

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

B E T W E E N:

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, c. C-36, AS AMENDED***

**AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF DEL  
EQUIPMENT INC.**

Applicant

**FACTUM OF THE APPLICANT  
Motion for Preservation Order – Rule 45.02  
(returnable October 22, 2019)**

October 21, 2019

**Goodmans LLP**  
Barristers & Solicitors  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Jason Wadden** LSO #: 46757M  
**Chris Armstrong** LSO#: 55148B  
**Andrew Harmes** LSO#: 73221A

Tel: 416.979.2211  
Fax: 416.979.1234

Lawyers for Del Equipment Inc.

## I. OVERVIEW

1. On September 10, 2019, DEL Equipment Inc. (“**DEL**” or the “**Company**”), the CCAA debtor, discovered that a payment of \$874,107.08 (the “**Funds**”) owing to it from Mack Defense, LLC (“**Mack Defense**”) – about 20% of DEL’s expected receipts for the month – was improperly paid to Gin-Cor Industries Inc. (“**Gin-Cor**”) at the direction of Gin-Cor. Despite DEL’s efforts over the past month to resolve this issue with Mack Defense and Gin-Cor, the Company has been unable to recover the Funds.

2. Gin-Cor had no right to receive the Funds, which Mack Defence intended to pay to DEL. As a result, Gin-Cor has been unjustly enriched and is liable to make restitution for the mistaken payment of money, and the Funds are impressed with a constructive trust in favour of the Company.

3. However, Gin-Cor refuses to transfer the Funds to DEL as was intended and alleges that it has set-off the Funds against amounts it alleges are owed to it by DEL. However, as Gin-Cor holds the Funds under a constructive trust, it is not able to set-off such amounts against amounts owed to it by the Company. Moreover, Gin-Cor does not have clean hands since it was its own wrongful actions in providing incorrect information to Mack Defence that caused the misdirection and its interception of the Funds.

4. Gin-Cor’s improper interception and retention of the Funds has contributed to the Company’s liquidity crisis that is one of the reasons for these proceedings.

5. DEL brings this *ex parte* motion under Rule 45.02 of the Ontario *Rules of Civil Procedure* (the “**Rules**”) for an interim Order requiring Gin-Cor to transfer the Funds to the Monitor in order to ensure that the Funds are preserved pending final determination of the dispute between DEL, Gin-Cor, and Mack Defense. It is imperative that the Funds be secured as quickly as possible, and the full issue be

resolved, so that the Company can avoid the incurrence of additional costs to the detriment of all of its stakeholders.

6. In the alternative, the Company submits that Gin-Cor should be required to segregate and hold separate an amount equal to the Funds and that the Court should grant an equitable lien for the benefit of DEL in the amount of the Funds over such segregated funds or over the assets of Gin-Cor.

## II. FACTS

7. DEL is a leading Canadian truck body and equipment “up-fitter” that engineers, designs, manufactures and sells special truck bodies, attachments, equipment and work-ready vehicles. DEL’s primary business consists of the commercial sale of work-ready trucks through its nation-wide distribution network.

Affidavit of Douglas Lucky, sworn October 21, 2019 (the “**Lucky Affidavit**”), para. 4, Application Record (“**AR**”), Tab 4, p. 61

8. In June 2017, an agreement was reached with Gin-Cor, a company that operates in the same field as DEL, pursuant to which Gin-Cor would acquire a 40% equity interest in and management control of DEL for a nominal sum, with a view to earning a 100% equity interest upon the achievement of certain profitability-related milestones (the “**Gin-Cor Transaction**”).

Lucky Affidavit, para. 7, AR, Tab 4, p. 62

9. Unfortunately, although DEL’s revenues increased in 2017 and 2018 compared to 2016, the Gin-Cor Transaction did not produce the hoped-for synergies, with the result that DEL has suffered increasing losses over the past two and a half years. In July 2019, Gin-Cor and the majority shareholder of DEL, Diesel Equipment Limited (“**Diesel**”), agreed to terminate the Gin-Cor

Transaction, with the result that 100% ownership and control of DEL reverted to Diesel on or about July 18, 2019, and Gin-Cor ceased to manage DEL's business as of that date.

Lucky Affidavit, para. 9, AR, Tab 4, p. 62

10. One of the matters that has negatively impacted DEL's liquidity is a dispute between DEL, Gin-Cor, and Mack Defense, a customer of DEL (the "**Dispute**"), which resulted in an approximately 20% reduction in anticipated receipts for September 2019. While Diesel has provided certain limited discretionary emergency financing to DEL in recent weeks, it has indicated that it is not prepared to provide further financing in the absence of a formal restructuring process being commenced.

Lucky Affidavit, para. 60, AR, Tab 4, p. 79

11. In mid-2018, DEL (through its Moncton branch) delivered a series of quotes and re-quotes to Mack Defense for the up-fit of four different truck configurations and 19 up-fit trucks (the "**MD Trucks**") to be delivered to the Canadian Department of National Defence ("**DND**") and the Parks Canada Agency ("**Parks Canada**"). Mack Defense issued purchase orders ("**POs**") for the MD Trucks to DEL in July and November 2018. Over the course of late 2018 and over the first half of 2019, DEL up-fitted the MD Trucks as requested by Mack Defense and delivered them to DND bases and Parks Canada locations between May 3, 2019, and June 25, 2019. On or about June 6, 2019, DEL (then operating under the tradename Gincor Werx due to the Gin-Cor Transaction) issued a series of invoices to Mack Defense for the MD Trucks totalling \$874,107.08, which invoices were due and payable upon receipt (the "**MD Invoices**"). Although the quotes and the MD Invoices delivered to Mack Defense include the logo and trade name Gincor Werx, each is clear they were issued by DEL as the legal entity. In addition, the POs issued by Mack Defense were addressed to "Del Equipment Ltd".

Lucky Affidavit, para. 61, AR, Tab 4, p. 80

12. On September 10, 2019, DEL was following up with its customers to collect overdue accounts receivable when it became aware that the \$874,107.08 payment owing by Mack Defense to DEL in respect of the MD Invoices had instead been made by Mack Defense to Gin-Cor, and not DEL. Upon learning of this, DEL immediately reached out to Mack Defense via telephone calls and emails to understand what had transpired. DEL also received and responded to various emails from Gin-Cor. Based on these inquiries and exchanges, DEL understands that the following events occurred:<sup>1</sup>

- (a) On the morning of April 10, 2019, Brett Stoddart, a buyer at Mack Defense, emailed Jim Hazlehurst, a representative of DEL, asking for payment instructions for the work performed in relation to the MD Trucks. When Mr. Hazlehurst did not immediately respond, Mr. Stoddart emailed a Gin-Cor representative minutes later asking for payment instructions.
- (b) At 11:28 am on April 10, 2019, the Gin-Cor representative provided Mark Defense with Gin-Cor's own payment instructions despite the fact that Gin-Cor was not entitled to such amounts and Gin-Cor knew (or should have known) that it was not entitled to such amounts. It appears that the Gin-Cor representative was providing payment instructions for an invoice #53998 issued by Gin-Cor to Mack Defense, which invoice, to the best of my knowledge and belief, has nothing to do with the MD Trucks.<sup>2</sup>
- (c) About an hour later, at 12:37 pm (April 10, 2019), Steve Lewin responded on behalf of DEL to Mr. Stoddart, and advised that DEL was "...now Del Equipment Inc. operated as Gincor Werx" and provided correct payment instructions for DEL, including filling

---

<sup>1</sup> DEL expressly reserves the right to seek discovery of both Mack Defense and Gin-Cor in relation to the matters addressed herein as well as to deliver further evidence in respect of these matters.

<sup>2</sup> Account details have been redacted from the payment instructions.

out Mack Defense's "New Supplier Request Mack Defense Purchasing Form", which clearly indicated DEL as the supplier and included DEL's correct banking information.<sup>3</sup>

- (d) Based on the payment information provided by the Gin-Cor representative, Mack Defense paid a total of \$874,107.08 (the "**Funds**") to Gin-Cor via wire transfers made August 28 and September 5, 2019, representing the total Funds for the MD Trucks.
- (e) In making the payments to Gin-Cor, Mark Defense either ignored or overlooked the proper payment instructions that DEL had sent on April 10, 2019, which clearly set out DEL's correct banking and wire transfer information.
- (f) Neither Mack Defense nor Gin-Cor dispute that the Funds was intended to be given to DEL for the MD Trucks.
- (g) By email dated September 18, 2019, Gin-Cor acknowledged that the Funds received by it was "Del funds". Notwithstanding this acknowledgement, Gin-Cor has taken the position that it is entitled to retain the Funds it wrongfully received from Mack Defense in order to set-off the Funds against obligations of DEL to Gin-Cor, or to unilaterally retain the Funds as collateral for alleged obligations owed by DEL to Gin-Cor.
- (h) Gin-Cor is only owed a small amount of money from Mack Defense, if any, on account of work unrelated to the MD Trucks (any amounts that might be owing from DEL to Gin-Cor are currently under review by DEL). Therefore, Gin-Cor could not have thought the payment was intended for it. As such, even if the provision of the wrong payment instructions was an honest mistake, Gin-Cor should have immediately realized

---

<sup>3</sup> Account details have been redacted from the payment instructions.

the problem when it received the Funds since (i) the Funds came from Mack Defence and Gin-Cor was not owed such amounts from Mack Defence; (ii) the Funds were in an amount that did not correspond to any amount that might have been owing from DEL to Gin-Cor; and

- (i) Although Mack Defense has admitted in telephone conversations (i) between Isabel Marques, DEL's controller, and Brett Stoddart, the buyer at Mack Defense, on September 12, 2019; and (ii) between Douglas Lucky and Brian Happel, Director of Business Control & Treasurer of Mack Defense, on September 1, 2019, that Mack Defense had inadvertently paid the Funds to Gin-Cor, Mack Defense has refused to pay DEL the amount owed for the MD Trucks on the basis that it views the Dispute as a dispute between DEL and Gin-Cor.

Lucky Affidavit, para. 62, AR, Tab 4, pp. 80-83

13. Between September 11 and October 1, 2019, DEL attempted in good faith to resolve these issues through numerous emails and/or discussions with both Mack Defense and Gin-Cor, neither of whom agreed to pay the amount due and owing to DEL for the MD Trucks. On October 10, 2019, DEL's counsel sent demand letters to each of Mack Defense and Gin-Cor, including advising Gin-Cor that it held the Funds in trust for DEL and that, to the extent it did not immediately pay the Funds to DEL, it should be segregated in a separate account. On October 15, 2019, counsel to Mack Defense responded via letter indicating that Mack Defense views the Dispute as being between DEL and Gin-Cor. Gin-Cor has advised via text message that the matter is now being dealt with by their lawyers, but no formal reply has been received to DEL's demand and request to segregate the Funds.

Lucky Affidavit, para. 63, AR, Tab 4, p. 83

14. Based on DEL's prior involvement with Gin-Cor's business, including the Company's understanding of Gin-Cor's financial circumstances, the Company is concerned that if immediate steps are not taken to preserve and protect the Funds, there is a possibility that such funds will be dissipated by Gin-Cor and DEL will not be able to recover the Funds from Gin-Cor if it prevails in the Dispute.

Lucky Affidavit, para. 64, AR, Tab 4, p. 84

### **III. LAW & ARGUMENT**

#### **A. The Funds Should Be Preserved By The Monitor Pursuant To Rule 45.02**

15. Rule 45.02 of the Rules provides that the Court can order the interim preservation of the Funds pending determination of the Dispute between the parties:

##### **Specific Fund**

45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

*Rules of Civil Procedure, RRO 1990, Reg 194, Rule 45.02.*

16. The applicable test for the granting of relief under Rule 45.02, as established by the Ontario Court of Appeal, is as follows:

- (a) First, the moving party must be claiming a right to a "specific fund", which is satisfied by showing that:
  - (i) the funds sought to be preserved are readily identifiable; and
  - (ii) the moving party has asserted a legal right, in the litigation, to the specific fund;
- (b) Second, there is a serious issue to be tried regarding DEL's claim to the Funds; and

- (c) Third, the balance of convenience must favour granting the relief sought by DEL.

*Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 at para. 18, Applicant's Book of Authorities ("BOA"), Tab 1

17. Each of these branches of the test are considered below. For sake of clarity, the "serious issue to be tried" branch of the test is separated into two sections, the first addressing DEL's claims for unjust enrichment and mistaken payment, and the second explaining why Gin-Cor cannot claim set-off.

**B. The Funds Are A "Specific Fund"**

18. As noted above, the first branch of the Rule 45.02 test, which asks whether DEL has a claim to a "specific fund", has two sub-branches:

- (a) there must be a specific fund that is readily identifiable; and
- (b) DEL must have asserted a legal right, in the litigation, to the specific fund.

*Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 at para. 19, BOA, Tab 1

*Oriental Garden Chinese & Vietnamese Restaurant Inc. et al. v. Nguyen*, 2018 ONSC 7538 at para. 20, BOA, Tab 2

19. In regards to the requirement for the existence of a "specific fund", the Funds held by Gin-Cor constitute a specific fund that is readily identifiable. Courts have held that relief under Rule 45.02 is not dependent on whether or not a proprietary interest is claimed in the funds, and thus it is not necessary that the funds be held in a separate account or to be physically segregated at the time the order is made for the funds to be a "specific fund" within the meaning of the Rule 45.02.

*Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 (ONCA) at para 25-27, BOA, Tab 1

*3Genius Corp. v. Locationary Inc.*, 2016 ONSC 4092 at para. 14, BOA, Tab 3

20. Therefore, even if the Funds are held in multiple accounts or have been commingled with Gin-Cor's general corporate funds, the Funds are sufficiently specified and differentiated as they were clearly identifiable at the time of the interception by Gin-Cor – the Funds were transferred by Mack Defence pursuant to its attempt to pay DEL for the MD Invoices. The financial documentation evidencing the transfer of Funds, and correspondence between the parties, make the Funds sufficiently identifiable to be a “specific fund” within the meaning of Rule 45.02.

*3Genius Corp. v. Locationary Inc.*, 2016 ONSC 4092 at para. 14, BOA, Tab 3

21. Some cases have noted that the “specific fund” requirement is not satisfied where “funds” sought to be preserved are a receivable to be paid in the future. For example, Party A cannot seek relief under Rule 45.02 in respect of a receivable owed to Party B from Party C. However, in this case, the “specific fund” requirement is met because the motion is brought in respect of the actual, specific funds that were mistakenly transferred by Mack Defence to Gin-Cor.

*Persaud v. Persaud*, 2018 ONSC 3024 at para. 16, BOA, Tab 4

22. The second sub-branch, requiring that the Company has asserted a legal right to the specific fund in the litigation, is also satisfied. In these CCAA proceedings, the Company claims entitlement to recovery of the Funds specifically and does not assert a general claim for damages. A claim of unjust enrichment or mistaken payment of money, unlike a mere claim for unliquidated damages, is a legal right sufficient to satisfy the second part of the Rule 45.02 test.

*Oriental Garden Chinese & Vietnamese Restaurant Inc. et al. v. Nguyen*, 2018 ONSC 7538 at paras. 22-27, BOA, Tab 2

23. In order to resolve this dispute on an efficient basis, the Company proposes that the hearing to determine the entitlement to the Funds (and any related dispute, such as Mack Defense's continuing liability to make payment to DEL) be determined in a hearing within these CCAA proceedings as opposed to a separate lawsuit (just as many other issues in a CCAA are resolved). It is submitted that a separately instituted lawsuit is not required to satisfy the second sub-branch of the Rule 45.02 test that a legal right to the funds be asserted "in the litigation". The Company submits that the Court can set a hearing or trial of the issue in the CCAA hearings without the need for separately initiated legal proceedings, and that such process constitutes "litigation" for the purposes of Rule 45.02. In the alternative, if this Court determines that a separately instituted proceeding is required, then the Company hereby undertakes to file a Notice of Action forthwith upon the granting of the requested order and relies on Rule 1.03(1) ("motion") that a motion may be brought in respect of an intended proceeding.

24. As a result, DEL respectfully submits that it has satisfied the first branch of the test under Rule 45.02 and has shown that the relief requested is in respect of a "specific fund", and that DEL has asserted a legal right to such funds in the CCAA proceedings.

**C. There Is A Serious Issue To Be Tried – DEL Has Valid Claims for Return of Funds**

25. The second branch of the Rule 45.02 test asks whether there is a serious issue to be tried. In the context of a Rule 45.02 motion, the "serious issues to be tried" means that the moving party can show a "serious prospect of ultimate success". The issue to be tried in this case is whether the Company has a claim against Gin-Cor for unjust enrichment or mistaken payment notwithstanding any claim of set-off by Gin-Cor. For the reasons explained below, DEL has demonstrated that it has a serious prospect of ultimate success.

*Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 (ONCA) at para. 20, BOA, Tab 1

*Oriental Garden Chinese & Vietnamese Restaurant Inc. et al. v. Nguyen*, 2018 ONSC 7538 at paras. 29, BOA, Tab 2

*Persaud v. Persaud*, 2018 ONSC 3024 at para. 21, BOA, Tab 4

(i) Unjust Enrichment

26. Gin-Cor has been unjustly enriched as a result of receiving the Funds. The Supreme Court of Canada in *Kerr v. Baranow* has stated that, in order to establish unjust enrichment, DEL must satisfy three factors:

- (a) Gin-Cor must have received a benefit;
- (b) DEL must have suffered a loss corresponding in some way to the benefit; and
- (c) There is no juristic reason for Gin-Cor's benefit and DEL's corresponding loss.

*Kerr v. Baranow*, 2011 SCC 10 at para. 32, BOA, Tab 5

27. The first two factors are satisfied. Gin-Cor has received an incontrovertible benefit in the form of the Funds, and DEL has suffered a corresponding loss by not receiving the Funds. Despite Mack Defence's assertion that it did not know who was authorized to represent DEL, there is no dispute that (i) the Funds were intended to be paid to DEL on account of the MD Invoices; (ii) Gin-Cor provided the incorrect account information to Mack Defence that caused the Funds to be improperly diverted and intercepted by Gin-Cor; and (iii) Gin-Cor is keeping the Funds not on the basis that the Funds were owed to it by Mack Defence, but rather on the basis that Gin-Cor alleges that it can set-off the Funds against amounts it says the Company owes to it. DEL has been deprived of the Funds that it was supposed to receive because Gin-Cor provided incorrect information to Mack Defence that caused Mack Defence to transfer the Funds to Gin-Cor instead.

28. The third factor is also satisfied since Gin-Cor cannot rely on “set-off” as a “juristic reason” for its enrichment and it has no other right to retain the Funds.

29. Set-off is a defence to a claim and is not a juristic reason within the unjust enrichment test. The Supreme Court of Canada in *Kerr* held that set-off is not a “juristic reasons”, and stated that the phrase “juristic reason” is...

intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits.

*Kerr v. Baranow*, 2011 SCC 10 at para. 114, BOA, Tab 5, citing *Wilson v. Fotsch*, 2010 BCCA 226 at para. 30, BOA, Tab 6

30. Set-off, which is a defence, is used to determine the net amount owed at the quantum or damages stage of a proceeding, which determination occurs after the determination of the parties’ legal rights. The Supreme Court of Canada in *Kerr* adopted the following holding of the British Columbia Court of Appeal in *Wilson v. Fotsch* on whether set-off qualifies as a “juristic reason”:

The juristic reason analysis is intended to establish whether there is a reason for the defendant to retain a proven enrichment, not to determine its value or off-set reciprocal enrichment by the plaintiff. The issues of quantum and set-off are for the quantification of the award following a finding of unjust enrichment. By interposing the issue of extent into the juristic reason stage, the full unjust enrichment analysis is short-circuited... [emphasis added]

*Wilson v. Fotsch*, 2010 BCCA 226 at paras. 28 and 30, BOA, Tab 6

31. Set-off is therefore not a juristic reason that allows Gin-Cor to claim that there is a juristic reason for its enrichment by receiving the Funds.

32. Furthermore, as noted above, Gin-Cor has acknowledged that it received the Funds by mistake, and hence there is no juristic reasons for the enrichment.

33. As a result, the test for unjust enrichment set out by the Supreme Court in *Kerr* is satisfied and Gin-Cor has been unjustly enriched and, as explained below, the Funds are or will be subject to a constructive trust.

(ii) Recovery of Mistaken Payments

34. The Company is also entitled to the return of the Funds based on relief of mistaken payments.

35. It is well settled that funds paid under mistake of fact may be recovered on the basis that the recipient would otherwise be unjustly enriched, and that a party will be unjustly enriched where it has received a benefit due to a mistake of fact. Gin-Cor's unjust enrichment resulted from a mistake of fact, and DEL is entitled to restitution as a result.

*Pinnacle Bank, N.A. v. 1317414 Ontario Inc.*, 2002 CarswellOnt 218 (ONCA) at para. 17, BOA, Tab 7, citing Halsbury's Laws of England, 4th Edition re-issue, Mistake para. 69 (Butterworths; London 1999)

*Royal Bank v. R.*, 1931 CarswellMan 20 (Man KB), BOA, Tab 8

36. The Ontario Court of Appeal in *Pinnacle Bank, N.A. v. 1317414 Ontario Inc.*, set out the test for recovery of funds paid under mistake of fact:

- (a) First, the mistake must have been honest on the part of the person paying the funds. At this time, it is not disputed that Mack Defense made an honest mistake in paying the Funds to Gin-Cor, believing either that it was, in fact, paying the Funds to DEL or that Gin-Cor and DEL were the same entity;

- (b) Second, the recipient of the funds must “in some way be a party to the mistake, either as inducing it, responsible for it, or connected with it”. Gin-Cor is a party to the mistake as a result of wrongfully providing Mack Defense with instructions and banking information to wire transfer the funds into Gin-Cor’s own account, thereby inducing the mistaken transfer;
- (c) Third, there must be an obligation to make the payment. It is not disputed that Mack Defense had an obligation to pay the Funds to DEL pursuant to the MD Invoices;<sup>4</sup> and
- (d) Fourth, the recipient of the funds must have no legal, equitable, or moral right to retain the money as against the payer. As discussed above, Gin-Cor had no right to the monies from Mack Defence (the payer). As discussed above in the section regarding set-off, Gin-Cor has no legal or equitable right to the Funds, as it has been unjustly enriched and set-off cannot be used to “justify” the unjust enrichment.

*Pinnacle Bank, N.A. v. 1317414 Ontario Inc.*, 2002 CarswellOnt 218 (ONCA) at para. 10, BOA, Tab 7

37. As a result, the test for mistake of fact is satisfied in the circumstances, resulting in unjust enrichment, and DEL is entitled to restitution in order to reverse the unjust enrichment.

*(iii) Conclusion re Serious Issue To Be Tried – DEL’s Claim*

38. For the foregoing reasons, it is clear that there is a serious issue to be tried regarding the Company’s entitlement to be paid the Funds that were intended for it.

---

<sup>4</sup> DEL maintains the position that Mack Defense continues to have an obligation to pay \$874,107.08 to DEL. However, the immediate purpose of this motion and the remedies sought hereunder is to secure the Funds so that they can be provided to whichever party is ultimately entitled to them at the resolution of the Dispute.

**D. There Is A Serious Issue To Be Tried – Gin-Cor Cannot Claim Set-off**

39. The Company further submits that Gin-Cor cannot claim set-off even at the “damage quantification” stage because:

- (a) Gin-Cor does not have clean hands in its receipt of the Funds, and therefore cannot claim equitable set-off;
  - (b) the Funds are held (or will be held) subject to a constructive trust; and
  - (c) legal set-off does not apply.
- (i) *Gin-Cor Does Not Have Clean-Hands*

40. Gin-Cor cannot avail itself of equitable set-off because it does not come before this Court with clean hands. The Ontario Superior Court of Justice in *Sherwood Dash Inc. v. Woodview Products Inc.* described the principle of the clean hands doctrine as follows:

Judges of the courts of equity do not deny relief because a claimant is a villain or a wrongdoer; rather, the judges deny relief when the claimant’s wrongdoing taints the appropriateness of the remedy being sought by the court.

*Sherwood Dash Inc. v. Woodview Products Inc.*, 2005 CarswellOnt 7191 (ONSC) at paras. 51-52, BOA, Tab 9

41. It was Gin-Cor’s own actions in improperly directing Mack Defense to pay the Funds to it, rather than DEL, that has tainted the appropriateness of set-off in these circumstances (even if it was otherwise available, which is disputed). By redirecting and intercepting the Funds, and then keeping the Funds when it learned that it was not the intended recipient (if that was unknown before), Gin-Cor has caused this very situation and the harm to DEL. Because the situation arose by Gin-Cor’s own hands, it does not have clean hands and is not entitled to equitable set-off or other equitable relief.

(ii) *A Constructive Trust Will Be Imposed On the Funds and, As Trustee, Gin-Cor Cannot Exercise Set-off*

42. The Supreme Court of Canada held in *Soulos v. Korkontzilas* that where there is unjust enrichment a constructive trust is the natural remedy to effect restitution:

I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act.<sup>5</sup>

*Soulos v. Korkontzilas*, 1997 CarswellOnt 1489 (SCC) at para. 43, BOA, Tab 10

43. The existence of or likely imposition of a constructive trust means that Gin-Cor acts or will be held to act as trustee of the Funds. As the Funds are or will be subject to a constructive trust, and Gin-Cor will be the trustee in respect of the Funds, it cannot effect set-off against the Funds.

44. The Ontario Superior Court of Justice in *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.* concluded that it is impermissible for a trustee to set-off amounts against trust funds as it runs counter to the very notion of a trust:

Although the foregoing cases have addressed the issue of set-off against a trust in different ways, they confirm that a trustee cannot justify withholding trust funds in breach of his or her trust obligations on the grounds that the beneficiary is indebted to him or her. Simply stated, a trustee cannot use the concept of set-off, legal or equitable, to justify self-help by breach of trust.

*Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, 2000 CarswellOnt 3155 (ONSC) at para. 334, BOA, Tab 12

---

<sup>5</sup> This statement, and the conditions under which a constructive trust will be imposed, was further expanded on by the Supreme Court in *Moore v. Sweet*, 2018 SCC 52 at paras. 32-33, BOA, Tab 11.

*(iii) Legal Set-off Does Not Apply*

45. Further, Gin-Cor cannot avail itself of legal set-off because there is no mutuality between the debts being set-off. In this case, there is no mutuality because there is no mutuality between the parties to the “debts” and there is no mutuality in the “right” in which they hold such amounts.

46. First, given that the Funds were transferred by Mack Defence to Gin-Cor, there is no mutuality between the parties in the transaction giving rise to the claims.<sup>6</sup> This is made clear by the fact that Mack Defence also has a claim against Gin-Cor for mistaken payment because it too remains liable to the Company for its failure to pay the MD Invoices.

*Green v. Mirtech International Security Inc.*, 2009 CarswellOnt 450 (ONSC) at para. 12, BOA,  
Tab 13

47. In addition, as noted above, the Funds are or will be impressed with a constructive trust before any claim of set-off can be considered. As a result, the “right” in which Gin-Cor holds the Funds is that of trustee and not in its own right, but it only claims amounts owing from DEL in its personal right. As a result, there is no mutuality of “rights” in which the set-off claims are asserted. Therefore, legal set-off is not available to Gin-Cor.

*(iv) Conclusion re Serious Issue To Be Tried – Gin-Cor Cannot Claim Set-off*

48. For the foregoing reasons, it is clear that there is a serious issue to be tried that DEL should be given the Funds despite Gin-Cor’s claim of set-off.

---

<sup>6</sup> It is noted that Gin-Cor may argue that the parties to be considered for the legal set-off analysis are the same because the Company has an unjust enrichment-type claim against Gin-Cor, and Gin-Cor has a receivable claim against the Company. It is submitted that this argument is not correct since, as a result of the unjust enrichment, Gin-Cor holds the Funds in a different “right”: see para. 47 herein.

**E. The Balance Of Convenience Favours Paying The Funds Into The Monitor**

49. The balance of convenience strongly favours the Monitor preserving the Funds or, in the alternative, ordering that Gin-Cor segregate the Funds.

50. First, it is not disputed that Gin-Cor had no right to receive the Funds from Mack Defence in the first place.<sup>7</sup> Even to the extent that Gin-Cor is owed amounts from the Company, Gin-Cor had no right to misdirect the Funds and then retain the Funds. Gin-Cor has, in effect, effected a garnishment before it has even made any claim against the Company. Thus, the payment of the Funds to the Monitor restores and preserves what should have been the status quo before Gin-Cor's wrongful interception of the Funds.

51. Second, in this case, the taking of the Funds by Gin-Cor amounts to an unlawful preference. As Gin-Cor was involved in the management of DEL until July 2019, and the relationship was terminated as a result of the poor performance of DEL, Gin-Cor would have known of the weakened financial position of DEL that occurred during its management of the Company. It would have also known or ought to have known that the interception and retention of the Funds would have had a serious impact of DEL's liquidity position. Given that there is over \$11 million in unpaid secured debt and significant overdue amounts owing to trade creditors – something that Gin-Cor would have known – it would amount to an unlawful preference for Gin-Cor to take such funds ahead of DEL's secured creditors and in priority to other unsecured creditors in a circumstance where creditor recoveries are uncertain.

Lucky Affidavit, para. 36, AR, Tab 4, p. 72

---

<sup>7</sup> It is acknowledged that there might have been a small amount owing from Mack Defence to Gin-Cor. However, the discrepancy between that small receivable and the amount of the Funds actually received by Gin-Cor would lead any reasonable person to conclude that the Funds were not intended for it. At most, Gin-Cor would be entitled to keep the small amount that it was owed by Mack Defence.

52. Third, any inconvenience suffered by Gin-Cor is a result of its own actions. Gin-Cor would have been put on notice that the Funds were not intended for it when it received the Funds from Mack Defence, and it was again put on notice when the Company demanded that the Funds be repaid. Any inconvenience it may suffer is a result of its own conduct in electing to retain the Funds in the face of knowing that it was not the intended recipient of the Funds.

53. Fourth, there are no deleterious effects in paying the Funds into the Monitor. Gin-Cor's entitlement to the Funds, if any, will be determined and resolved as part of the CCAA proceedings, which can be done expeditiously.

54. Lastly, and conversely, the Company and all of its stakeholders will suffer far greater inconvenience if the Funds are not recovered. These CCAA proceedings were required, in part, as a result of the wrongful taking of the Funds. The liquidity position of the Company has required the imposition of DIP financing, with its attendant additional costs to the Company and corresponding erosion of the position of all other stakeholders. Certainty that the Funds can be recovered may allow for the minimization of the use of DIP financing and otherwise improve the liquidity position of the Company for the benefit of all stakeholders).

**F. DEL Is Entitled To An Equitable Lien Over Gin-Cor's Property**

55. If the Court does not order the delivery of the Funds to the Monitor, the Company respectfully submits that the Court should order Gin-Cor to segregate the Funds into a separate account, and that an equitable lien should be granted over the Funds, or in the further alternative, an equitable lien should be imposed on all of the assets of Gin-Cor in the amount of the Funds.

56. An equitable lien is available in circumstances that would otherwise give rise to a constructive trust, including unjust enrichment, but where a constructive trust is not possible because the property has been comingled with other property to the point that it is not identifiable.

57. As stated by the Ontario Court of Justice, General Division in *Banton v. CIBC Trust Corp.* (affirmed by the Ontario Court of Appeal, leave to appeal to Supreme Court refused), an equitable lien can flow from the misappropriation of funds in a constructive trust:

Where trust funds have been wrongfully mingled with funds of the trustees - or with funds of another person who, like Mr. Banton, must be considered to have had notice of the breach of trust - the persons seeking to recover the trust property - whether they be the beneficiaries or the trustees - have a right to a lien or charge against the commingled funds for the amount of the trust funds that were misapplied.

*Banton v. CIBC Trust Corp.*, 1999 CarswellOnt 2596 (OCJ Gen Div) at para. 28, BOA, Tab 14, affirmed 2001 CarswellOnt 828 (ONCA), leave to appeal refused 2001 CarswellOnt 3069 (SCC).

58. As a result of Gin-Cor's unjust enrichment, as well as the constructive trust that exists or will likely exist in respect of the Funds as a result, DEL is entitled to an equitable lien over the property of Gin-Cor in the amount of the Funds. This is particularly appropriate as Gin-Cor's own financial position is such that the Funds may be dissipated before they can be recovered by the Company, to the detriment to the estate and its stakeholders.

#### **IV. ORDER SOUGHT**

59. For all of the above reasons, DEL respectfully requests an order pursuant to Rule 45.02 in the form requested, with costs reserved to the hearing of the entitlement of the Funds.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2019

GOODMANS LLP

---

**Goodmans LLP**  
Lawyers for the Applicant,  
Del Equipment Inc.

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

**Jurisprudence**

1. *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475
2. *Oriental Garden Chinese & Vietnamese Restaurant Inc. et al. v. Nguyen*, 2018 ONSC 7538
3. *3Genius Corp. v. Locationary Inc.*, 2016 ONSC 4092
4. *Persaud v. Persaud*, 2018 ONSC 3024
5. *Kerr v. Baranow*, 2011 SCC 10
6. *Wilson v. Fotsch*, 2010 BCCA 226
7. *Pinnacle Bank, N.A. v. 1317414 Ontario Inc.*, 2002 CarswellOnt 218 (ONCA)
8. *Royal Bank of Canada v. R.*, 1931 CarswellMan 20 (Man KB)
9. *Sherwood Dash Inc. v. Woodview Products Inc.*, 2005 CarswellOnt 7191 (ONSC)
10. *Soulos v. Korkontzilas*, [1997] 2 SCR 217 (SCC)
11. *Moore v. Sweet*, 2018 SCC 52
12. *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, 2000 CarswellOnt 3155 (ONSC)
13. *Green v. Mirtech International Security Inc.*, 2009 CarswellOnt 450 (ONSC)
14. *Banton v. CIBC Trust Corp.*, 1999 CarswellOnt 2596 (OCJ Gen Div), affirmed 2001 CarswellOnt 828 (ONCA), leave to appeal refused 2001 CarswellOnt 3069 (SCC).

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 45.02**

#### **INTERIM ORDER FOR PRESERVATION OR SALE**

##### ***Specific Fund***

45.2 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED** Court File No.

**AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF DEL EQUIPMENT INC.**

Applicant

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT**  
(Preservation Order Motion)

**Goodmans LLP**

Barristers & Solicitors  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Jason Wadden** LSO #: 46757M

**Chris Armstrong** LSO#: 55148B

**Andrew Harmes** LSO#: 73221A

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for Del Equipment Inc.