "Pastiche Modern Eatery", located at 3025 North Campbell Avenue, in Tucson, Arizona.

Mom's Mercedes

[121] The Bankrupt testified as follows regarding the Mercedes his mother is standing beside in the social media post referenced above:

> "Q349 Is that your mother beside the white…it looks like an SLR. I cant tell from the front. Is that your mother beside the white Mercedes?
>
> A Yes it is
>
> Q And that is the white Mercedes the dream car that you bought your mother?
>
> A Correct
>
> Q355 Okay. How much did you pay for your mother's Mercedes?
>
> <u>A I cant remember</u>
>
> Q Those aren't fake though, are they, the cars? The watch is fake, but the cars are real; do I have that right?
>
> A Correct
>
> Q This is December 17 2021. <u>You didn't use any of Mr, Small's money to make those purchases did you?</u>
>
> <u>A No"</u>

[122] Apart from the blanket denials, the Bankrupt offered no evidence on this motion as to the source of the funding to purchase the Restaurant, the Lamborghini, purchase or lease the Mercedes, or any proof whatsoever that the watch was fake, borrowed or a bit of both.

[123] The Lamborghini was declared on the Statement of Affairs, repossessed by the financier and a proof of claim for the shortfall filed. The Mercedes was also declared as leased, the source of the funds used to lease it and the Lamborghini is not clear.

LAW AND ANALYSIS

A. Legislation:

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[124] Section 69.4 of the BIA read:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> **(a)** that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> **(b)** that it is equitable on other grounds to make such a declaration.

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B. Jurisprudence regarding application of s.69.4:

[125] The Court has considered all materials and arguments raised by all parties on this Motion. Any failure by the court to refer to specific arguments and materials raised by the Parties does not reflect that the Court has not considered those arguments.

[126] The lifting of a stay under section 69.4 is at the discretion of the Court. The test for lifting of the stay is set out in *Ma, Re* (2001), 2001 CanLII 24076 (ON CA), 143 O.A.C. 52 (C.A.), at paras. 2-3(“***Re Ma***”):

> “2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is “likely to be materially prejudiced by [its] continued operation” or (b) “that it is equitable on other grounds to make such a declaration.” The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 1995 CanLII 2018 ONSC 4425 (CanLII) - Page 4 - 7371 (ON SC), 1995 CanLII 7371 (ON SC), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 1996 CanLII 10233 (ON CA), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > “In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.”
>
> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4.

As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay."

[127] In *Re Mathur*, 2018 ONSC 4425, ("***Mathur***") Wilton-Siegel J., after quoting the above passage from *Re Ma* states:

> "[16] It is agreed that *Ma* sets a low threshold – a plaintiff must show no more than some chance of success. This is often expressed as a question of whether the plaintiff has pleaded facts that, if believed, would establish a claim. However, the onus on a plaintiff will depend, in part, on the extent to which a defendant adduces evidence that an action is frivolous, vexatious or has little chance of success. In such event, a court may need to have regard at least to the nature and strength of the plaintiff's evidence bearing on the merits of the action: see *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, 344 O.A.C. 49, per Strathy C.J.O."

[128] Also in *Mathur*, Wilton-Siegel, J. stated with respect to the analysis required with respect to the evaluation of the Plaintiff's claim for which leave is sought, and assessments of credibility:

> "[21] Given the foregoing facts before the Master, the Master was entitled to draw the following two conclusions: (1) that the merits of the Respondent's claim depended largely on issues of credibility that were not to be decided on the motion before her; and (2) to the extent she was required to consider the merits of the Respondent's case, the Respondent satisfied the obligation to establish some chance of success.
>
> [22] In respect of the first conclusion, the Respondent specifically denies the Debtor's allegation that he met George and his wife for the first time two years after the loan. This raises a legitimate credibility issue. More importantly, the issue of the Debtor's knowledge of any circumstances giving rise to a fiduciary relationship and any breach thereof by Peter, or of any fraudulent misrepresentations on his part, will inevitably raise issues of credibility.
>
> [23] In respect of the second conclusion, the following considerations are relevant. While the Debtor says he was not privy to Chatzigiannis' discussions with Giannopoulos, this is a bald assertion for which the evidence is not definitive. In any event, even if true, the mere fact that the Debtor did not physically interact with Giannopoulos until two years after the loans were made does not exclude a claim against him as a joint tortfeasor or in conspiracy. The critical question is, as mentioned, the extent of his knowledge of, and participation in, any actions on the part of Chatzigiannis that might have constituted breach of a fiduciary duty owed to Giannopoulos or a fraudulent misrepresentation. This is not addressed in the Debtor's affidavit in the motion record nor is it otherwise addressed in the materials before the Court on this appeal."

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[129] In *Re Francisco*, cited in *Re Ma*, Adams J. cited the tests in *Re Advocate Mines* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.) ("***Re Advocate Mines***") as providing examples where a Court can exercise its discretion under s.69.4:

> "In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings".

Stating:

> "[12] It should be understood that *Re Advocate Mines Ltd.*, supra, is not an exhaustive codification of the policy underlying the *Bankruptcy and Insolvency Act*. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view *Advocate Mines* as a limiting or exhaustive instrument is an error in principle. Moreover, I am satisfied the action in question is one in respect of which a discharge may not be a defence and, further, that the action had progressed to a point where logic dictated the action be permitted to continue to judgment."

[130] In *Re Advocate Mines*, Registrar Ferron stated:

> "Section 49 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.
>
> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *Bankruptcy Act* inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment."

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[131] Before granting an order to lift a stay, the moving party must satisfy the court on any one or more of these grounds. They do not all need to be satisfied: *Save-A-Lot Holdings Corp. v. Christiansen* 2021 BCSC 2546.

[132] *Re Sangha*, 2016 CarswellBC 2770 ("***Re Sangha***") which similarly lists the categories listed by Registrar Ferron in *Re Advocate Mines*, quoting the following passage:

> " The principles that emerge from the jurisprudence may be summarized:
>
> (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the *Bankruptcy and Insolvency Act*, which is to permit the rehabilitation of the bankrupt unfettered by past debts.
>
> (2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.
>
> (3) The existence of one or more of the factors listed in *Re Advocate Mines* will be an important consideration but is not determinative.
>
> (4) The court is not to attempt to determine the proposed claim on its merits.
>
> (5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants."

[133] The test was also stated in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, 2008 ABQB 398 (CanLII) 67, ("***Stone Sapphire***") which in itself is citing *Re Advocate Mines*:

> "67. As held in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc* ., courts will generally consider lifting a stay when the action is:
>
> (a) is one that would survive the BIA proceedings;
>
> (b) the matter is an unliquidated debt that is so complex that the summary process under the BIA is inappropriate;
>
> (c) if the insolvent person's involvement is necessary in respect of other parties;
>
> (d) if the action is necessary to recover under an available policy of insurance; or
>
> (e) that the action has progressed to a point where logic dictates that the action continue to judgment."

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[134] In *Re Ramgulam-Rafiq*, 2024 ONSC 6085 (CanLII) ("***Ramgulam-Rafiq***"), Associate Justice Rappos stated the following regarding the case that the Creditors need to establish to obtain leave:

> "[18] The moving parties are not required to establish that they have a *prima facie* case against Ms. Ramgulam-Rafiq and Mr. Doon. However, the court may consider the merits of the action where relevant to the issue of whether there are sound reasons for lifting the stay. It will be difficult to find that there are sound reasons for lifting the stay where it is apparent that the action has little prospect of success.[6]
>
> [19] The moving parties need only plead specific facts that show that there are sound reasons to lift the stay, such as a set of facts, which if believed, would fall within claims that are not released upon discharge under section 178(1) of the BIA.[7]
>
> [20] The threshold for the moving parties to meet has been described as being a low one. However, the onus on a plaintiff will depend, in part, on the extent to which a defendant adduces evidence that the action in question is frivolous, vexatious or has little chance of success. In that case, a court may need to have regard to the nature and the strength of the plaintiff's evidence concerning the merits of the action.[8]
>
> …
>
> [23] The language of section 178(1) does not necessarily correspond to legal causes of action. The categories are ways of characterizing existing liabilities so as to trigger the underlying policy rationale for allowing those liabilities to survive discharge from bankruptcy, regardless of the legal basis for that liability.[10]
>
> [24] The role of the court is to examine the pleadings and any other "contextual facts" on the record to determine whether the liability is properly characterized as falling within any of the listed categories. The language of section 178 need not be explicitly used in the pleadings, but the facts alleged must clearly suggest that the liability falls under that provision.[11]
>
> …
>
> [61] The plaintiffs argue that their claims also constitute debts or liabilities resulting from obtaining property or service by false pretenses or fraudulent misrepresentation.
>
> [62] The core content of the phrases "false pretenses" and "fraudulent misrepresentation" is deceitful statements.[30] They may be made verbally, or by a non-disclosure of material facts through blameworthy or strategic silence.[31]
>
> [63] This section does not require the debtor to have been convicted of the offence of false pretenses under the *Criminal Code*. The section also does not require the moving party to show facts sufficient to prove that the debtor would be criminally convicted if charged.[32]"

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[135] The Creditors also cited in their factum the decision of Penny, J. in *Global Royalties Limited v David Brook*, 2015 ONSC 6277 (CanLII) ("***Global Royalties***") where Penny, J. made the following statements relevant to this motion:

> "[5] Under s. 69.3 of the BIA, upon bankruptcy, no creditor has a claim against a debtor or shall commence or continue any action for the "recovery of a claim provable in bankruptcy."
>
> [6] The term "claim provable in bankruptcy" is defined in s. 121 of the BIA. There are three essential requirements:
>
> (i) there must be a debt, liability or obligation to a creditor;
>
> (ii) the debt, liability or obligation must be incurred before the date of bankruptcy; and
>
> (iii) it must be possible to attach a monetary value to the debt, liability or obligation,
>
> *John Briggs Armstrong (Re)*, 2015 BCSC 1167 (CanLII) at para. 23.
>
> ...
>
> [13] Second, the definition of creditor includes a contingent creditor. <u>The plaintiffs' claims are for unliquidated damages and have yet to be proved, to be sure, but to the extent they assert monetary claims arising pre-bankruptcy, they are creditors</u>.
> …
>
> [18] In *Re Ma* the Court of Appeal for Ontario upheld the decision of the registrar lifting the stay to permit the TD Bank to continue an action against the bankrupt. The bankrupt argued that the creditor had to establish a *prima facie* case on the merits by providing evidence of the facts giving rise to the proposed claim. The registrar held that the test to be applied is whether the type of claim which the creditor seeks to advance against the bankrupt is the type of claim that should be allowed to proceed. <u>She held that it was not the function of the court on a motion to lift the stay to embark upon a scrutiny of the merits of the proposed action.</u>
>
> [19] The Court of Appeal pointed out that lifting the statutory stay is far from a routine matter. <u>The Court of Appeal affirmed, however, that there was no obligation on the part of the moving party to establish a prima facie case on the basis of evidence. The gloss on the previous law provided by the Court of Appeal in *Re Ma* is that the court is not precluded from *any* consideration of the merits where relevant to the issue of whether there are "sound reasons" for lifting the stay. The court used the example that, if the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay</u>.

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[20] It is well-established in the authorities that "sound reasons" constituting material prejudice or other equitable grounds includes:

> (i) actions against the bankrupt for a debt for which a discharge would not be a defence (s. 178(1));
>
> (ii) actions involving sufficient complexity to make the summary procedure under s. 135 of the BIA inappropriate; and
>
> (iii) actions in which the bankrupt is a necessary party for the complete adjudication of matters at issue involving other parties.
>
> …

[24] Morawetz J. noted, in connection with the decision in *Re Ma*, that, "the moving creditor need only plead specific facts which show that there are sound reasons to lift the stay, such as a set of facts which, if believed, would fall within the ambit of s. 178(1)(d)." See *Ieluzzi (Re),* 2012 O.J. No. 2763. ("**Ieluzzi**")

[25] Here, the plaintiffs have alleged that Brook committed fraud, misappropriated money and assets and obtained property by fraudulent misrepresentation. The plaintiff complains that none of these allegations have been proved. That, however, is clearly not the test.

[26] While the pleading lacks a certain amount of particularity, this is not a pleadings motion. The bottom line of the pleading is that allegations are made of fraudulent conduct which, if proved, could result in an award of monetary damages which would not be released on discharge.

[29] Based on the allegations in the statement of claim, Brooks is a central figure in the events giving rise to the causes of action pleaded against all defendants. It would make little sense to have one procedure to deal with the other eight defendants and another, entirely different procedure, to deal with Brooks. The conclusion of Ground J. in *Royal Bank of Canada v. Societe Generale (Canada),* [2003] O.J. No. 5139 is equally applicable here:

> "…the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part and parcel of the fraudulent scheme and, accordingly, there cannot be a completed adjudication of the issues in the action among the other parties without the production of documents in the possession of, and the discovery of, [an, I would note, the evidence of] the Bankrupts."

Legal Submissions by the Bankrupt

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[136] The Bankrupt made reference to a series of cases in the Bankrupt's Affidavit and in a "Case Law Addendum" including *Kenwood Hills Inc.* 2015 ONSC 4481, *Portus Alternative Asset Management Inc.* 2007 ONSC 5089, *Patterson v. Kingsway Financial Services Inc.* (2006 ONCA 384, *Toronto-Dominion Bank v. Canmarc Holdings Inc.* 2019 ONSC 3451, *G. A. Consulting v. A. D. Realty Corp.* 2019 ONSC 5272, *In re: M. & N. Enterprises Ltd.* 2022 BCSC 1012.

[137] All of the Bankrupt's submissions are to the effect that the Debtor should be permitted breathing space to reorganize without the distraction of ongoing litigation, and that Bankruptcy should provide a "fresh start" to the Bankrupt.

[138] Except factually, in this case there is no "reorganization". The Bankrupt has to date provided $1800 to the Trustee. The Properties have either been sold, or the Hamilton Property may be in the process of being sold by the 2nd Mortgagee. There are dozens of investor creditors whose claims have not been determined yet. This is a pure liquidation of the assets of the Bankrupt, where the "breathing space to reorganize" argument is not relevant.

[139] The entire policy premise behind s.178 of the BIA is as stated recently by the Supreme Court of Canada in *Poonian v. British Columbia (Securities Commission)* 2024 CarswellBC 2172, 2024 CarswellBC 2171, 2024 SCC 28, 2024 CSC 28, [2024] 10 W.W.R. 1, 14 C.B.R. (7th) 1, 2024 A.C.W.S. 2273, 495 D.L.R. (4th) 1, 91 B.C.L.R. (6th) 1 ("***Poonian***"):

> "1 The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), furthers two important purposes: the equitable distribution of a bankrupt's assets among creditors and the bankrupt's financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a "fresh start" when appropriate. The fresh start principle is codified in s. 178(2) of the BIA; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the BIA permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.
>
> 2 Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. <u>Through s. 178(1) of the BIA, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy</u>."

[140] None of the *Kenwood Hills Inc.*, *Portus Alternative Asset Management Inc.*, *Patterson v. Kingsway Financial Services Inc.*, *Toronto-Dominion Bank v. Canmarc Holdings Inc. G. A. Consulting v. A. D. Realty Corp.,* and *M. & N. Enterprises Ltd.* cases cited by the Bankrupt appear to exist in CanLii with the CanLii citations indicated by the Bankrupt. I tried to find each of these cases in CanLii by name and/or citation and could not. The Bankrupt did not provide copies of these cases cited to the Creditors or the Court.

[141] As an example, the only *Portus Alternative Asset Management* case reported in CanLii in the entire year 2007 is 2007 CanLII 44814 (ON SC), but that case had nothing to do with leave

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under s.69.4 of the BIA. There are no cases reported in CanLii at all, that have the words “Portus” and “Leave” or reference s.69.4 of the BIA, in 2007 or otherwise.

[142] In that *Portus* case C. Campbell, J. was deciding whether the court has the inherent jurisdiction to "fill" a "functional" gap in the BIA and/or to give effect to the provisions of the BIA itself where the provisions of the statute itself are insufficient to fulfill the purpose of the statute. He decided that he did have the jurisdiction to fill those gaps in a situation where:

> “[36] The "gap" created arises because Part XII does not specifically contemplate a fraud by a securities firm on its own customer prior to the firm's bankruptcy.”

[143] Incidentally, in 2007 I was a member of the team of lawyers at Fraser Milner Casgrain LLP appointed as representative counsel to the investors of Portus Alternative Asset Management. I do not remember such a motion being brought or decided.

[144] In order to be certain that there was a serious problem with the legal submissions that the Bankrupt had made to the Court, I asked that my colleague Associate Justice Rappos, a Jurist with exceptional computerized legal research skills, to also attempt to find the cases cited above by the Bankrupt, to eliminate the possibility that I was not using CanLii properly.

[145] AJ Rappos found:

- There is no case with the citation 2015 ONSC 4481, but there was a *Kenwood Hills Development* case from 1995 where Farley, J. that dealt with a petition for a bankruptcy order and section 43(7), but had nothing to do with leave under s.69.4 of the BIA

- There is no case with the citation 2007 ONSC 5089

- There is no case with the citation 2006 ONCA 384

- There is a case with the citation 2019 ONSC 3451, called *Montour v. Ontario (Health Professions Appeal and Review Board)* which is a Ontario Divisional Court case dealing with judicial review of a decision of the Health Professions Appeal and Review Board,

- There is a case with the citation 2019 ONSC 5272, which is an aggravated assault case, *R v. Sanchez*

- This is a case with the citation 2022 BCSC 1012 - *Holness and Small Law Group Professional Law Corporation v. Parmar* which deals with a review concerning a contingency fee under the *Legal Professional Act* in BC

[146] It is unclear where the Bankrupt got these non-existent cases and citations, or whether the Bankrupt used Chat GPT or other AI program to generate his fictitious legal submissions.

[147] I am not deciding whether the claims made by the Creditors against the Bankrupt in the Fraud Action will survive Bankruptcy. I am deciding whether the Creditors meet the legal test of being allowed to have another Court determine whether those claims are claims under s.178(1)(d)

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and (e) to fulfill the overriding policy objectives of the BIA that a fresh start should not be given for certain types of claims.

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Analysis

[148] The Trustee and the OSB are not opposing this leave Motion.

[149] As I have set out in detail above, the Creditors have set out, in great detail, the basis upon which they are seeking an order under s.178(1)(d) and (e) of the BIA. In particular in the Statement of Claim in the Fraud Action, the Small Affidavit, and in the testimony of the Bankrupt, there are ample causes of action, and material facts plead, that prove that the Creditors have

> "…plead specific facts that show that there are sound reasons to lift the stay, such as a set of facts, which if believed, would fall within claims that are not released upon discharge under section 178(1) of the BIA"

as stated by AJ Rappos in *Ramgulam-Rafiq*.

[150] In this case there is evidence from the Creditors, and from the Bankrupt himself, that there were representations made by the Bankrupt to the Creditors about the:

1) Possible Rate of return of the Legacy Investments;

2) Use of the investment funds by the Bankrupt to flow to Legacy;

3) The necessity of the personal loan to the Bankrupt to permit the Creditors to "qualify" for the Legacy investment;

4) The methodology and necessity of the transfer of funds to Legacy,

5) The actual alleged use of the invested funds by the Bankrupt,

that would be sufficient, if accepted at trial, would fall within claims that are not released by Discharge under s.178(d) and (e) of the BIA.

[151] Conversely, the evidence provided by the Bankrupt to defend this motion, and during his Discovery, does not provide a basis for this Court to determine for the purposes of this Motion that the claims made by the Creditors in the Statement of Claim to the Fraud Action are frivolous, vexatious or that the Fraud Action, if permitted to proceed to trial, have little prospect of success, per *Global Royalties*.

[152] I find that the Creditors have plead specific facts in the Statement of Claim, supported by the evidence they have filed on this Motion "…which show that there are sound reasons to lift the stay, such as a set of facts which, if believed, would fall within the ambit of s. 178(1)(d)." per *Ieluzzi.*

[153] The Bankrupt himself in the Statement of Defence, in the Discovery Transcript and in the Bankrupt's Affidavit, made the specific admissions that I have set out in these reasons that the Creditor's are owed money under the Notes and that the Principal amount has not been paid.

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These admitted facts alone are strong evidence that the Fraud Action is not "…frivolous, vexatious and if permitted to proceed to trial, has little prospect of success".

[154] Additionally, in this case there other *Advocate Mines* factors that also guide the Court to exercise its discretion in granting leave under s.69.4.

[155] As set out in detail above, there is an ample factual dispute relating to the content of the of the representations made by the Bankrupt to the Creditors, as set out above. This cannot be resolved without a credibility assessment given the diametrically opposed testimony of the Creditors in the Small Affidavit and the Bankrupt in the Discovery Transcript and the Bankrupt's Affidavit, and the admissions and denials made by the Bankrupt in the Statement of Defence. The Fraud Action is an action:

> "…in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate." Per *Advocate Mines*.

[156] There will need to be an assessment made of the credibility of the parties by the Trier of Fact to determine which representations are to be believed, in order to determine whether the declarations sought under s.178 by the Creditors should be granted.

[157] There are also issues that need to be determined regarding the flow of funds, and the security purportedly granted by the Bankrupt on the Properties, which by necessity involves the determination of the validity, enforceability, and priority of those claims in relation to other alleged owners of property interests, and secured and unsecured creditors claiming interests in the Properties, including the Trustee.

[158] I note that currently the Trustee has only received approx. $1800 from the Bankrupt in the estate. There are currently funds tied up with respect to the sale of the St. Catharines Property with multiple claims being made to that fund, dependant on a determination of the complex issues I have outlined in these reasons.

[159] The Trustee does not have the resources to fund that litigation, which, in addition to determining whether the claims of the Creditors against the Bankrupt are claims to which s.178 of the BIA applies, also by necessity will have to determine:

> -the entitlement of the Creditors, and the Trustee in the shoes of the Bankrupt to those funds, and
>
> - any entitlement to the proceeds of sale of the Hamilton Property, if the power of sale proceedings by the Second Mortgagee of the Hamilton Property have proceeded to the sale of the property, and
>
> - the generation of proceeds to which entitlement and priority needs to be determined.

[160] These matters cannot be properly adjudicated in the summary proof of claim process under the BIA, and also constitute:

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> "3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties" per *Advocate Mines*.

[161] The Fraud Action has the necessary procedural and fact finding tools lacking from the Bankruptcy process to determine many of the above claims in a context that third parties and the priority claims involving those parties can be considered, which would not be possible in the summary proof of claim process under the BIA.

[162] Also, as stated by Loo, J. in *Zheng v. Anderson Square Holdings Ltd*. 2023 CarswellBC 3698, 2023 BCSC 2215, 2023 A.C.W.S. 5957:

> "16 In this case, the parties are far beyond the point at which the litigants were in Save-A-Lot . Leading up to the trial, the plaintiffs have produced a list of documents and the defendants have produced five amended lists. There have been examinations for discovery by both sides spanning approximately 26 days. The defendants have defended this action, by means of interlocutory applications and otherwise, for more than four years. And most importantly, the trial has now started. There are more than 30 plaintiffs ready to testify. Both the court and counsel have set aside 19 days for the hearing of this trial.
>
> …
>
> 32 I find that lifting the stay would be equitable in that it will allow the parties to address the serious and fairly complicated allegations against all the defendants in a venue that is more suitable than the trustee claims process. Further, a stay would prejudice the plaintiffs in producing their evidence, due to the passage of time if the trial date were to be rescheduled and if they were required to abandon the preparation that they have made for this trial. Further, it would prejudice them in the manner described in Talwerdi."

[163] There is a Summary Judgment hearing scheduled for April 2025 in the Fraud Action. There can be a more expeditious and thorough determination made of these issues through that process, rather than the summary BIA proof of claim process.

[164] As a result the Creditors have satisfied the onus to prove that there are "sound reasons consistent with the scheme of the [BIA] to relieve against the automatic stay" per *Francisco*.

[165] From the same factual context, I also find that the Creditors have proven on an objective standard that there will be "material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption" per *Ma*, if leave is not granted and they will not be permitted to seek the declaration under s.178 of the BIA, as then their claims could be discharged by an order of discharge, without the creditors having the opportunity of proving that it should not be, in circumstances that sound reasons exist that the declaration could be obtained based on the pleadings in the Fraud Action. This would violate the fundamental overriding policy objectives of the BIA as were set out above in *Poonian*.

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[166] I also note that the Fraud Action was commenced in May of 2022 and the date under which the Fraud Action must be set down for Trial under R.48.14 to avoid being dismissed by the Registrar is fast approaching.

[167] As the OSB has advised that they have commenced an SIU investigation of the Bankrupt and his conduct which will by necessity take a considerable period of time. As a result the Creditors will suffer further material prejudice if leave is not granted now, as the events around the investments made by the Creditors, the granting of the Notes and the various payments are occurred in 2021 and 2022, and given the document retention policies of financial institutions in both Canada and the United States may result in evidence required by the Creditors disappearing, this is further evidence of material prejudice if leave is not granted now.

[168] In addition, the determination of the Fraud Action may also have the effect of determining priorities of secured and unsecured claims to the Properties, for the Creditors and the Bankruptcy Estate, which could not be determined easily outside of a judicial determination of the claims of the Creditors, due to their equitable nature.

[169] It is therefore appropriate and equitable to lift the stay of proceedings.

DISPOSITION

[170] In the context of this Motion, on all of the evidence before me, and in exercising my discretion as Registrar, factors as enumerated above, I am satisfied that the relief requested by the Creditors should be granted.

[171] After considering all of the factual admissions made by the Bankrupt, and in the Bankrupt's motion materials, which I have summarized above and will not repeat, and after considering the Trustee's non-opposition, the Small Affidavit, the Bankrupt's Affidavit, the Discovery Transcript, and the pleadings of the parties, I find that on this issue there is sufficient evidence before me to determine that there are "sound reasons for lifting [a] stay" and that the Bankrupt has not provided sufficient evidence on this Motion to prove that "it is apparent that the proposed action has little prospect of success", because the Creditors have "… failed to show that its claim is one that will survive bankruptcy in any event" as per *Mathur*.

[172] I find that there is a prospect of success that the Moving Parties can prove that the claim by the Moving Parties are for a debt that will not be released by the Bankrupt's discharge, as such liability may fall within the provisions of section 178(d) and (e) of the BIA as arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, based on the above mentioned jurisprudence.

[173] For all of the reasons set out above, and utilizing my Judicial discretion as Registrar under the BIA, I find that under s. 69.4 of the BIA I may make a declaration lifting the automatic stay under the BIA as, after considering all of the evidence on this motion, and all legal arguments made by the Bankrupt and the Creditors, I am satisfied that:

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(a) The Creditors are "likely to be materially prejudiced by the continued operation" of the Stay of Proceedings relating to the Bankrupt; and

(b) "… it is equitable on other grounds to make such a declaration.", as the evidence of the Bankrupt will be crucial in the Fraud Action to establish the factual framework surrounding the various transactions which are alleged the Creditors to be part and parcel of the fraudulent misrepresentations and, accordingly, there cannot be a completed adjudication of the issues in the action among the Creditor and the Bankrupt without the production of documents in the possession of, and the discovery of, the Bankrupt; and that depriving the Creditors of "fundamental procedural tools under the Rules and trial practice would constitute a form of material prejudice";

(c) sound reasons, consistent with the scheme of the BIA, exist for relieving against the otherwise automatic stay of proceedings, as set out in great detail above, and

(d) I have not found, for the reasons set out in great detail above, that the Bankrupt has adduced evidence that the Fraud Action is frivolous, vexatious or has little chance of success, on the evidence before me on this Motion.

[174] Accordingly I have granted the Order requested by the Creditors that the stay of proceedings pursuant to section 69.3(1) of the BIA be lifted so as to permit the Creditors to continue with the Fraud Action as against the Bankrupt. I would ask that Aitken provide to me through my ATC a word version of the Draft Order at Tab 3 to the Motion Record of the Creditors, so I may amend the Order to add the usual protections for the Trustee in s.69.4 orders of this nature, and the costs award below.

COSTS

[175] The Creditors have filed a costs outline on this Motion. The "actual rate" claimed for Aitken (2021 Call) and his assisting counsel Annelise Do Rio (2024 Call) of $13,619.50 with HST $1770.53 totalling $15,390.03 is appropriate for the Toronto Market, particularly where there have been two prior adjournments requested by the Bankrupt, or ordered by the Court, for the Bankrupt to provide proper materials, which he still did not do by the third hearing date.

[176] Counsel for the Creditors submitted fees of $6431 with HST $836.03 on a partial indemnity rate totalling $7267.00. No Substantial Indemnity rate was provided, but is usually 1.5x the Partial Indemnity Rate.

[177] The 29.2 Hours reported is appropriate given the two prior adjourned motion dates that counsel had to prepare for. The years of experience of the counsel and the hourly rates were also appropriate.

[178] Taking into account the provisions of R.57.01 as interpreted by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA)

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and *Davies v. The Corporation of the Municipality of Clarington et al* 100 O.R. (3d) 66, 2009 ONCA 722 ("***Davies***") and in particular:

- the importance of this Motion to continue the Fraud Action,

-the $500,000 amount claimed by the Creditors in the Fraud Action,

-the complexity of the factual issues that I have set out in these reasons,

-the adjournments requested or necessitated by the Bankrupt, and

-the conduct of the Bankrupt, in particular in relation to putting forward apparently fictitious legal authorities to support his opposition to the Motion brought by the Creditors, although this was not provided to the counsel for the Creditors with sufficient notice for them to have to respond to these cases,

I find that costs on the partial indemnity scale totalling $7267.00 (including HST) would be a result that "…in all the circumstances the result is fair and reasonable; and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor." Per *Davies* at 20.

[179] Given that the Bankrupt had been engaged in litigation with these Creditors for 2 years prior to Bankruptcy, with his own counsel, it could not have been out of his contemplation that opposing this leave Motion, and requiring two adjournments to file materials, could result in a cost award against him of at least this amount.

[180] I order that the Bankrupt pay costs to the Creditors on a partial indemnity scale, in the amount of $7267.00 (including HST). As these costs I have ordered for opposing this motion occurred post-bankruptcy, this costs award is not a "claim provable" in bankruptcy, and will not be compromised by any order of discharge of the Bankrupt.

Associate Justice Ilchenko
Registrar in Bankruptcy
Superior Court of Justice

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