Court of Queen's Bench of Alberta

Citation: Access Mortgage Corporation (2004) Limited v Arres Capital Inc, 2018 ABQB 1034

Date: 20181220
Docket: 1401 12431
Registry: Calgary

Between:

Access Mortgage Corporation (2004) Limited

Plaintiff

- and -

Arres Capital Inc

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice C.M. Jones

I. Introduction

[1] This matter involves competing claims to funds under the administration of a court-appointed receiver.

[2] By order of this Court dated February 13, 2015, Alvarez & Marsal Canada Inc. was appointed receiver ("Receiver") of Arres Capital Inc. ("Arres"). Arres was assigned into bankruptcy on July 26, 2017 and the Receiver now acts as trustee of Arres' estate.

[3] The matter before me relates not to the whole of Arres' estate, but only to certain funds, referred to as the "Graybriar Funds". There are two separate and quite different claims to the Graybriar Funds. One of the Applicants, Terrapin Mortgage Investment Corp. ("Terrapin"), alleges an equitable mortgage over the Graybriar Funds. The other Applicants, Staci Serra, Wesley Serra and 875892 Alberta Limited ("875") are persons related to Arres. I will refer to them collectively as the "Serra Parties". Mr. Serra 100% of the shares in Arres Holdings Inc. which in turn owns 100% of the shares of Arres. Ms. Serra is Mr. Serra's spouse; she owns and controls 875. The Serra Parties claim entitlement to the Graybriar Funds as a result of assignments to one or more of them of amounts due to Arres (the "Alleged Assignments").

[4] I note that both Terrapin and the Serra Parties claim a priority interest in the Graybriar Funds. Thus, what is at issue before me is not so much their alleged entitlement to the Graybriar Funds as their alleged priority over other creditors.

II. Background

[5] As noted above, the claims of Terrapin and of the Serra Parties are quite different. While it will be necessary to analyze those claims separately and the specific facts relevant to the claims are different, both arise out of the same initial situation.

[6] Graybriar Land Company Limited and Graybriar Greens Inc. (collectively, "Graybriar") sought to finance a condominium development near Stony Plain, Alberta.

[7] As part of its business, Arres arranged mortgage loans with borrowers. It raised mortgage monies through a group of private investors. It would advance those funds on the security of mortgages and it then administered those mortgages as a trustee on behalf of the investors.

[8] In this case, Arres acted as trustee for 76 investors (the "Graybriar Investors") who collectively invested approximately $9,000,000. Those monies, together with others for a total of $9,700,00, were advanced to Graybriar and secured by a mortgage in favor of Arres (the "Graybriar Mortgage") registered against title to the Graybriar condominiums. Arres held the Graybriar Mortgage in trust for the Graybriar Investors pursuant to written agreements (the "Trust Agreements") that were the same for each investor, apart from the name of the investor and the dollar amount invested.

[9] Eventually, Graybriar defaulted on the Graybriar Mortgage and Arres took foreclosure action on behalf of the Graybriar Investors in respect of seven condominium units (the "Graybriar Units").

[10] As part of foreclosure proceedings, Arres attempted to acquire the Graybriar Units, intending to keep three of them and to effect a transfer of the other four (the "179 Units") to 1798582 Alberta Ltd. ("179"). Prior to its being struck in 2017, Ms. Serra was a director of 179 and her corporation, 875, held 100% of its voting shares. Apparently without notice to the Graybriar Investors, Arres sought an order approving its offer to purchase the Graybriar Units (the "Sale Order"). The Sale Order relieved Arres of the need to pay the purchase price for the Graybriar Units into Court. Instead, it was allowed to set off the purchase price against the amount outstanding under the Graybriar Mortgage.

[11] Terrapin agreed to finance the acquisition of the 179 Units and advanced funds in the amount of $426,000 (the "179 Loan") to counsel for 179 on February 13 or 14, 2014. On or about February 14, 2014, counsel for 179 submitted documents, including the Sale Order, to the Land Titles Office, seeking to discharge the Graybriar Mortgage, transfer title to the 179 Units to 179, register a mortgage in favour of Terrapin (the "Terrapin Mortgage") for the 179 Loan and transfer to Arres clear title to the three remaining Graybriar Units.

[12] The Registrar of Land Titles rejected the documents submitted by counsel for 179. Apparently, the Registrar required the correspondence directing registrations to be authored by Arres' counsel and on Arres' counsel's letterhead.

[13] Meanwhile, Terrapin advanced the 179 Loan to counsel for 179 on trust conditions. Those monies were dispersed to various parties, but were not used to pay out the Graybriar Mortgage.

[14] On February 14, 2014, before the documents submitted to the Land Titles Office could be rectified permitting the Sale Order to be acted upon, some of the Graybriar Investors (the "Richcrooks Investors") obtained an *ex parte* order from this Court suspending foreclosure proceedings in respect of the Graybriar Units (the "Stay Order").

[15] The Richcrooks Investors took the position that Arres had lost the right to represent them in the Graybriar foreclosure action and should not have obtained the Sale Order without first advising them. The Richcrooks Investors asserted in their factum that:

> As a result of the bankruptcy proceedings commenced against Arres, legal counsel for the [Richcrooks Investors] wrote to Arres and its lawyers on October 31, 2013. This letter purported to terminate Arres as trustee in respect of the Mortgage and demanded the Graybriar Investors represented "receive from the Trustee a transfer of title to the Investor of the Investor's Proportionate Interest in the Mortgage...

[16] As a result of the Stay Order, the 179 Units were not transferred to 179 and, notwithstanding the advance of the 179 Loan, the Terrapin Mortgage was not registered against title to the 179 Units. Title to the 179 Units remained in the name of Graybriar Land Company Ltd. with the Graybriar Mortgage registered against title until a judicial sale was effected as noted *infra*.

[17] The Stay Order came back before this Court on September 15, 2014. Strekaf J, as she then was, declined the Richcrooks Investors' application for an indefinite stay of the Sale Order. She directed them to appeal the Sale Order and to provide an undertaking as to damages satisfactory to the Court.

[18] The Richcrooks Investors failed to provide the directed undertaking and on December 17, 2014, Strekaf J vacated the Stay Order.

[19] On December 9, 2015, the Court of Appeal allowed the Richcrooks Investors' appeal and directed, *inter alia*, that the sale proceeds of the Graybriar Units be paid into Court and that this Court determine who had the right to those sale proceeds. The Court of Appeal encouraged the parties "to proceed to resolve their outstanding litigation with dispatch".

[20] The Richcrooks Investors have taken no further steps in respect of the Sale Order or the Stay Order.

[21] Pursuant to an order of Romaine J dated June 4, 2018, the Graybriar Units have been sold, resulting in the Graybriar Funds, which are being held by the Receiver.

[22] Terrapin argues that the Richcrooks Investors have taken no steps to assert a claim to the Graybriar Funds. Terrapin would have this Court declare that the Richcrooks Investors' appeal has been effectively abandoned and that the Sale Order should be considered substantively valid.

III. Issues

[23] As noted above, both Terrapin and the Serra Parties claim priority entitlement to the Graybriar Funds. The issue before me is whether either of them has priority over Arres' other creditors.

IV. Analysis

A. Terrapin

[24] Terrapin argues that "if everything had gone properly" it would have a legal mortgage over the Graybriar Funds. Terrapin argues that the Sale Order would have been registered had the Richcrooks Investors not intervened and that their intervention did not alter the substantive elements of the Sale Order. Terrapin would have this Court give effect to the Sale Order, despite it never having been registered at the Land Titles Office, because the Richcrooks Investors have abandoned whatever basis they may have had for intervening and obtaining a stay.

[25] Counsel for the Richcrooks Investors advised that, at the time his clients obtained the Stay Order, there was an extant claim against Arres alleging breach of trust under the Trust Agreements and asserting a debt owing to the Richcrooks Investors. They took the position that the proceeds of sale of the Graybriar Units were trust moneys under the Trust Agreements. Counsel advised that the Richcrooks Investors did not consider it necessary to take further steps to recover these moneys because they intended to pursue them as part of the receivership of Arres that could be foreseen at the time.

[26] The Receiver's counsel pointed out that I am not required to resolve priorities as between Terrapin and the Richcrooks Investors. He noted that Arres' bankruptcy effective July 26, 2017 gave rise to a stay under s. 69 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. The effect of that stay was to freeze any actions by the Richcrooks Investors in respect of amounts allegedly belonging to them under the Trust Agreements.

[27] He clarified that priority as between Terrapin and the Richcrooks Investors was a matter for the Arres claims process. By contrast, the equitable mortgage sought by Terrapin before me is a priority contest between Terrapin and Arres. That contest, the Receiver pointed out, was between Arres' claims under a registered first mortgage and Terrapin's claim to an equitable mortgage. Moneys established to form part of Arres' estate may then be subject to claims of others, like the Richcrooks Investors and Terrapin.

[28] As between Arres and Terrapin, the Receiver takes the position that Arres has the first claim to the funds. I note that the Graybriar Mortgage no longer exists. All that remains are sale proceeds from the Graybriar Units against which the Graybriar Mortgage was registered.

[29] The Receiver argues that Terrapin has to establish some basis for priority to the Graybriar Funds over the Graybriar Mortgage. In the words of counsel for the Receiver, the Arres' first mortgage trumps any other claims to the Graybriar Funds unless Terrapin can establish a priority.

[30] As noted above, the Terrapin Mortgage was never registered. Recognizing that it does not have a legal mortgage, Terrapin asserts an equitable mortgage over the Graybriar Funds. Terrapin argues that, but for the action of the Richcrooks Investors, the sale to 179 would have

been completed pursuant to the Sale Order, funds would have been received by 179 and the Terrapin Mortgage would have been registered against the 179 Units.

[31] Terrapin claims a priority interest in Arres' estate by virtue of its alleged equitable mortgage. I note, however, that Terrapin did not lend funds to Arres. It loaned funds to 179, which had intended to purchase the 179 Units. Terrapin is therefore a creditor of a creditor (179) of Arres.

[32] The Receiver points out that, unlike a legal mortgage, an equitable mortgage does not transfer the legal estate in the property securing the mortgage. Rather, it creates, in equity, a charge upon the property. The Receiver's position is that no equitable mortgage arises on these facts and, even if one did, the Graybriar Mortgage would take priority.

[33] The Receiver cites *Falconbridge on Mortgages*, 5th ed (Toronto: Thomson Reuters Canada, 2017), note 16 at 5-2, in support of its position that an equitable mortgage may arise in one of three circumstances:

> (a) The interest mortgaged is equitable or future, because in such a case, even if the mortgage complies with all formalities, it cannot be a legal mortgage;
>
> (b) The mortgagor has not executed an instrument sufficient to transfer the legal estate. In this case, it is the informality of the mortgage that prevents it from being a legal mortgage. This category also includes a written agreement to execute a legal mortgage, that is, a promise to grant a legal mortgage which is itself not a grant of a legal mortgage; or
>
> (c) There has been a deposit of title deeds.

[34] The second and third grounds have no application here. There was no defect in the mortgage documentation that prevented 179 from granting a legal mortgage to Terrapin. Indeed, the executed agreement between 179 and Terrapin was a legal mortgage document, not merely an agreement to execute a mortgage. Further, no title deeds were deposited with Terrapin.

[35] With respect to the first ground, 179 never acquired title to the 179 Units and thus did not have the right to grant Terrapin a mortgage over them. It therefore failed to comply with two covenants under its agreement with Terrapin. The Receiver argues this situation is analogous to that in ***Re Elias Markets Ltd*** (2006), 274 DLR (4th) 166 at paras 75-77 where the Ontario Court of Appeal determined that failure to satisfy conditions precedent set out in a mortgage document precluded a finding that an equitable mortgage had been granted.

[36] The Receiver also argues that Terrapin cannot assert a mortgage of an equitable or future interest. While the Receiver acknowledges that a valid contract for the sale of land may give the purchaser and equitable interest, it states that 179 never paid the purchase price for the 179 Units and therefore never became the equitable owner of them. Consequently, 179 had no interest in the 179 Units, whether legal or equitable, that could support a mortgage to Terrapin.

[37] Moreover, the Receiver argues that even if Terrapin could establish an equitable mortgage, it would rank lower in priority than the Graybriar Mortgage.

[38] The Graybriar Mortgage is dated 2006 and 2007, before Terrapin entered into the 179 Loan. It was registered against title to the Graybriar Units under the *Land Titles Act*, RSA 2000, c L-4 ("*LTA*"). Section 14 of the *LTA* provides that the serial number attached to each instrument

or caveat in the Registrar's daily record determines the priority of the instrument or caveat filed or registered.

[39] The Receiver argues that even an earlier equitable mortgage is subordinated to a later legal mortgage. It points to s. 203(2) of the *LTA*, which provides that a person who takes a mortgage from an owner is not, except in the case of fraud by that person:

> (a) bound or concerned, for the purposes of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money; or
>
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

[40] The Receiver argues that its position is affirmed by both *Falconbridge* and ***Re Elias Markets***. *Falconbridge* states in note 16 at 7-4:

> ... between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice.

[41] The Ontario Court of Appeal stated in ***Re Elias Markets*** at para 69:

> As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.

[42] Terrapin responds by reiterating its earlier observation that the Sale Order was never appealed and that the Richcrooks Investors never took the additional steps directed by the Court. Through a somewhat unusual series of events, Terrapin advanced moneys that were never used to acquire an interest in real property, with the result that the presumptive mortgagor did not have the requisite interest to grant the mortgage. What ultimately happened to those funds is unclear, but they do not appear to be capable of being traced or followed into the Graybriar Funds. Terrapin argues that its legitimate interests should not be frustrated on these facts.

[43] I agree with the Receiver. While I am not without sympathy for Terrapin, it cannot satisfy the requirements for an equitable mortgage, given 179's lack of interest in the Graybriar Units. Further, even if an equitable mortgage could be established, it is clear that it would rank behind the Graybriar Mortgage. Accordingly, Terrapin's request for a declaration that the Graybriar Funds are held for it pursuant to an equitable mortgage is dismissed.

B. The Serra Parties

[44] Arres seeks an Order declaring the Alleged Assignments from Arres to the Serra Parties valid and enforceable. The Receiver opposes that application. The Alleged Assignments pertain

to a number of expenses, charges and debts arising under different agreements and circumstances.

[45] Under the terms of the Trust Agreements, Arres was permitted to "set off, deduct and withhold" certain administrative costs, fees and expenses associated with its management of the Graybriar Mortgage prior to distributing remaining funds to the Graybriar Investors.

[46] On November 11, 2008, the Graybriar Mortgage was renewed for one year. Arres claims that the Graybriar Investors signed renewal letters evidencing their approval of this renewal. A renewal agreement (the "Renewal Agreement") set out the terms and conditions of this renewal. Pursuant to the terms of the Renewal Agreement and a commitment letter that was attached to and formed part of each of the Trust Agreements (the "Commitment Letter") Arres purported to charge a renewal fee not to exceed 2% of the principal balance owing on the Graybriar Mortgage at the time of renewal. Arres also purported to charge an interest rate spread as further compensation for administering and servicing the Graybriar Mortgage.

[47] When Graybriar encountered financial difficulty, two "priority mortgages" were approved by the Graybriar Investors. These priority mortgages, which ranked ahead of the Graybriar Mortgage, totalled approximately $1,235,162.38 by July 2010. The priority mortgages were contributed to by "co-lenders" who entered into loan administration agreements with Arres (the "Co-Lender Administration Agreements"). Arres claims that the Co-Lender Administration Agreements, like the Trust Agreements, allowed it to set off and deduct certain administrative costs, fees and expenses associated with its management of the priority mortgages prior to distributing any and all proceeds thereof to the co-lenders.

[48] Arres argues that both the Trust Agreements and the Co-Lender Administration Agreements allowed Arres to assign rights accruing to it under those agreements. Arres and the Serra Parties assert that fees payable to Arres under the Trust Agreements and Co-Lender Agreements were assigned to Ms. Serra and to 875.

[49] Further, Arres points to a document dated December 5, 2009 under which it argues it was to advance $287,360 towards new home warranties (the "New Home Warranty Agreement"). Arres claims that, in order to fulfill this obligation, it borrowed these monies from Mr. Serra and from 1499760 Alberta Ltd. ("149"), a company controlled by Mr. Serra. Arres claims that pursuant to the New Home Warranty Agreement, 149 and Mr. Serra were to earn fees from ongoing monitoring costs.

[50] The Serra Parties claim priority over the Graybriar Funds stemming from these assignments.

[51] The Receiver challenges the Serra Parties' claim on three grounds. First, it asserts that if the Alleged Assignments actually took place and did so for consideration, they were subject to the *Personal Property Security Act*, RSA 2000, c P-7 ("*PPSA*"). As the Alleged Assignments were not registered in the Personal Property Registry ("PPR"), the Receiver argues that they are unperfected security interests that do not take priority over other creditors. Second, the Receiver asserts that there is insufficient evidence that the Serra Parties gave sufficient (or any) consideration for the Alleged Assignments. Third, the Receiver argues that because Arres was prohibited from assigning any interest in the Trust Agreements, the Alleged Assignments were invalid.

1. Application of the PPSA

[52] As between a debtor and a creditor, registration of a debt under the *PPSA* is not necessary. The parties' rights and obligations are governed by their agreement. A creditor registers its interest at the PPR to protect the priority of its claims against third parties. Registration serves as notice to third parties of the creditor's security interest and helps to elevate a creditor's claim above that of unsecured creditors.

[53] This priority survives a debtor's bankruptcy. Section 136 of *BIA* provides that secured creditors have first priority to a distribution by the trustee.

[54] Generally, priority among secured creditors is determined by the order in which they have "perfected" their interests. An interest is perfected when a security agreement has been executed, the debtor has possession of the subject property and the security interest has been registered. Accordingly, the first creditor to have registered at the PPR generally will be entitled to claim priority.

[55] It is undisputed that the Alleged Assignments were not registered at the PPR.

[56] The Receiver argues that the Alleged Assignments are subject to section 3 of the *PPSA*, which provides that:

> 3(1) Subject to section 4, this Act applies to
>
> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.
>
> (2) Subject to sections 4 and 55, this Act applies to
>
> (c) a transfer of an account or chattel paper…
>
> that does not secure payment of an account or performance of an obligation.

[57] The Receiver asserts that an assignment of receivables to secure payment or performance of an obligation is a "security interest". It points to s. 1(1)(tt) of the *PPSA*, which provides that:

> (tt) "security interest" means
>
> (i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods...

[58] The Receiver argues that ss. 3(1) and 3(2) of the *PPSA* contemplate a very broad range of financing transactions and non-financing transactions, respectively. The Serra Parties do not argue that the Alleged Assignments do not fall within those sections. Rather, they rely on an exception to the need for registration, as discussed *infra*.

[59] I find that the Alleged Assignments, assuming they were valid, would constitute a security interest as they originate in documents that purport to secure payment or performance of an obligation. At the very least, I accept that, if the Alleged Assignments are valid, they fall within section 3(2). Whatever else they may be, they appear to reflect the transfer of an account.

[60] Therefore, the Serra Parties will be unsecured creditors unless some exception applies to obviate the necessity of registering the Alleged Assignments at the PPR.

[61] The Serra Parties rely upon the exception in s. 4(d) of the *PPSA*, which provides, *inter alia*, that:

> 4 Except as otherwise provided under this Act, this Act does not apply to the following:
>
> ...
>
> (d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services.

[62] The Serra Parties argue that the Alleged Assignments fall within this exception because they amount to the creation or transfer of an interest in present or future compensation for services other than fees for professional services. They argue that Arres, as a mortgage broker, was compensated by setting off and deducting certain administrative costs, fees and expenses associated with its management of the Graybriar Mortgage, prior to distributing any remaining proceeds to Graybriar Investors. They assert that compensation thus earned by Arres should not be viewed as fees paid for professional services.

[63] The Serra Parties point to the decision of this Court in ***Re Lloyd***, [1995] 164 AR 59. There, the Master held that the *PPSA* does not apply to fees earned by a real estate agent. He found that professional services did not include those of a real estate salesperson and, thus, fees paid to that person were not fees paid for professional services.

[64] The Serra Parties argue that the same analysis should apply to mortgage brokers such as Arres. They point out that both real estate agents and mortgage brokers are governed by the *Real Estate Act*, RSA 2000, c R-5 ("*REA*"). Section 1(1)(r) of the *REA* provides, in part, that:

> "mortgage broker" means a person who on behalf of another person for consideration **or other compensation**
>
> (A) solicits a person to borrow or lend money to be secured by a mortgage,
>
> (B) negotiates a mortgage transaction,
>
> (C) collects mortgage payments and otherwise administers mortgages, or
> (D) buys, sells or exchanges mortgages or offers to do so... [Emphasis added.]

[65] Thus, they argue, like a real estate agent who is not considered a professional and whose compensation is not subject to *PPSA* registration for purposes of establishing priorities among claimants in the event of an assignment, Arres should be able to avail itself of the exception in section 4(d) of the *PPSA*.

[66] In response, the Receiver notes that s. 4 of the *PPSA* provides narrow exceptions to transactions that otherwise would fall within its ambit and require registration to perfect a priority. The Receiver argues that the term "compensation" must be construed with reference to the words "wages, salary, pay, [and] commission". Section 4(d), the Receiver argues, addresses a narrow category of assignments of wages or analogous modes of payment for labour or personal services that are not otherwise prohibited under s. 53 of the *Consumer Protection Act,* RSA 2000, c C-26.3. That Act prohibits most assignments of wages or similar receivables for labour or personal services. For those few assignments of wages that are permitted, s. 4(d) of the *PPSA* reflects the impracticality of requiring such assignments to be registered.

[67] The Receiver argues that Arres acted as an intermediary in mortgage transactions and did not provide labour or personal services. Its view is that amounts owing to Arres do not fall within the exception in s. 4(d) because they cannot be said to be "wages, salary, pay, commission or any other compensation for labour or personal services". Rather, they relate to reimbursement of expenses incurred by Arres in the course of administering the Trust Agreements. The Receiver states that s. 4(d) was not intended to exclude the *PPSA*'s application to the assignment of such receivables. Any reference to these amounts not being for "professional services" is therefore irrelevant.

[68] The Receiver takes the position that the policy objectives of the *PPSA* would be undermined if assignments of fees computed with reference to the value of a transaction or of reimbursement for expenses were excluded by virtue of s. 4(d).

[69] I agree with the Receiver. While the amounts Arres was permitted to set off under the relevant agreements may have constituted its compensation, they were not akin to the payment of wages. The facts in ***Re Lloyd*** are not analogous to those before me and the reasoning in that case does not apply. Therefore, s. 4(d) of the *PPSA* does not exempt the Alleged Assignments from registration and the lack of registration means that the Alleged Assignments do not have priority over the claims of Arres' other creditors.

2. Valuable Consideration for the Alleged Assignments

[70] While non-compliance with the registration requirements of the *PPSA* negates any priority for the Alleged Assignments, I will also consider the Receiver's second basis for challenging Arres' claims.

[71] The Serra Parties argue that the Alleged Assignments comprise a number of assignments for which they have given valuable consideration. In Arres' Brief, the Serra Parties set out several assignments they claim Arres made and the consideration given for them. Though the facts alleged are somewhat confusing, I will attempt to set out the Alleged Assignments in chronological order.

[72] Arres alleges that on November 20, 2007, it agreed to purchase $200,000 of shares in a company called Grand Lion Entertainment Group (the "Grand Lion Shares"). It asserts that it paid $50,000 towards those shares and that 875 assumed the remainder of that obligation by

"providing an additional $150,000". Arres claims that 875 received the Grand Lion Shares and agreed to transfer them to Arres, provided Arres transferred a mortgage receivable or new investment of not less than $250,000 to 875 (the "Grand Lion Assignment"). The Serra Parties assert that the additional amount ($250,000 - $200,000 = $50,000) was to compensate 875 for its foregone mortgage interest and the risk of holding the Grand Lion Shares in lieu of mortgages.

[73] Arres asserts that on or about June 25, 2008, 875 borrowed $1,524,750 from Access Mortgage. Arres claims that the net proceeds from this loan in the amount of $1,017,487.29 were "given to Arres" and that this money was used to satisfy some of its obligations to Graybriar Investors under the Trust Agreements. In exchange, Arres executed an assignment in favour of 875 (the "June Assignment") of various accounts receivable from a number of projects, including the Trust Agreement fees.

[74] The Serra Parties assert that on September 1, 2008, Arres agreed to transfer a portion of the loan renewal fee owed to it pursuant to the Renewal Agreement, in the amount of $230,000, in partial satisfaction of its obligations under the Grand Lion Assignment.

[75] The Serra Parties claim that on January 31, 2009, Arres assigned any and all accounts receivable under the Trust Agreements to Ms. Serra (the "January Assignment"). They state that the consideration Arres received for the January Assignment was bonuses deemed to have been advanced to Mr. Serra and Ms. Serra on January 31, 2009 in the amount of $2,200,000 and a further $8,000 cash payment made by Mr. Serra. Arres points to a QuickBooks entry as evidence of these deemed bonuses and the $8,000 payment from Mr. Serra.

[76] The Serra Parties assert that on or about July 10, 2010, Mr. Serra and Ms. Serra "allotted" to Arres $105,000 from the proceeds of a separate project, Houseco. They claim this amount was paid to Arres by cheque "in further consideration towards the June Assignment and the January Assignment".

[77] Arres claims that it made an assignment to Ms. Serra on September 30, 2010 (the "September Assignment") in exchange for a cheque received from her for $97,500. The Serra Parties claim that the September Assignment included an assignment by Arres to Ms. Serra of any and all accounts receivable from the Trust Agreement Fees.

[78] As additional consideration for the June and January Assignments, the Serra Parties claim that Ms. Serra paid an additional $167,234.47 to Arres through a series of cheques. In its brief, Arres refers to this payment as an assignment dated March 23, 2012 (the "March Assignment").

[79] The Serra Parties also claim that Ms. Serra paid an additional $177,053 to Arres by cheque on October 11, 2012. In its brief, Arres refers to this as the "October Assignment" and claims this amount was paid as additional consideration for the June and January Assignments.

[80] The Serra Parties also point to a QuickBooks entry from Arres dated September 30, 2013 that purports to show a further $243,568.20 paid by Ms. Serra towards the June and January Assignments.

[81] In his Affidavit sworn July 17, 2018, Mr. Serra claims that a total of $2,079,747.03 represents accounts receivable assigned from Arres allegedly "from the Graybriar Mortgage." In addition, Mr. Serra deposes that Ms. Serra advanced $2,537,000 to Arres.

[82] The Receiver argues that the evidence of the Serra Parties does not establish that they gave sufficient, or any, consideration for which the Alleged Assignments validly could have been made.

[83] At paragraph 15 of its Third Report dated August 17, 2018, the Receiver notes as follows:

> The Receiver has reviewed the amount of $2,537,000 identified as being advanced by or otherwise owing by the [Serra] Parties to the Debtor at paragraph 37 of the Affidavit of Mr. Serra. The Receiver has confirmed that the sum of $97,500 was advanced by Ms. Serra to the Debtor on or about September 30, 2010 as discussed in the Second Report. Other than this amount, the Receiver has been unable to substantiate any of the other amounts reportedly advanced by the [Serra Parties] to the Debtor based on its review of Arres' financial records (ie. Balance Sheet and financial statements). In addition, the Receiver has been unable to identify the recording of the respective $2.35 M liability of the Debtor to any of the [Serra] Parties in Arres' accounting records.

[84] At para 16 of its Third Report, the Receiver makes the following observation in respect of each of the four accounts receivable alleged to comprise the $2,079,747 claimed by Mr. Serra:

> The Receiver has not been able to identify the recording of this amount as an account receivable in Arres' financial records.

[85] In addition to this overview, the Receiver also addresses the Alleged Assignments more specifically. With respect to the Grand Lion Assignment, the Receiver states in its brief that "no document has been entered into evidence" establishing that Arres actually received the Grand Lion shares.

[86] With respect to the alleged advance of $1,017,487 by 875 to Arres from funds borrowed by 875 from Access Mortgage, the Receiver again states that "no document has been entered into evidence" establishing that 875 borrowed these funds from Access Mortgage or that Arres received any of them.

[87] 875 alleges that it contributed a further $300,000 "towards the June Assignment" by agreeing to sell its interest in a "Bankview Mortgage" and transferring the funds to Arres. The Receiver states that the only documentation related to this alleged contribution is a deposit slip showing an amount received from Access Mortgage that has no evident connection to 875.

[88] With respect to the management bonuses of $2.2 million allegedly deemed to have been advanced to Mr. Serra and Ms. Serra and to have been satisfied, in part, by the Alleged Assignments, the Receiver argues that management bonuses of this magnitude are not sufficiently supported by Arres' accounting records. It argues that there is no journal entry that reflects elimination of Mr. Serra's and Ms. Serra's rights to be paid $2.2 million by way of receipt of the Alleged Assignments. The Receiver further argues that no evidence has been adduced to show that these alleged management bonuses were ever reported in Mr. Serra's or Ms. Serra's tax returns. The Receiver suggests that they may have been simply reversed in whole or in part by a subsequent journal entry.

[89] With respect to Mr. Serra's' alleged payment of $8,000 to Arres, the Receiver argues that accounting records suggest that this amount was actually a repayment by Mr. Serra of a shareholder's loan made to him by Arres. That accounting record is a debit entry to a bank

account which is identified as "SH Loan/Management Wages". This record, the Receiver argues, shows no connection to Mr. Serra or the Alleged Assignments and is not evidence that Mr. Serra paid consideration for the Alleged Assignments.

[90] With respect to Mr. Serra's and Ms. Serra's alleged allotment to Arres of $105,000 from the proceeds of the Houseco project, the Receiver notes that this transaction is supported only by a notice of assignment signed by Mr. Serra and Ms. Serra. The Receiver contends in its brief that it cannot be determined if this notice was signed on behalf of Mr. Serra and Ms. Serra, 875 or Arres. It elaborated somewhat in oral argument, saying that there was no evidence of the $105,000 having been received by Arres.

[91] As noted above, Ms. Serra is alleged to have paid $167,234.47 and $177,053 to Arres as consideration for the March and October Assignments. The Receiver notes that copies of cheques attached to Mr. Serra's Affidavit sworn on July 17, 2018 offered as evidence of consideration for the Alleged Assignments were drawn on Arres' bank account, not Ms. Serra's bank account.

[92] With respect to the sum of $243,568.20 allegedly paid by Ms. Serra to Arres in or around September 2013, the Receiver notes that this transaction is supported only by a line item in a listing of Arres' bank transactions that does not show any connection between Ms. Serra and the deposit in question.

[93] The Receiver does acknowledge that payment of $97,500 is reflected in a cheque to Arres by Mr. Serra and Ms. Serra in or around September 2010. Still, it argues, it is impossible to verify whether this payment represents consideration for the Alleged Assignments. Further, there is no record on the Arres balance sheet dated July 31, 2014 showing amounts owing to the Serra Parties. Accordingly, the Receiver asserts that the Serra Parties have not proven that this amount is currently owing. Moreover, the Receiver's position is that, even if this amount is proved owing, it does not take priority over Arres' other debts because of the lack of *PPSA* registration.

[94] I accept the Receiver's position. The evidence does not satisfy me that the Serra Parties provided consideration for the Alleged Assignments. Therefore, the Serra Parties have not proven that they are creditors of Arres in respect of the Alleged Assignments.

3. Validity of Alleged Assignments

[95] The Receiver argues that Arres could not validly have assigned its receivables because doing so would have been a breach of trust under the Trust Agreements. The Receiver notes that section 13.8 of each of the Trust Agreements requires a Graybriar Investor's consent before an assignment can be made. It argues that there is no evidence of any prior or subsequent written consent to the Alleged Assignments.

[96] The Receiver further argues that it would be improper to allow Mr. Serra, as one of the Serra Parties, to benefit, directly or by virtue of his "connection" with Ms. Serra and 875, from a breach of trust when he was a principal, and essentially the mind and management of, Arres.

[97] The Serra Parties assert that the Graybriar Investors were given written notice of the Alleged Assignments in 2009 and acquiesced to them. It points out that clause 11.1(c) of the Trust Agreements provides that Arres' trusteeship may be terminated by the Graybriar Investors if Arres purports to assign its rights without their prior written consent. The Receiver disputes the assertion that the Graybriar Investors acquiesced in any breach of trust by Arres. While it

acknowledges that the Trust Agreements allow the Graybriar Investors to terminate the trustee if they so choose, the Receiver argues that failing to exercise that right does not rise to the level of acquiescence to a breach of trust.

[98] Arres also argues that amounts it was allowed to set off and deduct from funds otherwise distributable to a Graybriar Investor never formed part of the property administered under the Trust Agreement. The Receiver disagrees and argues that the Alleged Assignments did not operate to remove these monies from what would otherwise have been trust property.

[99] I have reviewed an example of the Co-Lender Administration Agreements and I am unable to find any express power for either party to its assign rights thereunder. Further, I agree with the Receiver that clause 13.8 of the Trust Agreements permitted assignment of a party's rights only with the prior written consent of the other party. I am not satisfied that the prior consent of the Graybrair Investors was obtained.

[100] In addition, I reject Arres' argument that the amounts subject to the Alleged Assignments were not trust property. If an amount may be set off against otherwise distributable trust property, it follows that until that set off occurs the amount should be characterized as trust property. I note that the Trust Agreements do not provide that amounts to be set off or deducted by Arres are not part of the trust property.

[101] Accordingly, I agree that the Alleged Assignments, if they in fact arose, gave rise to a breach of the Trust Agreements.

[102] This raises the question of the effect of that breach of trust. The Receiver asserts that the Alleged Assignments were void *ab initio* because they were contrary to the terms of the Trust Agreements, but cites no authority for that proposition. In argument, I posed the question whether an assignment made in breach of trust might nevertheless be valid and enforceable by the assignee, but give the beneficiary an *in personam* action against the trustee for breach of trust or, in some circumstances, an *in rem* right to trace and recover the trust property. I note that *Waters' Law of Trusts in Canada*, 3d ed (Thomson Carswell: Toronto, 2005) states this at p13:

> Moreover, though the trust beneficiary who has only an equitable interest is unable to bring an action in conversion against the trustee or third party unless the beneficiary has a right to immediate possession of the trust property, the beneficiary does have a right to follow the property into the hands of third parties. First, he will sue the trustee personally for breach of trust, and if the trustee is unable to meet his claim he can proceed to trace the property, supposing it continues to be identifiable, and recover it from third parties. It is this right to trace which leads to the oft-made statement that the trust beneficiary's interest cannot be merely *in personam*, it must at least be partly *in rem*. What these obscure and confusing latinisms mean is that, since the beneficiary in protecting or asserting his equitable interest is not restricted to a personal action against the trustee, but may bypass the breaching trustee and sue the third party, he is asserting an interest of some kind in the trust property itself.

[103] Though this argument was not well developed by any of the parties, this seems to me to indicate that a transaction undertaken in breach of trust is not void *ab initio*. Rather, the aggrieved beneficiary is entitled to a remedy, which may be *in personam* or *in rem*, depending

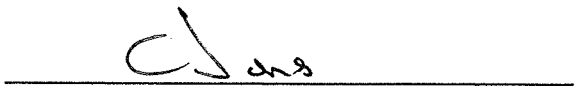
upon the circumstances. However, given the lack of argument and my other conclusions, I need not decide this.

[104] I am satisfied that, to the extent the Alleged Assignments may have been made, registration under the *PPSA* would have been required to grant them priority over Arres' other creditors. Further, the evidence does not satisfy me that consideration was given for the Alleged Assignments and they should not, therefore, be recognized as valid.

V. Conclusion

[105] In the result, the applications of both Terrapin and the Serra Parties are dismissed. The parties may speak to costs.

Heard on the 21st day of September, 2018.
Dated at the City of Calgary, Alberta this 20th day of December, 2018.



C.M. Jones
J.C.Q.B.A.

Appearances:

Kerry Lynn Okita
For Terripan Mortgage Investment Corp

Walker W. MacLeod and Theodore Stathakos
for the Reciever

Judy Burke, Q.C. and Irfan Tharani
for Arres Capital Inc

Taimur R. Akbar
for Graybrair Land Company Limited