Court File No. CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

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

RESPONDING FACTUM OF GIN-COR INDUSTRIES INC.
Returnable May 5, 2020 (Mr. Justice Hainey)

May 1, 2020

KAGAN SHASTRI LLP
Lawyers
188 Avenue Road,
Toronto, ON., M5R 2J1

Rahul Shastri (33475V)
P. 416.368.2100 Ext.223
F. 416.324.4200
E. rshastri@ksllp.ca
David Winer (39330D)
P. 416.368.2100 Ext. 25
F. 416.324.4200
E. dwiner@ksllp.ca
Lawyers for the Respondent, Gin-Cor Industries Inc.

INDEX

PART I: OVERVIEW

1. On October 22, 2019, the Applicant, DEL Equipment Inc. ("DEL") obtained an *ex parte* order pursuant to Rule 45.02 (the "Preservation Order"), requiring the moving party, Gin-Cor Industries Inc. ("GCI") to transfer to the Monitor, MNP Ltd., the sum of $874,107.08 (the "Mack Payment").

2. On November 5, 2019, the parties consented to an Order which directed GCI to pay to its lawyers in trust the sum of $874,107.08. The Order provides that such payment is without prejudice to GCI to now argue that the funds it received from Mack Defence LLC were not a "specific fund" as provided in Rule 45.02, or that such funds were comingled and/or disbursed prior to the date of the Preservation Order (or any other defence available to GCI at law or equity including set off).

3. There was no "*specific fund*" within the meaning of the settled Rule 45 jurisprudence or, alternatively, if there was a "specific fund" such funds were disbursed. A Rule 45.02 Order may only be made where the specific fund is available. The Court will not require a party to borrow funds in order comply with a Rule 45.02 order.

4. DEL alleges that the Mack Payment was made by Mack Defense to GCI in error and that the Mack Payment was intended for DEL. However, Mack has made no demand or claim for the repayment of these funds.

5. At the time that the Mack Payment was received, DEL was indebted to GCI (and its related companies collectively the "GinCor Group") in the sum of $1,296,206. [1], [2] Gin-Cor has a legal right to set off against the Mack funds. Contrary to DEL's position, there is no unjust enrichment. DEL's pre-existing debt to GCI is a juristic reason for GCI to maintain the funds.

PART II: SUMMARY OF FACTS

GCI and the GinCor Group

6. GGI operates in the same field, competitively, with DEL.[3]

7. GGI has approximately seventy (70) employees through its facilities in Mattawa, Kingston and Carleton Place.[4]

8. The complete GinCor Group of companies consists of GCI, Durabody Industries, JC Trailers, GinCor Trailer Werx and 200 Harry Walker Parkway.[5]

9. The GinCor Group employs approximately 270 full-time employees.[6]

---

1 According to DEL's own records, GCI itself was owed $802,126.77. DEL's records set that amount at $790,845 and the total amount outstanding to the Gin-Cor Group is $1,503,696; Exhibits 1-4 and "A" Lucky Cross-Examination; Responding Motion Record at tabs 4-8.

2 Exhibits 1-4 and "A" to the cross-examination of Douglas Lucky. Tabs 4-9 Responding Motion Record at Pages 146-176.

3 ¶ 7 to the Affidavit of Renzo Silveri sworn November 4, 2019 (the "Silveri Affidavit"); Responding Motion Record at tab 1 .

4 *Ibid* at ¶8.

5 *Ibid* at ¶9.

6 *Ibid* at ¶10.

Amounts Outstanding from DEL to the GinCor Group

10. After the application of the Mack Payment, DEL remains indebted to the GinCor Group the sum of $650,620.07.[7]

11. These outstanding receivables represents approximately 26% of the GinCor Group's monthly revenue and approximately 11% of its outstanding accounts' receivables. DEL's failure and now refusal to make payment of the $650,620.07 continues to negatively impact on the GinCor Group's cash flow and its business operations.[8]

The DEL/GCI Transaction

12. In June 2017[9], various entities, including GCI and Diesel Equipment Limited ("DIESEL")[10] entered into a term sheet on April 11, 2017 for the operation of DEL. One of the primary objectives of this relationship was to "turn around the operations of DEL so that it would become a profitable, sustainable organization that would have a successful future". [11]

---

7 *Ibid* at ¶11 and Exhibit "A" thereto. DEL's records put that amount at $422,099 (see Exhibit "A" to the cross-examination of Douglas Lucky, Tab 8 p. 176, Responding Motion Record)

8 *Ibid* at ¶12.

Ibid at ¶6.

10 Identified as DEL's 100% shareholder and DEL's secured creditor in ¶16 and ¶43 of Affidavit of Douglas Lucky sworn October 20, 2019 (the "Lucky Affidavit"), Motion Record; and

11 *Ibid* at ¶12 and Exhibit "B" thereto

13. Following further negotiations, a shareholders' agreement was entered into on or about April 30, 2018 which turned over operational control of DEL to GCI.[12] [13] At all times, DEL's principal, Paul Martin, had final say in decisions relating to DEL.[14]

Termination of DEL/GCI Transaction

14. The relationship did not fare well and eventually GCI was displaced from operational management and control. [15]

15. Subsequently, the parties to the shareholders' agreement entered into a Full and Final Mutual Release which released all matters as between them save and except trade debts for services provided in the ordinary course of business. This included amounts outstanding from DEL to the GinCor Group for goods purchased by DEL from the GinCor Group, as well as rents outstanding from DEL.[16]

DEL Rental Arrears

16. GCI, as tenant, entered into a lease with Tilzen Holdings Limited for the lease of the space known municipally as 210 Harry Walker Parkway North, Newmarket, Ontario (the "Leased Premises"). GGI assigned its rights under the lease to 210 Harry Walker

---

12 Through a related entity, GCD Holdings (2017) Limited.

13 *Ibid* at ¶15 and Exhibit "C" thereto.

14 Transcript from the cross-examination of Renzo Silveri. Page 12, question 35.

15 *Ibid* at ¶16.

16 *Ibid* at ¶17 and Exhibit "D" thereto.

Holdings Inc. The assignee, 210 Harry Walker Holdings Inc. then entered into a sublease with DEL.[17]

17. The material terms of the sublease were as follows:[18]

a. Term: 10 years commencing December 1, 2017 through to November 30, 2027 (Article I);

b. Basic Rents[19] (s3.1 and Schedule "A"):

i.	May 1, 2018 – March 31, 2019	$61,571/month
ii.	April 1 – June 30, 2019	$53,773/month
iii.	July 1,2019 – November 30, 2020	$46,172/month
iv.	December 1, 2020 – November 30, 2023	$48,076/month
v.	December 1, 2023 – November 30 ,2027	$49,979/month

c. Additional Rents – proportionate share of taxes, utilities, insurance and operating costs (s3.2).

18. As the Applicant has conceded[20] DEL has not paid rents for July, August and September, 2019 to the GinCor Group (specifically 210 Harry Walker Holdings Inc.). Additionally, the October 2019 rent is also owing.[21]

---

17 *Ibid* at ¶18 and Exhibit "E" thereto.

18 *Ibid* at ¶19 and Exhibit "E" thereto.

19 Based on the percentage of space of the building utilized by DEL and not 50% as set out in ¶26 of the Lucky Affidavit.

20 ¶26 of the Lucky Affidavit.

21 ¶20 of the Silveri Affidavit.

19. As of October 22, 2019, DEL was indebted to the GinCor Group (through 210 Harry Walker Holdings Inc.) for the rents totalling $412,693.[22]

20. Beyond the rental arrears, DEL owes the GinCor Group a further $237,927.36 for net trade payables.[23]

21. Prior to the receipt of the Mack Payment, DEL also owed monies to various companies within the Gin-Cor Group. Immediately prior to the receipt of the Mack Payment, DEL owed the GinCor Group $1,296,206.[24]

The Settlement Agreement

22. Following the parties having entered into a settlement agreement, GCI, made attempts to engage Paul Martin, DIESEL's and DEL's principal, in order to resolve the outstanding payment issue. Despite such efforts, GCI could not obtain payment from DEL.[25]

---

22 *Ibid* at ¶21. DEL's records put this amount at $219,571. Exhibit "A" to the cross-examination of Doug Lucky; Responding Motion Record at Tab 8.

23 *Ibid* at ¶23 and Exhibit "A" thereto.

24 *Ibid* at ¶25 and Exhibit "F" thereto. DEL's records put that amount at $1,503,696. Exhibit "A" to the cross-examination of Doug Lucky. Tab 8, page 176, Responding Motion Record.

25 *Ibid* at ¶26.

GinCor Group's Pre-existing Relationship with Mack Defence

23. Independent of the DEL/GCI Transaction the GinCor Group had a pre-existing supply relationship with Mack Defence.[26]

Mack Defence's Request for Payment Instructions from the GinCor Group

24. Contrary to ¶62(d) of the Lucky Affidavit, Gin-Cor did **not** direct Mack Defence to make a payment to it of the Mack Payment.

25. In April 2019, at Mack Defence's request, Anne-Marie Tremblay of GCI filled-in Mack Defence's payment form. At the time Mack Defence owed GCI money for its invoice no. 53998. [27, 28]

26. Ms. Tremblay was not asked to and did not provide payment instructions with respect to invoices issued and rendered by DEL[29, 30]

27. GCI did receive the sum of $874,107.08 from Mack Defense. GCI denies, however, that Mack Defence wired such funds based on the payment information provided by the GCI representative.[31]

---

26 Transcript from cross-examination of Renzo Silveri. Pages 21-22, questions 75-78.

27 Exhibit "C" to the Lucky Affidavit.

28 Silveri Affidavit at ¶29.

29 It is also noteworthy that as at April 2019, no invoices for the Mack Payment had been issued by DEL until June 6, 2019. See ¶61 of the Lucky Affidavit.

30 *Ibid* at ¶31.

31 *Ibid* at ¶32.

The Mack Payment

28. The Mack Payment was received in two (2) tranches: $62,402.33 on August 29, 2019 and $811,669.75 on September 5, 2019.[32]

29. It was retained by GCI and properly credited to pre-existing and legitimate debts owing by DEL to the GinCor Group.[33]

30. Other than a vague reference to "various business disputes"[34] between DEL and GCI, DEL does not take issue with the fact or quantum of the receivables which are owing by it to GinCor Group.[35] On cross-examination, Doug Lucky confirmed that as at October 22, 2019, DEL owed the Gin-Cor Group $1,503,696 of which $790,845 was owed to GCI.[36]

31. The GinCor Group has credited the Mack Payment against DEL's receivables, thereby reducing DEL's receivables by $874,072.08. Despite that credit, DEL still owes the GinCor Group $650,620.07 (exclusive of interest).[37]

---

32 *Ibid* at ¶33.

33 *Ibid* at ¶34.

34 ¶26 of the Lucky Affidavit.

35 Silveri Affidavit at ¶35.

36 Exhibits 4 and "A" to the cross-examination of Doug Lucky. Pages 18-9, question 60 and pages 12-18 questions 31-59 of the Lucky Transcript. Responding Motion Record at Tabs 7 and 8.

37 *Ibid* at ¶36 and Exhibit "A" thereto.

32. GCI further disagrees that the Mack Payment was "wrongfully received" by GCI. GCI innocently received such funds from Mack Defense.[38]

33. The Mack Payment was wired by Mack Defense to GCI's current account at TD Bank, without its prior knowledge or request.[39] Further, following demand, Mack denied that its payment had been mistakenly made.[40] Mack has made no demand for the return of the funds. DEL has not instigated proceedings against Mack. In his email of September 16, 2019, Doug Lucky confirmed that the funds belonged to Mack and not DEL. This is an acknowledgement that if the funds had been paid under a mistake, the party who could claim for the repayment of the funds was Mack and not DEL. [41]

Mack Payment was Immediately Commingled and Disbursed

34. Well prior to October 10, 2019, the $874,107.78 received from Mack Defence had been commingled into GCI's operating account and used to pay out other of its normal operating expenses. The funds were never segregated.[42]

---

38 *Ibid* at ¶38.

39 *Ibid* at ¶39.

40 Motion Record at pp. 164-165 – Exhibit "H" to the Affidavit of Doug Lucky, Letter from Conlin Bedard dated October 15, 2019.

41 Motion Record at p.150 – Exhibit "E" to the Affidavit of Doug Lucky, Letter from Conlin Bedard dated October 15, 2019.

42 *Ibid* at ¶ 49.

35. GCI has produced its operating account and operating loan account transactional history for the period August 28, 2019 through to October 22, 2019.[43] [44] [45]

36. GCI's cumulative cash position discloses the following:[46]

a. August 28, 2019 being the date the first of the Mack Payment was received, GCI's cash was $(2,188,902)

b. September 5, 2019, being the date the second of the Mack Payments was received, GCI's cash position was $(1,166,919);

c. September 16, 2019,being the date Doug Lucky advised that GCI should return the Mack Payment to Mack Defence, GCI's cash position was $(1,761,710);

d. October 10, 2019,being the date of Goodmans' demand letter, GCI's cash position was $(526,898); and

e. October 22, 2019, being the date of Justice Hainey's Order, GCI's cash position was $(354,733)

37. Between August 28 and October 22, 2019, GCI has had the following grouped operating expenses:[47]

a. Payroll of $834,735.44; and

b. Trade payables to arms-length third party suppliers of $4,243,817.25.

---

43 *Ibid* at ¶ 50 and Exhibit "G" thereto.

44 *Ibid* at ¶ 52 and Exhibit "I" thereto.

45 *Ibid* at ¶ 53 and Exhibit "J" thereto.

46 *Ibid* at ¶ 54.

47 *Ibid* at ¶55.

38. From the period August 28 to October 22, 2019, there were over 500 hundred transactions through GCI's operating account (which, although a heavy volume, is typical). Receipts and disbursements each exceeded $10,000,000, during this period, which again is typical. Given the volume and the nature of the transactions, it is not possible to identify a specific fund from the Mack Payment. Moreover, as referenced above, the Mack Payment has been disbursed and is no longer available.[48]

PART III: ISSUES

i) What is the test for set-off? Is legal or equitable set-off available?
ii) Was the DEL debt owing to GCI a "juristic reason" such that GCI was not unjustly enriched?
iii) What is the Test for Granting Relief Under rule 45.02?

PART IV: THE LAW

Set Off

39. Section 111 of the *Courts of Justice Act* provides as follows:

> **111** (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.
>
> **Same**
>
> (2) Mutual debts may be set off against each other even if they are of a different nature.

40. Moreover, the CCAA also specifically contemplates that set off may be available, both to and against an insolvent company. Section 21 of the CCAA provides as follows[49]:

---

48 *Ibid* at ¶56.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be

41. Section 21 of the CCAA is a complete answer to DEL's submission that a set-off will create a preference.

42. If it is necessary to look beyond section 21 of the CCAA, legal set-off has two requirements:

a. Both obligations must be debts; and

b. Both debts must be mutual cross obligations.[50]

43. Mutual debts mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading.[51]

44. Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated. It is available where there has been an assignment. There is no requirement of mutuality. [52]

45. The debts which DEL admits are owing to GCI and the Gin-Cor Group are properly set off as either a legal or equitable set off.

---

50 *Telford v Holt* [1987] 2 S.C.R. 193 (SCC) at paragraph 25; Respondent's Book of Authorities at tab 1

51 *Telford, supra,* at paragraph 26.

52 *Telford, supra,* at paragraph 27.

GCI was not Unjustly Enriched

46. The onus is on DEL to show that the three part test for unjust enrichment has been met.

47. To determine whether there is an absence of a juristic reason, the Supreme Court has set out a two-step process. First, DEL must show that the circumstances are not within any of the established categories for denial of recovery, including the existence of a contract, common law or equitable obligations. Once the claimant has demonstrated that no established category applies, the claimant has a *prima facie* case for unjust enrichment. The second step allows the defendant to rebut the *prima facie* claim by demonstrating another reason for denying recovery. At this step, the court may examine the reasonable expectations of the party, public policy arguments and all other circumstances of the situation to determine whether a reason exists to deny recovery.[53]

48. DEL cannot show that the circumstances are not within any of the established categories for denial of recovery. DEL's debt owed to GCI is a recognized category for the denial of its claim.

49. At paragraphs 32-44 of its factum, DEL submits that GCI has been unjustly enriched as it received the Mack Payment in error. DEL relies on *Kerr v. Baranow* and on

---

53 Canadian Encyclopedic Digest, CED Restitution VIII.1. (d), Restitution, VIII Unjust Enrichment at §530 citing *Garland v. Consumers' Gas Co.* (2004), 2004 CarswellOnt 1558 (S.C.C.); Respondent's Book of Authorities at tab 2.

Wilson v Fotsch. Both of these cases are distinguishable. They were decided in a family law context and specifically a dispute between common law spouses.

50. A more germane and applicable decision is the case of *Toronto Dominion Bank v. Bank of Montreal.*[54] *TD v. BMO* was a decision of Mr. Justice MacPherson (as he then was) and involved a mistake as well. Carpita banked with both TD and BMO. BMO had extended a line of credit to Carpita for $10,000,000. In 1990, a clerk at TD made a data entry error and had credited Carpita's account with a $450,000 entry for a deposited cheque (as opposed to the actual amount of the cheque, $450.00). Caprita later obtained a certified cheque for approximately $500,000 from TD and then deposited such cheque to reduce its line of credit with BMO.

51. TD then sued BMO and sought recovery of the funds. TD alleged that BMO had been unjustly enriched and that the funds were impressed with a trust in favour of BMO.

52. Justice MacPherson canvassed the three part test for unjust enrichment. The first two branches were made out (as TD was deprived of its money and BMO received the money). In dealing with the third branch, Justice MacPherson held as follows:[55]

> However, in my view, the third element for unjust enrichment is missing. There is a juristic reason for B of M receiving and retaining the funds. When B of M cashed the certified cheque for about $585,000 it had granted a line of credit of $10,000,000 to Carpita and Carpita in fact owed it almost that amount. In other words, Carpita

---

54 *Toronto Dominion Bank v. Bank of Montreal*, 1995 CarswellOnt 326 (Ont.G.D.), Respondent's Book of Authorities at tab 3.

55 *TD v. BMO, supra*, at ¶39.

> owed a very substantial debt to B of M. The existence of this debt, and B of M's instant use of the cheque to reduce the debt, is a juristic reason for B of M's retention of the money. In *Barclays Bank*, supra, Goff J., after setting out the general principle that a person who pays money under a mistake of fact should be able to recover it, articulated three exceptions to the rule. The second one he expressed as follows, at p. 535:
>
> > His claim may however fail if ... (b) the payment is made for good consideration, *in particular if the money is paid to discharge, and does discharge, a debt owed to the payee ... by the payer ...*

53. As noted above, DEL relies on two decisions matrimonial decisions. Justice MacPherson, citing Lambert J.A. from the British Columbia Court of Appeal, noted as follows:[56]

> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial relationship.

54. It would not be unjust for the GinCor Group or GCI to maintain the Mack Payment at a time when DEL owed the GinCor Group at least $1,296,206.

---

56 *TD v. BMO, supra*, at ¶ 40.

55. Courts have repeatedly found the pre-existence of a debt to be a valid juristic reason (and therefore refused to find that a benefit constituted an unjust enrichment).[57], [58], [59], [60]

56. In *Harowitz*, RBC loaned funds to its customer, Mr. Melnitzner, on fraudulent pretences, who in turned used the proceeds of the advance to pay off a pre-existing debt owed to Mrs. Harowitz. The Court refused to find that the benefit constituted an unjust enrichment specifically because of the pre-existing debt owed by Mr. Melnitzer to Mrs. Harowtiz. The decision was upheld on appeal.[61]

57. The Court in *Harowitz* was critical of counsel's attempt to engraft family-law jurisprudence respecting unjust enrichment into a commercial context.[62]

58. The *Cotton Ginny* decision referred to by DEL at paragraph 35 of its factum is distinguishable. *Cotton Ginny* dealt with the distribution of substantial garnishment funds, which at the time that the CCAA Order had been made, were still with the Sheriff

---

57 *Royal Bank v. Harowitz*, 1994 CarswellOnt 836, [1994] (Ont.G.D.) at paras 42-51 and 55-64, aff'd at 1997 CarswellOnt 2609 (CA); Respondent's Book of Authorities at tab 4.

58 *Ierullo v. Rovan*, 2000 CarswellOnt 109, [2000] O.J. No. 108 (SCJ) para 28 aff'd at 2001 CarswellOnt 9827 (DivCt); Respondent's Book of Authorities at tab 5.

59 *McDiarmid Lumber Ltd. v. Canadian Imperial Bank of Commerce*, 1992 CarswellBC 268, [1992] (BCSC) para 26-28; Respondent's Book of Authorities at tab 6.

60 *Toronto Dominion Bank v. Carotenuto* 1998 CarswellBC 23 (BCCA) at para 14-15; Respondent's Book of Authorities at tab 7.

61 *Royal Bank v. Harowitz, supra,* at paragraphs 61-65; Respondent's Book of Authorities at tab 4.

62 *Royal Bank v. Harowitz, supra,* at paragraph 51.

for distribution.[63] The making of the CCAA in that case, stayed the garnishment proceedings with the result the creditor (Effigi) was denied access to those funds. In this case, the Mack Funds were received by GCI approximately six (6) weeks prior to the making of the CCAA Order. It is submitted that the Cotton Ginny decision is of no assistance to the moving party.

No Preference

59. DEL argues at paragraph 42 of its factum that if GCI is permitted to keep the funds, it will be an improper preference. That is not DEL's argument to make. Respectfully, that argument belongs to other creditors of DEL or the Monitor (none of whom have advanced such a claim or raised such an argument). Further as noted in paragraph 40 above, Section 21 of the CCAA which confirms that the law of set-off is applicable to all claims brought by or against the debtor is a complete answer.

60. Further, on cross-examination, Doug Lucky admitted that DEL prior to its filing had selected which suppliers to pay and which would not be paid. Among those preferred was an entity known as Unicell Limited, which is owned by Paul Martin (DEL's principal). Between August 1 and October 22, 2019, the AR owed by DEL to Unicell dropped by nearly $200,000 whereas the receivables owed to the Gin-Cor Group increased by about $269,300.[64]

---

63 In re: *Cotton Ginny*; Applicant's Book of Authorities at tab 4, paragraphs 43-44.

64 Lucky Transcript, page 20, question 65 and Exhibit "A" to the Lucky cross-examination

No Breach of Fiduciary Duty and No Bad Faith by GCI

61. Mr. Silveri was never a fiduciary of DEL. He confirmed that all decisions affecting DEL were to be approved by Paul Martin. In any event, Mr. Silveri resigned from DEL on July 18, 2019.[65]

62. When the funds were received by GCI from Mack, Mr. Silveri was no longer associated with DEL. There is no claim against Mr. Silveri and in fact all claims against him were released by DEL.[66]

63. Further by failing to settle the debts outstanding to the Gin-Cor Group, DEL was specifically in breach of its covenant to do so as contained in the Minutes of Settlement.

64. DEL has attempted to paint a picture that GCI does not have clean hands by reason of receiving the payment from DEL. For instance DEL erroneously says in its factum that GCI "redirected and intercepted" the Mack funds (para 52(b)).

65. That characterization is false and is not supported by any of the evidence. To the contrary all of the evidence points the other way.[67]

66. As such, there is no basis to impose a constructive trust on the Mack Payment. In *Royal Bank v. Harowitz*, Justice Killeen noted that as the claim for unjust enrichment failed,

---

65 *Supra* at FN16.

66 Mutual Release. Exhibit "D" to the Silveri Affidavit, p. 79 of the Responding Motion Record.

67 See paragraphs 25-35 above.

there was no basis to support a tracing type remedy: "The plaintiff plainly could not rely on the tracing claim here because of decisional limitations on that doctrine. The applicable case-law is clear that tracing is not permitted where the claim arises out of a contractual debtor-creditor relationship such as the one here between Melnitzer and the Bank." In this case, the relationship between DEL and GCI is a debtor-creditor relationship and therefore a tracing remedy would not be appropriate.[68]

Mistake Argument Cannot be Advanced by DEL

67. DEL relies on the decision in *Pinnacle Bank* in support of its argument that it is entitled to the funds based on the relief of mistaken payment. However, *Pinnacle* is distinguishable. In *Pinnacle*, the Bank double-paid one its customer's creditors. When the Bank demanded that the creditor return the second payment (made inadvertently) the creditor refused to refund the money and insisted that Bank's customer was indebted to it for an amount in excess of the payment. The crucial difference between *Pinnacle* and the present case is that in *Pinnacle* the Bank advanced the claim for the return of its funds. In order to make *Pinnacle* analogous with the present case Mack Defence would have to bring an action against GCI for the return of the funds. It has not done so.

68. DEL has not referred to any decision in which a party who did not advance funds can later claim such funds, by alleging that the funds were paid by mistake. It is submitted that there is no case which stands for this proposition.

---

68 *RBC v. Harowitz, supra*, at paragraph 60; Respondent's Book of Authorities at tab 4.

Specific Fund – Preliminary Point

69. DEL incorrectly submits in its factum that GCI cannot address the issue of whether the Mack Payment is a specific fund. DEL fails to mention that the Order of November 5, 2019, specifically reserved such right to GCI. As such whereas DEL submits that any argument related to whether the Mack Payment is a specific fund is a "collateral attack" on November 5, 2019 Order, it is in fact DEL that is collaterally attacking that very Order to which it consented and which contemplates and authorizes GCI to raise such arguments.

Test for Granting a Rule 45.02 Order

70. Rule 45.02 of the *Rules of Civil Procedure* states as follows:

> 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.[69]

71. The test the Applicant must meet to obtain an Order under Rule 45.02 has been set out as follows:

a. The Plaintiff must claim a right to a specific fund;
b. There is a serious issue to be tried regarding the Plaintiff's claim to the fund; and
c. The balance of convenience favours granting the relief.[70]

---

69 rule 45.02 of the *Rules of Civil Procedure*.

70 *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* 2012 ONCA 475 at ¶18, Respondent's Book of Authorities at tab 8; and

News Canada Marketing Inc. v. TD Evergreen, 2000 CarswellOnt 3544 (SCJ) at ¶14, Respondent's Book of Authorities at tab 9.

Rule 45.02 is an Exceptional Remedy

72. It has been noted that a rule 45 order is an exceptional remedy:

> Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have the potential to injure a defendant before the plaintiff has proven its case at trial. Furthermore, it can place a defendant in an unfair position because it freezes a fund that would otherwise be available to the defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a plaintiff on the basis of unproven allegations. Judicial discretion is therefore to be carefully exercised when considering a rule 45 order or the granting of a *Mareva* injunction given the severe prejudicial consequences that can result.[71]

73. Having regard to the wording of rule 45.02, the extreme nature of the remedy and the majority of the authorities, in order to succeed on a motion under Rule 45.02, a specific fund must be in existence and, in the case of money, be reasonably identifiable as earmarked for the litigation in issue.[72]

What is a Specific Fund?

74. "Specific fund" means a reasonably identifiable fund earmarked to the litigation in issue.[73]

---

71 D.M. Brown J. (as he then was) in *Deol v. Morcan Financial Inc.*, 2011 CarswellOnt 13652 (SCJ – Cmml List) at ¶ 9, citing the decision of *Stearns v. Scocchia*, 2002 CarswellOnt 3700; Respondent's Book of Authorities at tab 10.

72 *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.*, 2007 CarswellOnt 3444 (SCJ) at ¶27, reversing 2006 CarswellOnt 5273 (SCJ - Master); Respondent's Book of Authorities at tab 11.

73 *American Axle, supra,* at ¶28.

The Specific Fund Must be Available

75. The "specific fund" must be available. If the specific fund has been disbursed or spent, a rule 45 Order cannot issue.[74]

76. In the decision of *Rosen v. Homelife, infra*, MacFarland J. (as she then was) summed-up what is required in connection with a rule 45.02 Order:

> The heading or title for Rule 45.02 is "Interim Preservation of Property". In my view, the rule is intended for the preservation of property which is in existence and in the case of money, is reasonably identifiable fund which can be earmarked to the litigation in issue. See *Rotin et al. v. Lechier-Kimel et al.*, [1985] 3 C.P.C. (2nd) 15. In each of the cases to which counsel referred, the funds were available to be paid into court; in this case the specific fund is no longer available. Were I to make an order requiring this sum of money to be paid into court, the defendant against whom the order was made would have to obtain funds from other sources or his/its own resources. In my view, that is not what is contemplated by Rule 45.02. The rule provides jurisdiction, in my view, only for the 'specific fund' to be paid into court and not, where that fund is no longer available, for other monies to be paid into court in lieu thereof.[75] (emphasis added)

77. D.M. Brown J. (as he then was) noted in *Deol, supra*, quoted from *The Law of Civil Procedure in Ontario, by* John Morden and Paul Perell, as follows:

> Funds held in trust may constitute a specific fund, but a specific fund is not limited to trust funds; rather, a specific fund refers to a reasonably identifiable fund earmarked for the pending litigation. The rule has been used when the property at issue is a claim to pension funds held for employees. The rule has been applied with respect to sale proceeds held in a trust account.

---

74 *American Axle, supra,* at ¶29.

75 *Rosen v. Homelife/St. Andrew's Realty Inc.* 1994 CarswellOnt 4528 at ¶11; Respondent's Book of Authorities at tab 12.

> A deposit payable in a real estate transaction has been held not to constitute a specific fund. Revenue from the operation of a parking lot does not constitute a specific fund. *A claim to funds due under a contract does not constitute a specific fund.*
>
> Although the tracing of the fund may be done in the appropriate circumstance to prevent an injustice, the right to a remedy under the rule may be lost if before the motion is brought the specific fund is intermingled with other funds.
>
> *Where the specific fund is no longer available, an order may not be made under this rule requiring the defendant to pay other monies into court.* (underlining added, italics original).

Specific Funds Cannot be Commingled

78. In the decision of *DSLC Capital Corp. v. Creditfinance Securities Ltd.*[76], Cameron J. noted as follows:

> To the extent the funds have been commingled, they cannot be subject to R. 45.02.

79. A motion for leave to appeal DSLC decision was dismissed.[77] MacDonald J. (sitting in the Divisional Court) dismissed the leave motion and held, in part, as follows:

> I agree with Creditfinance that a party seeking a rule 45.02 order must claim a specific fund, and that even where a specific fund is claimed, a rule 45.02 order may be rendered unavailable to the extent that the specific fund has been commingled with other funds. The jurisprudence is clear on these points. (emphasis added)

80. It is submitted that the Creditfinance decision is binding authority on this Court.

---

76 *DSLC Capital Corp. v. Creditfinance Securities Ltd.*, 2009 CarswellOnt 2032 (SCJ – Cmml List) at ¶56, Respondent's Book of Authorities at tab 13.

77 *DSLC Capital Corp. v Creditfinance Securities Ltd.*, 2009 CanLII 39059 (SCJ-Div. Ct.) at ¶8; Respondent's Book of Authorities at tab 13.

81. The Applicant argues in paragraph 19 of its factum that "...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" and it relies on paragraphs 25-27 of the *Sadie Moranis* decision as authority for that proposition. Paragraphs 25-27 of the *Sadie Moranis* say no such thing. Those cited paragraphs only state that the Applicant need not claim a proprietary interest in the funds in order to come within the ambit of rule 45.02.

82. In *167986 Canada Inc. v. GMAC Commercial Finance Corp.*, the Divisional Court, noted that co-mingling of funds is an *indicia* that there is no specific fund, holding in part,

> "...[m]oreover, the wording of the LC Agreement permitting GMAC to commingle the Cash Collateral with its own funds indicates that there is no specific fund to which 167 could assert a proprietary claim."[78]

83. In the alternative and in any event, if the Applicants are able to establish that there was a specific fund (notwithstanding that such funds had been extensively commingled), such specific fund no longer exists. A rule 45 order cannot issue where the specific fund has been disbursed.

---

78 *167986 Canada Inc. v. GMAC Commercial Finance Corp.*, 2009 CarswellOnt 7350 (SCJ-Div.Ct.) at ¶47, Respondent's Book of Authorities at tab 15.

Rule 45 Orders are Different from *Mareva* Injunctions

84. A rule 45.02 order in this case would require the Respondent to borrow funds in order to post the same into Court. That is not what is contemplated, authorized or permitted by Rule 45.02.[79] [80] Given that the specific fund has been disbursed in the ordinary course of business, the effect of the Order sought is a *Mareva* injunction – which is distinct and not authorized by rule 45.

85. The Court noted in *Mutual Tech v. Law*:

> An order under Rule 45.02 is not a Mareva injunction. Were it so, quite apart from the question of whether it would be appropriate for a master to make the order, it would not be appropriate without an undertaking in damages and without the higher standard. That is because a Mareva injunction seeks to restrain a defendant from dealing with his or her own assets by restraining removal from the jurisdiction. The Rules Committee should not be assumed to have intended by means of Rule 45.02 to allow the court to grant injunctive relief without the usual safeguards. Injunctions are an exercise of the inherent power of a Superior Court judge and are governed by s. 101 of the *Courts of Justice Act*. Rule 45 by contrast should be seen as an expression of the authority conferred by s. 104 of the Act and interpreted accordingly.[81]

---

79 *Rosen v. Homelife/St. Andrew's Realty Inc.* at ¶11; Respondent's Book of Authorities at tab 12.

80 *Deol v. Morcan Financial Inc.* at ¶11; Respondent's Book of Authorities at tab 10.

81 *Mutual Tech v. Law, supra,* at ¶10. Respondent's Book of Authorities at tab 16.

PART V: ORDER SOUGHT

86. Therefore, GCI seeks an Order dismissing this motion and directing the release of the sum of $874,107.08, together with all accrued interest, from its lawyer's trust account to GCI, together with its costs of the within motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2020 at Toronto, Ontario.

Rahul Shastri

David Winer

Of counsel to the Respondent, Gin-Cor Industries Inc.

SCHEDULE "A"

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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.

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed

Courts of Justice Act R.S.O. 1990 c.C-43

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance.

Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

SCHEDULE "B"

1. *Telford v Holt* [1987] 2 S.C.R. 193 (SCC)

2. Canadian Encyclopedic Digest, CED Restitution VIII.1. (d), Restitution, VIII Unjust Enrichment at §530 **citing** *Garland v. Consumers' Gas Co.* (2004), 2004 CarswellOnt 1558 (S.C.C.)

3. *Toronto Dominion Bank v. Bank of Montreal*, 1995 CarswellOnt 326 (Ont.G.D.)

4. *Royal Bank v. Harowitz*, 1994 CarswellOnt 836, [1994] (Ont.G.D.) aff'd at 1997 CarswellOnt 2609 (CA)

5. *Ierullo v. Rovan*, 2000 CarswellOnt 109, [2000] O.J. No. 108 (SCJ) aff'd at 2001 CarswellOnt 9827 (DivCt)

6. *McDiarmid Lumber Ltd. v. Canadian Imperial Bank of Commerce*, 1992 CarswellBC 268, [1992] (BCSC)

7. *Toronto Dominion Bank v. Carotenuto* 1998 CarswellBC 23 (BCCA)

8. *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* 2012 ONCA 475.

9. *News Canada Marketing Inc. v. TD Evergreen*, 2000 CarswellOnt 3544 (SCJ).

10. *Deol v. Morcan Financial Inc.*, 2011 CarswellOnt 13652 (SCJ - Cmml List).

11. *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.*, 2007 CarswellOnt 3444 (SCJ).

12. *Rosen v. Homelife/St. Andrew's Realty Inc.* 1994 CarswellOnt 4528.

13. *DSLC Capital Corp. v. Creditfinance Securities Ltd.* 2009 CarswellOnt 2032 (SCJ - Cmml List).

14. *DSLC Capital Corp. v Creditfinance Securities Ltd.*, 2009 CanLII 39059 (SCJ-Div. Ct.).

15. *167986 Canada Inc. v. GMAC Commercial Finance Corp.*, 2009 CarswellOnt 7350 (SCJ-Div.Ct.)

16. *Mutual Tech v. Law*, 2003 CarswellOnt 892 (SCJ)

DEL EQUIPMENT INC.
Applicant

Court File No. CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF GIN-COR INDUSTRIES INC.

KAGAN SHASTRI LLP
Lawyers
188 Avenue Road
Toronto ON M5R 2J1

Rahul Shastri (33475V)
David Winer (39330D)
P. (416) 368-2100 ext. 223/225
F. (416) 324-4200/4202
E. rshastri@ksllp.ca / dwiner@ksllp.ca
Lawyers for the non-party,
Gin-Cor Industries Inc.

RCP-E 4C (May 1, 2016)